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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 prohibited 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; (3) that constitute crime similar to burglary, arson, or extortion; or (4) under the section's "residual clause." The U.S. 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 (predicated on the "risk of violence") unconstitutionally vague and thus effectively void.

The residual clause aside, 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 prohibited 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.[3] More often than not, the prior convictions are for violations of state law.[4]

In 2009, Congress directed the U.S. Sentencing Commission (the Commission) to report on the impact on the federal criminal justice system of mandatory minimum sentencing provisions like Section 924(e).[5] As part of its study, the Commission solicited the views of federal trial judges. Almost 60% of those responding to a Commission survey indicated that they considered § 924(e) mandatory minimum sentences appropriate.[6] More recently, the Commission reported a reduction in the already infrequent number of convictions under the ACCA,[7] which it suggested may be attributable to ACCA-generated litigation "regarding which convictions under federal and state statutes qualify under the Act."[8]

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[1] The prohibited 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 entirety 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] Of the dozens of § 924(e) Supreme Court cases, all but one involved felons in possession. The prohibited status in United States v. Hayes, 555 U.S. 415 (2009), flowed from a misdemeanor conviction for domestic violence. The "felon in possession" cases included Taylor v. United States, 495 U.S. 575 (1990); Custis v. United States, 511 U.S. 485 (1994); Daniels v. United States, 532 U.S. 374 (2001); Shepard v. United States, 544 U.S. 13 (2005); James v. United States, 550 U.S. 192 (2007); Logan v. United States, 552 U.S. 23 (2007); Begay v. United States, 553 U.S. 137 (2008); United States v. Rodriquez, 553 U.S. 377 (2008); Chambers v. United States, 555 U.S. 122 (2009); Johnson v. United States, 559 U.S. 133 (2010); McNeill v. United States, 563 U.S. 816 (2011); Sykes v. United States, 564 U.S. 1 (2011); Descamps v. United States, 570 U.S. 254 (2013); Johnson v. United States, 576 U.S. 591 (2015); Welch v. United States, 578 U.S. 120 (2016); Mathis v. United States, 579 U.S. 500 (2016); Beckles v. United States, 137 S. Ct. 886 (2017); United States v. Stitt, 139 S. Ct. 399 (2018); Stokeling v. United States, 139 S. Ct. 544 (2019); Quarles v. United States, 139 S. Ct. 1872 (2019); Shular v. United States, 140 S. Ct. 779 (2020); Borden v. United States, 141 S. Ct. 1817 (2021); Wooden v. United States, 142 S. Ct. 1063 (2022).

[4] Jennifer Lee Barrow, *Recidivism Reformation: Eliminating Drug Predicates*, 135 HARV. L. REV. F. 418, 439 (2022) ("It is important to remember that ACCA predicates are usually state law offenses.").

[5] Pub. L. No. 111-84, § 4713, 123 Stat. 2843 (2009).

[6] U.S. Sent' Comm'n, *Results of Survey of United States District Judges: January 2010 through March 2010, Question 1. Mandatory Minimums* (June 2010), 23 FED. SENT'G REP. 296, 300 (April, 2011).

[7] U.S. Sent 'Comm'n, *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways* (Mar. 2021), https://www.ussc.gov/research/research-reports/federal-armed-career-criminals-prevalence-patterns-and-pathways.

[8] *Id.* at 18 ("Litigation surrounding the ACCA appears to have impacted the number of armed career criminals sentenced . . . . [T]he provisions in the ACCA generated a great deal of litigation regarding which convictions under federal and state statutes qualify under the Act. . . . Such litigation has reduced the predicates that can qualify under ACCA, and, in turn, may have contributed to the decrease in the number of armed career criminals sentenced. . . . ." Of

Predicate Offenses

Section 924(e) begins with a violation of § 922(g), that is, with possession of a firearm by a felon, fugitive, or other person whose possession the section prohibits. The triggering possession offense need not itself involve a drug or violent crime.[9] 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").[10] 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.[11]

The violent felonies or serious drug offenses that do count must have been committed on different occasions.[12] The Supreme Court explained in *Wooden v. United States* that the word "occasion" ordinarily means "an event, occurrence, happening, or episode."[13] "Wooden committed his burglaries on a single night, in a single uninterrupted course of conduct. The crimes all took place at one location, a one-building storage facility with one address. Each offense was essentially identical, and all were intertwined with the others."[14] Thus, the prior conviction of a defendant who burglarized a storage facility and then broke into ten individual units within the facility counted as one occasion, not ten, for purposes of § 924(e).[15]

Section 924(e) most often owes its frequent appearance on the Supreme Court's docket to an interpretative tool known as the "categorical approach."[16] The categorical approach asks whether

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the 2,746 offenders convicted of a mandatory minimum firearms offense in Fiscal Year 2021, 262 were sentenced under the ACCA. U.S. Sent' Commn, QUICK FACTS: MANDATORY MINIMUM PENALTIES, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY21.pdf.

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

[10] The sentence is mandatory, plea agreements to the contrary notwithstanding. United States v. Symington, 781 F.3d 1308, 1313 (11th Cir. 2015) (citing in accord United States v. Moyer, 282 F.3d 1311, 1314 (10th Cir. 2002)). However, the court may depart from the mandatory minimum upon the government's motion for substantial assistance under 18 U.S.C. § 3553(e), *e.g.*, Tribue v. United States, 958 F.3d 1148, 1149 n.1 (11th Cir. 2020); Cross v. United States, 892 F.3d 288, 306 (7th Cir. 2018); United States v. Pledge, 821 F.3d 1035, 1037 (8th Cir. 2016).

[11] 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. 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.").

[12] *Id.* § 924(e)(1).

[13] 142 S. Ct. 1063, 1069 (2022).

[14] *Id*. at 1071.

[15] *Id*. at 1074; *see also* United States v. Williams, 39 F.4th 342, 359 (6th Cir. 2022) ("Relevant factors include timing, proximity of location, and 'the character and relationship of the offenses.' . . . 'Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events.'") (quoting *Wooden*, 142 S. Ct. at 1071).

[16] *See generally* Robert A. Zauzmer, *Fixing the Categorical Approach "Mess,"* 69 DEP'T JUST. J. FED. L. & PRAC. 3 (Sept. 2021). The definitions embody the categories, sometimes using references to an enumerated crime (*e.g*., § 924(e)(2)(B)(ii) ("the term 'violent felony' means any crime . . . that. . . is burglary")) and other times with a descriptive clause (*e.g*., 924(e)(2)(A)(ii) ("the term 'serious drug offense' means . . . an offense under State law,

Congress intended to treat a defendant's prior conviction as a predicate offense. The approach does so by inquiring whether the elements of the statute of prior conviction are the same or less inclusive than the federal standard under the ACCA. For instance, was § 924(e) meant to apply to a conviction under a state arson statute which covers more conduct 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 that the defendant was convicted of "generic arson," that is, arson as understood in § 924(e).[17]

When the prior conviction is for an offense other than one enumerated in § 924(e), the analysis becomes a matter of comparing the elements of the prior offense with the descriptive clause of § 924(e). Thus, a prior conviction may serve as predicate under the elements clause (i.e., the conviction is for a "crime that has as an element the use . . . of physical force . . .") only if the statute of conviction is no more inclusive, that is, only if the offense necessarily involves the defendant's use of physical force within the meaning of the statute.[18]

Serious Drug Offenses

Section 924(e) defines serious drug offenses as those violations of state or federal drug law punishable by imprisonment for 10 years or more.[19]

To qualify as a § 924(e) "serious drug" predicate offense, a prior state offense must (1) involve the (a) manufacture, (b) distribution, or (c) possession with intent to distribute; (2) a controlled substance as defined in the Controlled Substances Act; and (3) be punishable by imprisonment for a maximum of ten years or more.[20]

Application of § 924(e) depends upon that definition as the categorical standard rather than upon a "generic" controlled substance offense.[21] The standard is measured by the statute of conviction's reach at the time of the defendant's § 922(g) prohibited firearm possession,[22] and the

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involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . .”))

[17] United States v. Gatson, 776 F.3d 405, 410 (6th Cir. 2015) ("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 property.") (internal citations omitted); United States v. Furlow, 928 F.3d 311, 316 (4th Cir. 2019), *vacated and remanded on other grounds*, 140 S. Ct. 2824 (2020).

[18] Borden v. United States, 141 S. Ct. 1817, 1822 (2019) ("The focus is instead on whether the elements of the statute of conviction meet the federal standard. Here, that means asking whether a state offense necessarily involves the defendant's 'use . . . of physical force[’] . . . . If any–even the least culpable—of the acts criminalized do not entail that kind of force, the statute does not categorically match the federal standard, and so cannot serve as an ACCA predicate.").

[19] 18 U.S.C. § 924(e)(2)(A) ("[T]he 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[.]").

[20] *Id.*; United Stsates v. Jackson, 36 F.4th 1294, 1301 (11th Cir. 2022).

[21] Shular v. United States, 140 S. Ct. 779, 782 (2020).

[22] United States v. Jackson, 36 F.4th 1294, 1300 (11th Cir. 2022); United States v. Hope, 28 F.4th 487, 504 (4th Cir. 2022).

breadth of the controlled substance statute at the time of the purported predicate offense.[23] 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.[24] It is the maximum permissible term which determines qualification, even when discretionary sentencing guidelines may call for a term of less than 10 years,[25] or when the defendant was in fact sentenced to a lesser term of imprisonment.[26] To qualify as a predicate drug offense, the crime must have been at least a 10-year felony at the time of conviction for the predicate offense.[27]

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.[28] Additionally, 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 a state law predicate, involved the manufacture, distribution, or possession with intent to distribute a controlled substance.[29]

To qualify as a § 924(e) "serious drug" predicate offense, a prior federal offense must (1) be an offense under (a) the Controlled Substances Act, (b) the Controlled Substances Import and Export Act, or (c) the Maritime Drug Law Enforcement Act; and (2) be punishable by imprisonment for a maximum of 10 years or more.[30]

The infrequency of appellate challenges suggests that federal serious drug offenses serve as § 924(e) predicate offenses only rarely.

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."[31] Section 924(e) identifies three

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[23] *Jackson*, 36 F.4th at 1302 ("[I]oflupane has not been a federally 'controlled substance,' as defied in 21 U.S.C. § 802, since September 2015. And consequently, also since that time, a cocaine-related offense [under Florida law] that involved only ioflupane has not involved a federally 'controlled substance' for purposes of § 924(e)(2)(A)(ii)."); *Hope*, 28 F.4th at 505 ("Accordingly, after considering whether South Carolina's 2013 definition of 'marijuana' matches the February 2020 federal definition for 'marijuana,' we . . . hold that there is no categorical match.").

[24] United States v. Rodriquez, 553 U.S. 377, 380 (2008).

[25] *Id.* at 390; *see* United States v. Gardner, 34 F.4th 1283, 1287-88 (11th Cir. 2022); United States v. Mayer, 560 F.3d 948, 963 (9th Cir. 2009).

[26] 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).

[27] McNeill v. United States, 563 U.S. 816, 817-18 (2011); Rivera v. United States, 716 F.3d 685, 688-89 (2d Cir. 2013).

[28] United States v. Ojeda, 951 F.3d 66, 75 (2d Cir. 2020) ("'[I]nvolving' reasonably identifies inchoate as well as substantive drug crimes. . . ."); United States v. Daniels, 915 F.3d 148, 156 (3d Cir. 2019) ("It is also uncontested that every court of appeals to have considered the specific question of whether a 'serious drug offense' under § 924(e)(2)(A)(ii) includes attempts has answered this question in the affirmative.") (collecting cases).

[29] United States v. Lyman, 991 F.3d 994, 997 (8th Cir. 2021); United States v. Smith, 775 F.3d 1262, 1226-227 (11th Cir. 2014).

[30] 18 U.S.C. § 924(e)(2)(A)(i); United States v. Farrad, 895 F.3d 859, 886-87 (6th Cir. 2018); *In re* Jackson, 826 F.3d 1343, 1346 (11th Cir. 2016) (characterizing a federal conviction for possession with intent to distribute heroin as one that "definitively qualifies as [an] ACCA [] predicate").

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

varieties of "violent felonies": (1) offenses in which the use of physical force is an element; (2) offenses of the burglary/arson/extortion class; and (3) offenses under the now inoperable residual clause.[32]

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."[33] "Physical force" here means "violent force - that is, force capable of causing physical pain or injury to another person."[34] Thus, the category does not include convictions for failure to report for periodic imprisonment under an Illinois statute,[35] nor mere intentional touching of another, as under the Florida statute,[36] but it does include convictions for the threatened use of violent force.[37]

Burglary, et al. The second variety of violent felony predicates consists of the crimes of burglary, arson, extortion, or the use of explosives.[38] 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.[39]

Residual clause. The Supreme Court had previously held that the crimes found in the residual clause (crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another") 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."[40] Most recently, as discussed below, the Court found the standard in the residual clause 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.[41]

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[32] 18 U.S.C. § 924(e)(2)(B) ("[T]he 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*, 576 U.S. 591, 606 (2015), declared the residual clause (covering conduct that "presents a serious potential risk of physical injury to another") constitutionally vague and thus an impermissible basis upon which to impose § 924(e)'s mandatory minimum sentence.

[33] *Id.* § 924(e)(2)(B)(i).

[34] Johnson v. United States, 559 U.S. 133, 140 (2010); Stokeling v. United States, 139 S. Ct. 544, 553 (2019).

[35] Chambers v. United States, 555 U.S. 122, 126-28 (2009).

[36] *Johnson*, 559 U.S. at 145.

[37] 18 U.S.C. § 924(e)(2)(i) (covering "*threatened* use of physical force against the person of another") (emphasis added); *Stokeling*, 139 S. Ct. at 553 ("[T]he force necessary to overcome a victim's physical resistance is inherently 'violent' in the sense contemplated by *Johnson*."); United States v. Croft, 987 F.3d 93, 98 (4th Cir. 2021).

[38] 18 U.S.C. § 924(e)(2)(B)(ii).

[39] Quarles v. United States, 139 S. Ct. 1872, 1876-77 (2019) ("We believe that Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States.") (quoting Taylor v. United States, 495 U.S.575, 598 (1990)); United States v. Stitt, 139 S. Ct. 399, 405 (2018); Mathis v. United States, 579 U.S. 500, 520 (2016) (holding that a burglary statute that covers breaking and entering into a vehicle is broader than "generic" burglary and therefore cannot qualify as a § 924(e) predicate burglary offense); Descamps v. United States, 570 U.S. 254, 260 (2013) (holding that a state burglary statute that encompasses shoplifting cannot qualify as a § 924(e) predicate burglary offense).

[40] Begay v. United States, 553 U.S. 137, 144-45 (2008); Chambers v. United States, 555 U.S. 122, 692 (2009).

[41] Johnson v. United States, 576 U.S. 591, 606 (2015).

Prior to the Court's decision, the U.S. Sentencing Commission had recommended that Congress consider clarifying amendments to the ACCA's definitions of its predicate offenses.[42]

Constitutional Considerations

Defendants have raised a number of constitutional challenges to the application of § 924(e). They have argued that Congress lacked the constitutional authority to enact the provision, 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*,[43] 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."[44] 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.[45] 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?"[46]

Then to make matters worse, in the Court's view, "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony."[47] 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."[48]

The Fifth Amendment Due Process Clause also has an equal protection component under which the federal government is subject to limitations on invidious discrimination akin to those which the Fourteenth Amendment Equal Protection Clause imposes upon the states.[49] Occasionally, a defendant has argued to no avail that § 924(e) "violates equal protection because it does not apply

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[42] U.S. Sent'g Comm'n, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 365 (2011), at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

[43] 559 U.S. 133, 140 (2015).

[44] U.S. Const. Amend. V; *see generally* Cong. Rsch. Serv., CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 112-9, at 1983-87, https://constitution.congress.gov/browse/essay/amdt5-4-8/ALDE_00000909/['vague'].

[45] *Johnson*, 576 U.S. at 595 ("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.") (citing Kolender v. Lawson, 461 U.S. 352, 357-58 (1983)).

[46] *Johnson*, 576 U.S. at 597.

[47] *Id.* at 598.

[48] *Id.*

[49] *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (citing inter alia, *Bolling v. Sharpe*, 347 U.S. 497, 500 (1957)); Cong. Rsch. Serv., CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 112-9,at 1543-47, available at https://constitution.congress.gov/browse/essay/amdt5-4-6-11/ALDE_00000906/['sharpe'].

uniformly to similarly situated defendants previously convicted of drug offenses in different states;"[50] or because the section has a racially disparate impact.[51]

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.[52] Those powers which cannot be traced to an enumeration within the Constitution are reserved to the states and the people.[53] Congress's constitutional authority to regulate interstate and foreign commerce is among its most sweeping prerogatives, but the power is not boundless. The Constitution 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.[54] Absent such a nexus, the Constitution does not permit Congress to enact legislation proscribing possession of a firearm on school grounds, as the Supreme Court observed in *Lopez*.[55] Section 922(g)[56] outlaws receipt by a felon of a firearm "which has been shipped or transported in interstate or foreign commerce." This jurisdictional element, 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.[57]

Second Amendment

The Second Amendment provides, "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."[58] 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...."[59] The Court explained, for example, that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on possession of firearms by felons...."[60] Pointing to the statement in *Heller*, the lower federal appellate courts that

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

[51] United States v. Ronning, 6 F.4th 851, 853 (8th Cir. 2021) ("Ronning's constitutional claims are without merit. The Supreme Court has made it clear that disparate impact alone is insufficient to show an equal protection violation; instead, proof of discriminatory intent or purpose is required.").

[52] U.S. CONST. art. I, § 8, cl. 18; *see generally* Cong. Rsch. Serv., CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 112-9, at.377-83, https://constitution.congress.gov/browse/essay/artI-S8-C18-1/ALDE_00001242/.

[53] U.S. CONST. amend. X.

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

[55] *Lopez*, 514 U.S. at 552.

[56] 18 U.S.C. § 922(g).

[57] United States v. Stancil, 4 F.4th 1193, 1200 (11th Cir. 2021); United States v. Penn, 969 F.3d 450, 459-60 (5th Cir. 2020); United States v. Roszkowski, 700 F.3d 50, 57-58 (1st Cir. 2012); United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009).

[58] U.S. CONST. amend. II; *see generally* Cong. Rsch. Serv., CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 112-9,at 1351-55, https://constitution.congress.gov/browse/essay/amdt2-1/ALDE_00000408/.

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

[60] *Id.* at 626.

have considered the matter have concluded that the felon-in-possession offense established in § 922(g)(1) does not offend the Second Amendment.[61] From this conclusion 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.[62]

Apprendi and Its Progeny

The Court in *Almendarez-Torres v. United States* [63] identified the fact of a prior conviction as a permissible sentencing factor. The Court in that case 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.[64] Yet almost immediately thereafter in *Apprendi v. New Jersey*,[65] the Court 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."[66]

The Court further held in *Blakely v. Washington* and *United States v. Booker* that unless the defendant waives the issue, a jury must decide any sentence enhancing fact, other than the fact of a prior conviction.[67] The Court explained in *Shepard v. United States*, 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.[68] 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."[69]

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[61] United States v. Williams, 24 F.4th 1209, 1211 (8th Cir. 2022); Hatfield v. Barr, 925 F.3d 950, 953 (7th Cir. 2019); United States v. Moore, 666 F.3d 313, 316-17 (4th Cir. 2012) ("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*.") (summarizing holdings from the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits).

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

[63] 523 U.S. 224, 247 (1998).

[64] *Id*.

[65] 530 U.S. 466, 476 (2000).

[66] 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)); *see generally* Cong. Rsch. Serv., CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 112-9, at 1604-12, available at.https://constitution.congress.gov/browse/essay/amdt6-5-2-1/ALDE_00000938/.

[67] 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*, 530 U.S. at 490); United States v. Booker, 543 U.S. 220, 231 (2005) (quoting the same passage from *Apprendi*).

[68] 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.").

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

Nevertheless, the Court has yet to revisit *Almendarez-Torre*s,[70] 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.[71]

Eighth Amendment

Defendants sentenced under § 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.[72] The Amendment has been said to prohibit sentences that are "grossly disproportionate" to the crime.[73] Under varying theories, the Supreme Court has held that the Eighth Amendment permits the imposition of life imprisonment without the possibility of parole of a first-time offender convicted of large scale drug trafficking;[74] 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.[75] On the other hand, the Court held in *Roper v. Simmons*[76] that the Eighth Amendment precludes execution for a capital offense committed by a juvenile;[77] in *Graham v. Florida*[78] that it precludes imprisonment for life without parole for a non-homicide offense committed by a juvenile;[79] and in *Miller v. Alabama*[80] that it bars mandatory life imprisonment without the possibility of parole for an offense committed by a juvenile,[81] yet

[70] Alleyne v. United States, 570 U.S. 99, 111 n.1 (2013) ("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.").

[71] United States v. Burghardt, 939 F.3d 397, 409 (1st Cir. 2019); 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. 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."); United States v. Salahuddin, 509 F.3d 858, 863 (7th Cir. 2007); *cf.* United States v. Dudley, 5 F.4th 1249, 1260 (11th Cir. 2021) ("Finally, like many of our sister circuits, we have repeatedly rejected the argument that judicially determining whether prior convictions were committed on different occasions from one another for purposes of the ACCA violates a defendant's Fifth and Sixth Amendment rights.").

[72] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *see generally* Cong. Rsch. Serv., CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 112-9, at 1686-90, https://constitution.congress.gov/browse/essay/amdt8-3-2/ALDE_00000964/; CRS Rep. No. R47158, *Juvenile Life Without Parole: In Brief*, by Emily J. Hanson and Joanna R. Lampe.

[73] 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.).

[74] *Harmelin*, 501 U.S. at 994.

[75] *Ewing*, 538 U.S. at 30-31.

[76] 543 U.S. 551 (2005).

[77] *Id.* at 560.

[78] *Graham*, 560 U.S. 48 (2010).

[79] *Id.* at 82.

[80] 567 U.S. 460 (2012).

[81] *Id*. at 470.

permits a discretionary sentence of life imprisonment without the possibility of parole for murder committed by a juvenile.[82]

The lower federal courts have consistently rejected general claims that sentences under § 924(e) were grossly disproportionate to the crimes involved.[83] 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).[84] That pattern appears to have continued following *Graham*.[85]

Double Jeopardy

The Fifth Amendment ensures that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb."[86] The Double Jeopardy Clause protects against both successive prosecutions and successive punishments for the same offense.[87] 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.[88] 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).[89]

[82] Jones v. Mississippi, 141 S. Ct. 1307, 1313 (2021).

[83] 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).

[84] *Jones*, 574 F.3d at 552-53; 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).

[85] 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. Winfrey, 23 F.4th 1085, 1087-88 (8th Cir. 2022); 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).

[86] U.S. CONST. amend. V; *see generally* Cong. Rsch. Serv., CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 112-9 at 1457-80, https://constitution.congress.gov/browse/essay/amdt5-2-1/ALDE_00000857/.

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

[88] Blockburger v. United States, 284, U.S. 299, 304 (1932); *Dixon*, 509 U.S. at 696.

[89] 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.[90]

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

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