Three Strike Mandatory Sentencing (18 U.S.C. 3559(c)): An Overview

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Summary

The federal three strikes provision calls for a mandatory term of life imprisonment for defendants convicted of a serious violent felony who have two or more federal or state serious violent felony convictions or one or more of such felony conviction plus one or more federal or state serious drug conviction, 18 U.S.C. 3559(c). The qualifying violent felonies are those specifically enumerated within the section—murder, rape, violent robberies, extortion, among others—as well as unenumerated felonies, that is, any state and federal 10-year felony that involves the fact or risk of physical violence. The qualifying serious drug offenses are those punishable by imprisonment for 10 years or more under state or federal law. The section creates an exemption where defendants can prove that an otherwise qualifying conviction involved neither the fact nor risk of injury.

Defendants have regularly challenged the constitutionality of the section and whether their felony convictions constitute convictions for qualified offenses. The question of when a felony should be considered an unenumerated serious violent felony has proven perplexing, but recent Supreme Court construction of the term in another context may be illuminating. The Court has said in *Johnson*, *Chambers*, and *Begay* that for purposes of the Armed Career Criminal Act (ACCA) a violent felony is one that involves the purposeful, aggressive use of force, capable of inflicting physical pain or injury upon another.

Constitutional challenges have been to no avail, at least thus far. Defendants have argued without success (1) that requiring the defendant to prove to a judge by clear and convincing evidence, the inapplicability of an injury free conviction offends the due process and jury trial principles identified in *Apprendi* and its progeny; (2) that the section results in the imposition of cruel and unusual punishment in violation of the Eighth Amendment; (3) that the mandatory sentencing provision impermissibly intrudes upon the constitutional prerogatives of the federal courts in violation of the separation of powers doctrine; (4) that application of the section results in punishment for prior convictions in violation of the double jeopardy clause of the Fifth Amendment, and in some instances of the constitutional prohibition on ex post facto laws; and (5) that, under some circumstances, application of the section constitutes a violation of the equal protection component of the due process clause of the Fifth Amendment.

The text of section 3559(c) is appended.

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Introduction

A defendant convicted of a federal "serious violent felony" must be sentenced to life imprisonment under the so-called three strikes law, 18 U.S.C. 3559(c), if he has two prior state or federal violent felony convictions or one such conviction and a serious drug offense conviction.[1]

In the recently enacted hate crime provisions, Congress instructed the United States Sentencing Commission to report to it on the operation of such mandatory minimum sentencing statutes.[2] Over 60% of the federal district court judges responding to a subsequent commission survey indicated they considered federal mandatory minimum sentences too high.[3] Although the survey asked specifically about sentences under other mandatory minimum statutes, it provided no opportunity for a response focused on section 3559(c).[4]

Notice and Objections

Section 3559(c) requires prosecutors to follow the notice provisions of 21 U.S.C. 851(a), if they elect to ask the court to sentence a defendant under the three strikes provision.[5] Section 851(a), in turn, requires prosecutors to notify the court and the defendant of the government's intention to seek the application of section 3559(c) and the description of the prior convictions upon which the government will rely.[6] Without such notice, the court may not impose an enhanced sentence.[7] The purpose of the requirement "is to ensure the defendant is aware before trial that he faces possible sentence enhancement as he assesses his legal options and to afford him a chance to contest allegations of prior convictions."[8] As long as that dual purpose is served, however, a want of meticulous compliance or complete accuracy will not preclude enhanced sentencing.[9] The

[1] 18 U.S.C. 3559(c).

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

[3] 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.

[4] *Id.* A majority found the statutory mandatory minimums appropriate for trafficking in heroin, powder cocaine and methamphetamine; for firearms offenses; for aggravated identity theft; for production and distribution of child pornography; and for other child exploitation offenses. On the other hand, a majority found them too high for trafficking in crack cocaine (76%) or marijuana (54%); or receipt of child pornography (71%). *Id.*

[5] 18 U.S.C. 3559(c)(4).

[6] 21 U.S.C. 851(a)(1)("No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon...."). See e.g., *United States v. Sanchez*, 586 F.3d 918, 929-30 (11th Cir. 2009)("Prior to trial, the Government notified the district court and Camejo, pursuant to 18 U.S.C. §851, that if Camejo was found guilty of Counts 3, 4, or 5, it would ask the court to impose a life sentence, pursuant to 18 U.S.C. §3559(c), because he previously had been convicted in Florida circuit court of what §3559(c)(1)(A) deemed a 'serious violent felony' and two 'serious drug offenses'").

[7] *United States v. Hood*, 615 F.3d 1293, 1302 (10th Cir. 2010); *United States v. Baugham*, 613 F.3d 291, 294 (D.C. Cir. 2010); *United States v. Morales*, 560 F.3d 112, 113 (2d Cir. 2009).

[8] *United States v. Baugham*, 613 F.3d at 294-95; *United States v. Lane*, 591 F.3d 921, 927 (7th Cir. 2010).

[9] *United States v. Hood*, 615 F.3d at 1302 (noting the appropriateness of "harmless error analysis" rather than "hypertechnical approach"); *United States v. Baugham*, 613 F.3d at 295 ("Our caselaw also makes clear, however, that to comply with §851(a) the information need not be perfect with respect to every jot and tittle"); *United States v. Boudreau*, 564 F.3d 431, 437 (6th Cir. 2009)("Indeed, we have regularly held that actual notice satisfies the (continued...)

objections most often raised are constitutional challenges and those that question the qualifications of prior convictions as predicate offenses.

Predicate Offenses

Serious Drug Offenses

Serious drug offenses for purposes of section 3559(c) consist of (a) federal drug kingpin offenses;[10] (b) the most severely punished of the federal drug trafficking offenses;[11] (c) the smuggling counterpart of the such trafficking offenses;[12] and (d) state equivalents of any of these three.[13] When the prosecution relies upon a state drug trafficking conviction, for example, it must show that the amount of drugs involved warranted treating it as an equivalent.[14]

Serious Violent Felonies

The federal three strikes provision recognizes convictions for two categories of serious violent felonies—one enumerated, the other general. The inventory of enumerated serious violent felonies consists of the federal or state crimes of

- murder (as described in section 1111);
- manslaughter other than involuntary manslaughter (as described in section 1112);
- assault with intent to commit murder (as described in section 113(a));
- assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242);
- abusive sexual contact (as described in sections 2244(a)(1) and (a)(2);
- kidnapping;[15]
- aircraft piracy (as described in section 46502 of Title 49);
- robbery (as described in section 2111, 2113, or 2118);
- carjacking (as described in 2119);
- extortion;[16]
- arson;[17]

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requirements of Section 851(a)").

[10] 21 U.S.C. 848.

[11] 21 U.S.C. 841(b)(1)(A).

[12] 21 U.S.C. 960(b)(1)(A).

[13] 18 U.S.C. 3559(c)(2)(H).

[14] *United States v. Sanchez*, 586 F.3d 918, 930 (11th Cir. 2009)(parenthetical citations in the original)("A state drug offense qualifies as a 'serious drug offense' under §3559(c) only if the offense, if prosecuted in federal court, would have been punishable under [21 U.S.C. §841(b)(1)(A)] or [21 U.S.C. §960(b)(1)(A)].... [For example,] to qualify as a 'serious drug offense' under §3559(c)(2)(H)(ii), the drug offenses must have been punishable under 21 U.S.C. §841(b)(1)(A). Section 841(b)(1)(A), however, is limited only to offenses involving '5 kilograms or more' of cocaine or '50 grams or more' of cocaine base").

[15] 18 U.S.C. 3559(c)(2)(E)("the term 'kidnapping' means an offense that has as its elements the abduction, restraining, confining, or carrying away of another person by force or threat of force").

[16] 18 U.S.C. 3559(c)(2)(C)("the term 'extortion' means an offense that has as its elements the extraction of anything of value from another person by threatening or placing that person in fear of injury to any person or kidnapping of any person").

- firearms use;[18]
- firearms possession (as described in section 924(c)); or
- attempt, conspiracy, or solicitation to commit any of the above offenses.[19]

The more general, unenumerated category consists of "any other [state or federal] offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense."[20]

There are statutory exceptions for both categories. Among the enumerated offenses, arson offenses do not qualify as predicate offenses, if the defendant can establish by clear and convincing evidence that he reasonably believed the offense posed no threat to human life and that it in fact did not.[21] Moreover, neither robbery, attempted robbery, conspiracy to commit robbery, nor solicitation to commit robbery qualify, if the defendant can establish by clear and convincing evidence that the offense involved neither the use nor threatened use of a dangerous weapon and that no one suffered serious bodily injury as a consequence of the crime.[22]

Among the unenumerated offenses, this same no-weapon, no-injury standard applies—those otherwise qualifying 10-year felonies, marked by the use or threatened use of physical force against another, do not qualify as predicate offenses, if the defendant can establish by clear and convincing evidence that no weapon was used, and no injury sustained, in the course of the offense.[23]

The question of what constitutes a conviction for an unenumerated "serious violent felony" under section 3559(c) seems to have proven as perplexing as what constitutes a "violent felony" conviction under the Armed Career Criminal Act (ACCA).[24] Recent Supreme Court construction of the term "violent felony" in the ACCA may provide clarification for future cases arising under section 3559(c).[25] In *Johnson*, *Chambers*, and *Begay*, the Court has made it clear that the ACCA's

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[17] 18 U.S.C. 3559(c)(2)(B)("the term 'arson' means an offense that has as its elements maliciously damaging or destroying any building, inhabited structure, vehicle, vessel, or real property by means of fire or an explosive").

[18] 18 U.S.C. 3559(c)(2)(D)("the term 'firearms use' means an offense that has as its elements those described in section 924(c) or 929(a), if the firearm was brandished, discharged, or otherwise used as a weapon and the crime of violence or drug trafficking crime during and relation to which the firearm was used was subject to prosecution in a court of the United States or a court of a State, or both").

[19] 18 U.S.C. 3559(c)(2)(F)(i).

[20] 18 U.S.C. 3559(c)(2)(F)(ii).

[21] 18 U.S.C. 3559(c)(3)(B).

[22] 18 U.S.C. 3559(c)(3)(A).

[23] *Id.*

[24] E.g., *United States v. Abraham*, 386 F.3d 1033, 1038 (11th Cir. 2004)(escape constitutes a serious violent felony for purposes of section 3559(c)); *United States v. Dobbs*, 449 F.3d 904, 913-14 (8th Cir. 2006)(burglary is not a serious violent felony for purposes of section 3559(c)); *United States v. Evans*, 478 F.3d 1332, 1342 (11th Cir. 2007) (conviction for an anthrax threat against a federal building is not a serious violent felony for purposes of section 3559(c)).

[25] See *United States v. Rose*, 587 F.3d 695, 703-704 (5th Cir. 2009)(noting that circuit precedent construing the term "violent felony" in ACCA may be instructive when construing the term "serious violent felony" in section 3559(c)). The ACCA defines the term "violent felony" to mean "any crime punishable by imprisonment for a term exceeding one year ... that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a (continued...)

reference to violent felonies refers to purposeful, aggressive use of force capable of inflicting physical pain or injury upon another.[26] One circuit, however, has noted that conviction for a "serious violent felony" includes a state escape conviction, notwithstanding the holding in *Chambers* that held in another context that a failure-to-report offense lacked the intentional, aggressive use of force necessary to qualify as a violent felony.[27]

Constitutional Considerations

Defendants have challenged the constitutionality of section 3559(c) on a number of grounds. They have argued (1) that requiring the defendant to prove to a judge by clear and convincing evidence the inapplicability of an injury free conviction offends the principles identified in *Apprendi* and its progeny; (2) that the section results in the imposition of cruel and unusual punishment in violation of the proscription of the Eighth Amendment; (3) that the mandatory sentencing provision impermissibly intrudes upon the constitutional prerogatives of the federal courts in violation of the separation of powers doctrine; (4) that section 3559(c) results in punishment for prior convictions in violation of the double jeopardy clause of the Fifth Amendment and in some instances of the constitutional prohibition on ex post facto laws; and (5) that, under some circumstances, application of section 3559(c) constitutes a violation of the equal protection component of the due process clause of the Fifth Amendment.

Apprendi and Related Matters

Defendants sentenced under section 3559(c) have argued variously (1) that allowing the court, rather than the jury, to determine whether a defendant has sufficient, qualifying predicate offense convictions to warrant imposition of a mandatory minimum sentence violates the defendant's constitutional right to a jury trial; (2) that for the same reason allowing the court, rather than the jury, to determine whether a defendant's predicate offense conviction involved an injury free

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serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B).

[26] See *Johnson v. United States*, 130 S.Ct. 1265, 1271 (2010)(emphasis in the original)("We think it clear that in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force—that is force capable of causing physical pain or injury to another person"); *Chambers v. United States*, 129 S.Ct. 687, 692 (2009)("Conceptually speaking, the crime [of failing to report] amounts to a form of inaction, a far cry from the 'purposeful, violent, and aggressive conduct' potentially at issue when an offender [commits an enumerated offense, e.g.,] uses explosives against property, commits arson, burgles a dwelling or residence, or engages in certain forms of extortion"); *Begay v. United States*, 553 U.S. 137, (2008)("DUI differs from the [enumerated] crimes—burglary, arson, extortion, and crimes involving the use explosives—in at lease one pertinent, and import, respect. the [enumerated crimes all typically involve purposeful, 'violent,' and 'aggressive' conduct").

[27] *United States v. Sanchez*, 586 F.3d 918, 932 n.33 (11th Cir. 2009)("[W]e are mindful of the Supreme Court's recent decision in *Chambers v. United States*, 555 U.S. ___, 129 S.Ct. 687, 172 L.Ed. 2d 484 (2009) (holding that the Illinois crime of failure to report for imprisonment is not a violent felony for purposes of the Armed Career Criminal Act). We nonetheless find that decision inapposite. There, the Court held that a criminal defendant sentenced to 11 weekends of imprisonment could not have been found to have had the '"purposeful, 'violent,' and 'aggressive' conduct"' required to meet the statutory definition of a 'violent felony' by failing to report to the prison for four of those weekends. *Id.* at ___, 129 S.Ct. at 692 (quoting *Begay v. United States*, 553 U.S. 137, 128 S.Ct. 1581, 1586 (2008). This case is distinct. Here, Antonio Sanchez pled guilty to escape, not a failure to report. Moreover, the record suggests that he had the specific intent to escape from prison-he used the scheduled release as a ruse to leave the institution of his confinement for more than a month"). The prosecution indicated that Sanchez might have prevailed had he been able to establish that "his escape conviction was indeed for a nonviolent 'walkaway,'" *Id.* at 933 n. 35.

offense violates the defendant's constitutional right to a jury trial; (3) that requiring the defendant to prove that a predicate offense conviction involved an injury free offense in order to avoid the mandatory minimum sentence shifts the burden of proof from the government in violation of the defendant's constitutional right to due process; and (4) that the use of a clear and convincing standard rather than a proof beyond a reasonable doubt standard to judge whether a conviction involved an injury free offense also violates the defendant's constitutional right to due process.

Jury Trial—Prior Conviction

In *Apprendi* and the cases that followed, the Supreme Court has said that any fact relied upon to enhance a defendant's sentence beyond the maximum otherwise set by statute must be proven to the jury beyond a reasonable doubt unless the defendant waives that right. Those declarations, however, have always included a caveat—except for the fact of a prior conviction.[28] The caveat reflects a pre-*Apprendi* decision, *Almendarez-Torres*, in which Court held that the fact of a prior conviction might be treated as a sentencing factor to be determined by the sentencing court without offending the defendant's right to grand jury indictment, or by implication his right to a jury trial and conviction only on proof beyond a reasonable doubt.[29]

Pointing to the *Apprendi* caveat or *Almendarez-Torres* or both, the lower federal appellate courts have rejected the contention that section 3559(c) offends constitutional norms when it authorizes a sentencing court to determine whether a defendant has prior predicate offense convictions sufficient to trigger the section's mandatory minimum provisions.[30]

No Injury Exception

Almendarez-Torres does not speak to the validity of assigning sentencing courts the task of determining whether a defendant has shown by clear and convincing evidence that his robbery or arson convictions involved offenses free of physical injury or free of the involvement of dangerous weapons. Instead, the courts have rejected constitutional challenges on such grounds by pointing to other pre-*Apprendi* cases, *Patterson* and *Parke*, which held that once the elements of an offense have been constitutionally established a statute may assign the task of determining the existence of mitigating sentencing considerations to the sentencing court under any burden or standard.[31]

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[28] *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)("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"); *Blakely v. Washington*, 542 U.S. 296, 301 (2004)(quoting *Apprendi* language); *United States v. Booker*, 543 U.S. 220, 244 (2005)("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt").

[29] *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27, 247 (1998).

[30] *United States v. Snype*, 441 F.3d 119, 148 (2d Cir. 2006)("Thus, *Almendarez-Torres* continues to bind this court in its application of *Apprendi*.... With this understanding of the law, we identify no Sixth Amendment error in the district court's findings as to the fact of Snype's prior state robbery convictions. Four of our sister circuits have considered this question and reached the same conclusion"), citing *United States v. Cooper*, 375 F.3d 1041, 1053 n.3 (10th Cir. 2004); *United States v. Bradshaw*, 281 F.3d 278, 294 (1st Cir. 2002); *United States v. Weaver*, 267 F.3d 231, 251 (3d Cir. 2001); *United States v. Davis*, 260 F.3d 965, 969 (8th Cir. 2001).

[31] *United States v. Matthews*, 545 F.3d 223, (2d Cir. 2008), citing *Patterson v. New York*, 432 U.S. 197, 207-208 (1977) and *Parke v. Raley*, 506 U.S. 20, 26-7 (1992), and citing in accord *United States v. Contreras*, 536 F.3d 1167, 1173-174 (10th Cir. 2008); *United States v. Bradshaw*, 281 F.3d at 296-97; *United States v. Davis*, 260 F.3d at 970; *United States* (continued...)

Cruel and Unusual Punishment

The Eighth Amendment prohibits infliction of cruel and unusual punishments.[32] Defendants sentenced under section 3559(c) have occasionally contended that a sentence of life imprisonment without the possibility of parole—since there is no parole in the federal criminal justice system for any crime committed after 1987—violates this prohibition. The Supreme Court precedents provide some limited support, but are not as helpful as they might be. In *Solem*, the Court held that the imposition of a sentence of life imprisonment without the possibility of parole under a state recidivist statute constituted a cruel and unusual punishment when based on three relatively minor property offenses.[33] In *Graham*, it held that imposition of a sentence of life imprisonment without the possibility of parole constituted a cruel and unusual punishment when imposed upon a child for a nonhomicide offense.[34] Yet in between the two, in *Harmelin* and *Ewing* a divided Court found no Eighth Amendment impediment to imposition of a sentence of life imprisonment without the possibility of parole for a serious drug offense or to imposition of a lengthy prison term under a state three strike statute following serious property offense convictions.[35]

The Court has yet to address the issue in a case arising under section 3559(c), but each of the lower federal appellate courts to consider the question has rejected the Eighth Amendment argument.[36]

Separation of Powers

The Constitution vests the judicial power of the United States in the Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish."[37] Defendants sentenced under section 3559(c) have sometimes argued that by denying judges sentencing discretion, the section impermissibly intrudes upon the judicial power of the courts. The argument has been undermined by Supreme Court pronouncements in other contexts that "Congress has the power to define criminal punishments without giving the courts any sentencing discretion."[38] The lower federal appellate courts have yet to find the argument compelling.[39]

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v. Gray, 260 F.3d 1267, 1279 (11th Cir. 2001); *United States v. Ferguson*, 211 F.3d 878, 886-86 (5th Cir. 2000); *United States v. Gatewood*, 230 F.3d 186, 190 (6th Cir. 2000); *United States v. Kaluna*, 192 F.3d 1188, 1196 (9th Cir. 1999); *United States v. Wicks*, 132 F.3d 383, 388-89 (7th Cir. 1997).

[32] U.S. Const. Amend. VIII.

[33] *Solem v. Helm*, 463 U.S. 277, 303 (1983).

[34] *Graham v. Florida*, 130 S.Ct. 2011, 2034 (2010).

[35] *Harmelin v. Michigan*, 501 U.S. 957, 904, 1004 (1991); *Ewing v. California*, 538 U.S. 11, 30-1 (2003).

[36] *United Stats v. Rose*, 587 F.3d 695, 704-705 (5th Cir. 2009); *United States v. Gurule*, 461 F.3d 1238, 1247 (10th Cir. 2006); *United States v. Snype*, 441 F.3d 119, 152 (2d Cir. 2006); *United States v. Kaluna*, 192 F.3d 1188, 1199-200 (9th Cir. 1999); *United States v. DeLuca*, 137 F.3d 24, 40 n.19 (1st Cir. 1998); *United States v. Washington*, 109 F.3d 335, 337-38 (7th Cir. 1997); *United States v. Farmer*, 73 F.3d 836, 840 (8th Cir. 1996).

[37] U.S. Const. Art. III, §1.

[38] *Chapman v. United States*, 500 U.S. 453, 467 (199); see also *Mistretta v. United States*, 488 U.S. 361, 364 (1989)("the scope of judicial discretion with respect to a sentence is subject to congressional control").

[39] *United States v. Gurule*, 461 F.3d 1238, 1246 (10th Cir. 2006)("As for the Three Strikes statute in particular, the few reported decisions of which we are aware from other circuits are unanimous in rejecting this [separation of powers] argument.... We agree with these precedents"), citing *United States v. Kaluna*, 192 F.3d 1188, 1199 (9th Cir. 1999); (continued...)

Double Jeopardy and Ex Post Facto

The Fifth Amendment ensures that no "person be subject for the same offence to be twice put in jeopardy of life or limb."[40] The double jeopardy clause protects against both successive prosecutions and successive punishments for the same offense.[41] Defendants sentenced under section 3559(c) have occasionally argued that to do so is to punish them twice for their underlying predicate offenses. The courts have met the argument with the observation that "the Supreme Court has long since determined that recidivist statutes do not violate double jeopardy because 'the enhanced punishment imposed for the later offense is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes, but instead as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'"[42]

Ex post facto contentions have failed for much the same reason. The Constitution forbids the passage of ex post facto laws by either the United States or the states.[43] The proscription covers

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.[44]

In the case of section 3559(c), "the use of predicate felonies to enhance a defendant's sentence does not violate the Ex Post Facto Clause because such enhancements do not represent additional penalties for earlier crimes, but rather stiffen the penalty for the latest crime committed by the defendant."[45]

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United States v. Rasco, 123 F.3d 222, 226-27 (5th Cir. 1997); *United States v. Washington*, 109 F.3d 335, 338 (7th Cir. 1997).

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

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

[42] *United States v. Kaluna*, 192 F.3d at 1198-199, quoting *Witte v. Untied States*, 515 U.S. 389, 400 (1995) and *Gryger v. Burke*, 334 U.S. 728, 732 (1948); see also *United States v. Washington*, 109 F.3d at 338; *United States v. Farmer*, 73 F.3d 836, 840 (8th Cir. 1996).

[43] U.S. Const. Art. I, §§9, 10.

[44] *Stogner v. California*, 539 U.S. 607, 612 (2003), quoting *Calder v. Bull*, 3 Dall. (3 U.S.) 386, 390 (1798); see also *Johnson v. United States*, 529 U.S. 694, 699 (2000).

[45] *United States v. Abraham*, 386 F.3d 1033, 1038 (11th Cir. 2004); *United States v. Kaluna*, 192 F.3d at 1199; *United States v. Rasco*, 123 F.3d 222, 227 (5th Cir. 1997); *United States v. Washington*, 109 F.3d at 338; *United States v. Farmer*, 73 F.3d at 840-41.

Equal Protection

The equal protection component of the due process clause of the Fifth Amendment prohibits prosecution "based on an unjustifiable standard such as race, religion, or other arbitrary classification."[46] To prevail on an equal protection claim, a defendant must show an intentionally motivated discriminatory effect.[47] Defendants who claimed that section 3559(c) has a disparate racial impact have been unable to show that it was crafted for that purpose.[48]

[46] *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

[47] *Id.* at 465.

[48] *United States v. Washington*, 109 F.3d 335, 338 (7th Cir. 1997); *United States v. Farmer*, 73 F.3d 836, 841 (8th Cir. 1996). Equally unsuccessful was a defendant who claimed an equal protection violation based on disparate sentencing patterns from one state to another, *United States v. Wicks*, 132 F.3d 383, 389 (7th Cir. 1997)("Certain felonies—those described in (F)(i)—it [(Congress)] considered serious enough to include no matter how Draconian or lenient their treatment may be under state law, while others—those described in (F)(ii)—are subject to a congressional leveler through the requirement of the ten-year term of imprisonment. There is no federalism or equal protection issue at all in (F)(i), and none that survives rational basis analysis in (F)(ii)").

Appendix. 18 U.S.C. 3559(c)(text)

(c) Imprisonment of certain violent felons.—

(1) Mandatory life imprisonment.—Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if—

(A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of—

(i) 2 or more serious violent felonies; or

(ii) one or more serious violent felonies and one or more serious drug offenses; and

(B) each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony or serious drug offense.

(2) Definitions.—For purposes of this subsection—

(A) the term "assault with intent to commit rape" means an offense that has as its elements engaging in physical contact with another person or using or brandishing a weapon against another person with intent to commit aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242);

(B) the term "arson" means an offense that has as its elements maliciously damaging or destroying any building, inhabited structure, vehicle, vessel, or real property by means of fire or an explosive;

(C) the term "extortion" means an offense that has as its elements the extraction of anything of value from another person by threatening or placing that person in fear of injury to any person or kidnapping of any person;

(D) the term "firearms use" means an offense that has as its elements those described in section 924(c) or 929(a), if the firearm was brandished, discharged, or otherwise used as a weapon and the crime of violence or drug trafficking crime during and relation to which the firearm was used was subject to prosecution in a court of the United States or a court of a State, or both;

(E) the term "kidnapping" means an offense that has as its elements the abduction, restraining, confining, or carrying away of another person by force or threat of force;

(F) the term "serious violent felony" means—

(i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244(a)(1) and (a)(2); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and

(ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense;

(G) the term "State" means a State of the United States, the District of Columbia, and a commonwealth, territory, or possession of the United States; and

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

(i) an offense that is punishable under section 401(b)(1)(A) or 408 of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A), 848) or section 1010(b)(1)(A) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)(A); or

(ii) an offense under State law that, had the offense been prosecuted in a court of the United States, would have been punishable under section 401(b)(1)(A) or 408 of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A), 848), or section 1010(b)(1)(A) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)(A)).

(3) Nonqualifying felonies.—

(A) Robbery in certain cases.—Robbery, an attempt, conspiracy, or solicitation to commit robbery; or an offense described in paragraph (2)(F)(ii) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that—

(i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and

(ii) the offense did not result in death or serious bodily injury (as defined in section 1365) to any person.

(B) Arson in certain cases.—Arson shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that—

(i) the offense posed no threat to human life; and

(ii) the defendant reasonably believed the offense posed no threat to human life.

(4) Information filed by United States Attorney.—The provisions of section 411(a) of the Controlled Substances Act (21 U.S.C. 851(a)) shall apply to the imposition of sentence under this subsection.

(5) Rule of construction.—This subsection shall not be construed to preclude imposition of the death penalty.

(6) Special provision for Indian country.—No person subject to the criminal jurisdiction of an Indian tribal government shall be subject to this subsection for any offense for which Federal jurisdiction is solely predicated on Indian country (as defined in section 1151) and which occurs within the boundaries of such Indian country unless the governing body of the tribe has elected that this subsection have effect over land and persons subject to the criminal jurisdiction of the tribe.

(7) Resentencing upon overturning of prior conviction.—If the conviction for a serious violent felony or serious drug offense that was a basis for sentencing under this subsection is found, pursuant to any appropriate State or Federal procedure, to be unconstitutional or is vitiated on the explicit basis of innocence, or if the convicted person is pardoned on the explicit basis of innocence, the person serving a sentence imposed under this subsection shall be resentenced to any sentence that was available at the time of the original sentencing.

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