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 minimum 15-year term of imprisonment for recidivists convicted of unlawful possession of a firearm under 18 U.S.C. 922(g). Section 924(e) applies only to those defendants who have three prior state or federal convictions for violent felonies or serious drug offenses.

Violent felonies for purposes of section 924(e) are those that either (1) have an element of threat, attempt, or use of physical force against another or (2) that involve burglary, arson, or extortion, or some similar offense. Serious drug offenses are those punishable by imprisonment for 10 years or more.

Constitutional challenges to the application of section 924(e) have been generally 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

The Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e), establishes a 15-year mandatory minimum term of imprisonment for defendants convicted of unlawful possession of a firearm under section 18 U.S.C. 922(g) who have three prior convictions for violent felonies or serious drug offenses.[1] Although section 922(g) bans firearm possession for nine categories of individuals, section 924(e) applies most often to defendants with prior felony convictions for obvious reasons.[2] More often than not, the prior convictions are for violations of state law.

Congress directed the United States Sentencing Commission to report by October 28, 2010, 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 sixty percent of those responding to a Sentencing Commission survey indicated that they considered the section 924(e) mandatory minimum sentences appropriate.[4]

Predicate Offenses

Section 924(e) requires conviction for three predicate offenses. The offenses must constitute either violent felonies or serious drug offenses and must have been committed on different occasions.[5] "[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."[6] Thus, separate drug deals on separate days will constitute offenses committed on different occasions though they involve the same parties and location.[7] 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.[8]

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[1] 18 U.S.C. 924(e)(1)("In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g)"). 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.

[2] The other disqualified categories cover 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)(2)-(9).

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

[6] *United States v. Martin*, 526 F.3d 926, 938-39 (6th Cir. 2008)(internal citations omitted).

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

[8] *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 (continued...)

Application of section 924(e) provides no opportunity to challenge the validity of the underlying predicate offenses.[9]

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.[10] 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.[11] It is the maximum permissible term which determines qualification, even when discretionary sentencing guidelines called for a term of less than 10 years,[12] or when the defendant was in fact sentenced to a lesser term of imprisonment.[13] The appellate courts are divided over the question of whether the offense must be at least a 10-year felony at the time of conviction for predicate offenses or at the time of sentencing under section 924(e).[14]

As long as the attempt is punishable by imprisonment for 10 years or more, the term "serious drug offense" includes attempts to commit a serious drug offense.[15]

Violent Felonies

The assessment of whether a past crime constitutes a violent felony for purposes of section 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 on a particular occasion."[16] Violent felony predicates come in two

(...continued)

report, which is not allowed ..."); *United States v. Sneed*, 600 F.3d 1326, 1332-333(11th Cir. 2010), each citing *Shepard v. United States*, 544 U.S. 13 (2005).

[9] *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"); *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. Goodman*, 519 F.3d 310, 318 (6th Cir. 2008); *United States v. Krejcarek*, 453 F.3d 1290, 1297 10th Cir. 2006).

[10] 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").

[11] *United States v. Rodriquez*, 533 U.S. 377, 380 (2008).

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

[13] *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).

[14] *United States v. McNeill*, 598 F.3d 161, 164-66 (4th Cir. 2010)("the maximum sentence for a predicate conviction under the ACCA is determined as of the time of the underlying offense"), noting in accord *United States v. Hinojosa*, 349 F.3d 200, 205 (5th Cir. 2003), and to the contrary *United States v. Darden*, 539 F.3d 116, 122 (2d Cir. 2008) ("judges should examine the state law in place at the time of federal sentencing"); *United States v. Morton*, 17 F.3d 911, 915 (6th Cir. 1994).

[15] *United States v. Williams*, 499 F.3d 1004, 1009 (D.C. Cir. 2007).

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

varieties: offenses involving the use of physical force and offenses of the burglary/arson/ extortion class.[17]

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."[18] "Physical force" here means "violent force—that is, force capable of causing physical pain or injury to another person."[19] Thus, it does not include state convictions for intentional touching of another, such as the Florida statute in Johnson.[20]

Burglary et al. The second variety of violent felony predicates consists of the crimes of burglary, arson, extortion, use of explosives, and any other offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another."[21] The crimes found in the residual clause (crimes that "otherwise involve ...") are only those similar to the enumerated crimes of burglary, arson, extortion and the use of explosives, those marked by "purposeful, violent and aggressive conduct."[22] Thus, they do not include convictions for driving under the influence of alcohol or failing to report to begin serving a term of imprisonment.[23]

Substantial Assistance

Federal mandatory minimum sentencing statutes, including section 924(e), are subject to a general exception under 18 U.S.C. 3553(e) in cases where the defendant has provided the government with substantial assistance.[24] A defendant is entitled to a sentence below an otherwise applicable statutory minimum under the provisions of section 3553(e) only if the government agrees.[25] The courts have acknowledged that due process or equal protection or other constitutional guarantees may provide a narrow exemption. "Thus, a defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say, because of the defendant's race or religion."[26] A defendant is entitled to relief if the government's refusal

[17] 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").

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

[19] *Johnson v. United States*, 130 S.Ct. 1265, 1271 (2010); *United States v. Forrest*, 611 F.3d 908, 910 (8th Cir. 2010); *United States v. Ramon Silva*, 608 F.3d 663, 669 (10th Cir. 2010); *United States v. Hughes*, 602 F.3d 669, 673-74 (5th Cir. 2010).

[20] *Johnson v. United States*, 130 S.Ct. at 1272.

[21] 18 U.S.C. 924(e)(2)(B)(ii).

[22] *Begay v. United States*, 553 U.S. 137, 144-45 (2008); *Chambers v. United States*, 129 S.Ct. 687, 692 (2009); *United States v. Alexander*, 609 F.3d 1250, 1254-255 (11th Cir. 2010).

[23] *Begay v. United States*, 533 U.S. at 139; *Chambers v. United States*, 129 S.Ct. at 693.

[24] The discussion of section 3553(e) which follows has been borrowed largely from CRS Report R41326, *Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions*, by Charles Doyle.

[25] *Melendez v. United States*, 518 U.S. 120, 125-26 (1996)("We believe that §3553(e) requires a government motion requesting or authorizing the district court to impose a sentence below a level established by statute as [a] minimum sentence before the court may impose such a sentence").

[26] *Wade v. United States*, 504 U.S. 181, 186 (1992).

constitutes a breach of its plea agreement.[27] A defendant is also "entitled to relief if the prosecutor's refusal to move was not rationally related to any legitimate Government end."[28] Some courts have suggested that a defendant is entitled to relief if the prosecution refuses to move under circumstances that "shock the conscience of the court," or that demonstrate bad faith, or for reasons unrelated to substantial assistance.[29] A majority of the judges who answered the Sentencing Commission's survey agreed that relief under section 3553(e) should be available even in the absence of motion from the prosecutor.[30]

A motion under section 3553(e) for a sentence beneath the mandatory minimum and a motion under U.S.S.G. §5K1.1 for a sentence beneath the applicable Sentencing Guideline range are not the same. Thus, a motion under section 5K1.1 will ordinarily not be construed as a motion under section 3553(e).[31]

Any sentence imposed below the statutory minimum by virtue of section 3553(e) must be based on the extent of the defendant's assistance; it may not reflect considerations unrelated to such assistance.[32] It has been suggested that a court may use the section 5K1.1 factors for that determination, i.e., "(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered; (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant's assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; [and] (5) the timeliness of the defendant's assistance," U.S.S.G. §5K1.1(a).[33]

The substantial assistance exception makes possible convictions that might otherwise be unattainable. Yet, it may also lead to "inverted sentencing," i.e., a situation in which "the more serious the defendant's crimes, the lower the sentence—because the greater his wrongs, the more information and assistance he had to offer to a prosecutor;" while in contrast the exception is of no avail to the peripheral offender who can provide no substantial assistance.[34] Perhaps for this

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[27] *United States v. Motley*, 587 F.3d 1153, 1159 (D.C. Cir. 2009); *United States v. Smith*, 574 F.3d 521, 525 (8th Cir. 2009); *United States v. Doe*, 445 F.3d 202, 207 (2d Cir. 2006).

[28] *Wade v. United States*, 504 at 186; *United States v. Davis*, 583 F.3d 1081, 1098 (8th Cir. 2009).

[29] *United States v. Freemont*, 513 F.3d 884, 889 (8th Cir. 2008)("The district court may review the government's refusal to make a motion in limited circumstances. First, the district court may review the government's decision for an unconstitutional motive.... Second, a district court can compel a §3553(e) motion if the government acknowledges the defendant provided substantial assistance, but refuses to make a motion expressly because the defendant engaged in unrelated misconduct—a reason unrelated to the quality of the defendant's assistance.... Third, the district court may be able to compel a motion if the government acted in bad faith by refusing to make a motion"); but see *United States v. Perez*, 526 F.3d 1135, 1138 (8th Cir. 2008)(citing cases evidencing a split within the circuit over whether bad faith provides a sufficient basis to compel a government motion).

[30] *Survey, Question 15. Substantial Assistance*. Only 35% of the respondents disagreed with the statement that "Congress should amend 18 USC §3553(e) to authorize judges to sentence a defendant below the applicable statutory mandatory minimum to reflect a defendant's substantial assistance, even if the government does not make a motion," *Id*.

[31] *Melendez v. United States*, 518 U.S. 120, 126 (1996).

[32] *United States v. Burns*, 577 F.3d 887, 894 (8th Cir. 2009)(en banc)("Where a court has authority to sentence below a statutory minimum only by virtue of a government motion under §3553(e), the reduction below the statutory minimum must be based exclusively on assistance-related considerations"); *United States v. Jackson*, 577 F.3d 1032, 1036 (9th Cir. 2009); *United States v. Hood*, 556 F.3d 226, 234 n.2 (4th Cir. 2009), citing *inter alia United States v. Richardson*, 521 F.3d 149, 159 (2d Cir. 2008) and *United States v. Desselle*, 450 F.3d 179, 182 (5th Cir. 2006).

[33] *United States v. Gabbard*, 586 F.3d 1046, 1051 (6th Cir. 2009), citing *United States v. Richardson*, 521 F.3d at 159.

[34] *Hearing, Testimony of Jeffrey B. Steinback on behalf of the Practitioner's Advisory Group* at 8, quoting *United*
(continued...)

reason, most of the judges who responded to the Sentencing Commission survey agreed that a sentencing court should not be limited to assistance-related factors and should be allowed use the generally permissible sentencing factors when calculating a sentence under section 3553(e).[35]

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. Their arguments have yet to succeed.

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.[36] Those powers which cannot be traced to an enumeration within the Constitution are reserved to the states and the people.[37] 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.[38] 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*.[39] Section 922(g)[40] 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 section 922(g), that section 924(e) makes punishable.[41]

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States v. Brigham, 977 F.2d 317, 318 (7th Cir. 1992); see also *Hearing, Written Statement of Cynthia Hujar Orr, President of the National Ass'n of Criminal Defense Lawyers* at 3 (defendants "who have little or no information to provide the government, end up with far more severe sentences than leaders of conspiracies who run the operations and know the other participants").

[35] *Survey, Question 15. Substantial Assistance*. Only 24% of the respondents disagreed with the statement that "In determining the extent of a reduction below the statutory mandatory minimum under 18 USC §3553(e) ... the court's consideration should not be limited to the nature of the defendant's substantial assistance but also should include consideration of the factors at 18 USC §3553(a)," *Id.*

[36] U.S. Const. Art. I, §8, cl. 18.

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

[38] *United States v. Lopez*, 516 U.S. 549, 558-59 (1995); *United States v. Morrison*, 529 U.S. 598, 609 (2000).

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

[40] 18 U.S.C. 922(g).

[41] *United States v. Vallejo*, 373 F.3d 855, 860-61 (7th Cir. 2004), *citing in accord, United States v. Thompson*, 361 F.3d 918, 922 (6th Cir. 2004); *United States v. Leathers*, 354 F.3d 955, 599 (8th Cir. 2003); *United States v. Dunn*, 345 F.3d 1285, 1297 (11th Cir. 2003); *United States v. Darrington*, 351 F.3d 632, 634 (5th Cir. 2003).

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."[42] The Supreme Court in *Heller* declared that "the Second Amendment confer[s] an individual right to keep and bear arms ... [but] the right in not unlimited...."[43] It explained, however, that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on possession of firearms by felons...."[44]

The lower appellate courts have taken this to mean that 18 U.S.C. 922(g)(1) which prohibits firearm possession by a felon does not offend the Second Amendment.[45] From which it seems to follow that section 924(e), which imposes a mandatory minimum sanction upon felons who violate section 922(g)(1), is similarly inoffensive.[46]

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.[47] 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."[48]

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.[49] 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 section 924(e) defendant was convicted earlier of a qualifying predicate offense.[50] Justice Thomas, upon

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

[43] *District of Columbia v. Heller*, 128 S.Ct. 2783, 2799 (2008).

[44] *Id.* at 2816-817.

[45] *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010); *United States v. Vongxay*, 594 F.3d 1111, 1114-115(9th Cir. 2010); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009).

[46] *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)).

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

[48] *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).

[49] *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*.

[50] *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").

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."[51]

Nevertheless, the lower federal courts continued to adhere to *Almendarez-Torres* in section 924(c) cases—the fact of a prior qualifying conviction need not be charged in the indictment nor proved to the jury beyond a reasonable doubt.[52]

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.[53] It has been said to prohibit sentences that are "grossly disproportionate" to the crime.[54] 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;[55] 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.[56] On the other hand, the Court held in *Ewing* that the Eighth Amendment precludes execution for a capital offense committed by a juvenile,[57] and most recently in *Graham* that it precludes imprisonment for life without parole for a non-homicide offense committed by a juvenile.[58]

The lower federal courts have consistently rejected general claims that sentences under 924(e) were grossly disproportionate to the crimes involved.[59] In cases decided before *Graham*, the

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

[52] *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. Jones*, 574 F.3d 546, 553-54 (8th Cir. 2009); *United States v. Salahuddin*, 509 F.3d 858, 863 (7th Cir. 2007); *United States v. Coleman*, 451 F.3d 154, 159-60 (3d Cir. 2006).

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

[54] *Graham v. Florida*, 130 S.Ct. 2011, 2021 (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.).

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

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

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

[58] *Graham v. Florida*, 130 S.Ct. at 2034.

[59] *United States v. Helm*, 502 F.3d 366, (5th Cir. 2007), citing in accord *United States v. Cardoza*, 129 F.3d 6, 18 (1st Cir. 1997); *United States v. Rudolph*, 970 F.2d 467, 469-70 (8th Cir. 1992); *United States v. Crittendon*, 883 F.2d 326, 331 (4th Cir. 1989); *United States v. Pedigo*, 879 F.2d 1315, 1320 (6th Cir. 1989); *United States v. Dombrowski*, 877 F.2d 520, 526 (7th Cir. 1989); *United States v. Baker*, 850 F.2d 1365, 1372 (9th Cir. 1988); see also *United States v. Lyons*, 403 F.3d 1248, 1256-257 (11th Cir. 2005).

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 section 924(e).[60] To date, there have been no subsequent federal appellate court decision directly on point. Two circuits, however, have found no Eighth Amendment impediment to mandatory life imprisonment sentences imposed under provisions other than section 924(e) upon adults convicted of drug trafficking and based in part on predicate juvenile offenses.[61]

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."[62] The double jeopardy clause protects against both successive prosecutions and successive punishments for the same offense.[63] 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.[64] Defendants have argued to no avail that the double jeopardy clause bars reliance on the predicate offenses or on section 922(g) to trigger section 924(e).[65]

[60] *United States v. Jones*, 574 F.3d 546, 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).

[61] *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 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*, ___ F.3d ___, ___ (6th Cir. Sept. 21, 2010)(2010 WL 3632149)(same).

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

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

[64] *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).

[65] *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.

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