

Career Offender

and

Armed Career Criminal Act:

When the past comes back to haunt you -

How scary isn't always scary

Laura E. Davis, AFPD

FDSET

Laura_Davis@fd.org



RESEARCH RESOURCES

Online

Google (really)

law.justia.com (clunky, but better than nothing)

State legislature websites

Florida - www.leg.state.fl.us/statutes

Maryland - mgaleg.maryland.gov

Pennsylvania - www.legis.state.pa.us

GPO Federal Digital System - Government Printing Office - www.gpo.gov

Click on “FDsys: GPO’s Federal Digital System” on the left, a little under GPO logo

Doing an “Advanced Search” will let you narrow field before you put in search terms -
i.e. limit to United States Code or United States Court Opinions.

Circuit Courts of Appeals websites:

www.ca6.uscourts.gov

For any other circuit, same address with the 6 replaced with the necessary circuit number

Circuit blogs - best found by searching “X circuit blog” on google

Doug Berman’s blog: <http://sentencing.typepad.com/>

<http://www.scotusblog.com/>

<http://www.supremecourt.gov/>

www.fd.org

Offline

Law School libraries (though, sadly, many are getting rid of their books because “it’s all online”)

best resource: Librarians - if they don’t have something, they know who to send you to

Federal Defender office libraries (good source for old crimes codes and sentencing guidelines)

State Supreme Court libraries; Legislative Archives

Circuit Courts of Appeals libraries (per the website, Sixth Circuit has libraries in Cincinnati, Chattanooga, Cleveland, Columbus, Detroit, Grand Rapids, Louisville, Memphis, Nashville, and Toledo)

<p align="center">Armed Career Criminal Act (ACCA) 18 U.S.C. § 924(e)</p>	<p align="center">Career Offender U.S.S.G. § 4B1.1</p>
statute = mandatory	guideline = advisory
instant offense = 18 U.S.C. § 922(g)	instant offense = crime of violence or controlled substance offense
Predicate offenses: three previous convictions, committed on occasions different from one another, for violent felony or serious drug offense	Predicate offenses: two prior felony convictions for crime of violence or controlled substance offense
“previous conviction” = FOREVER	“prior conviction” - recent enough to count under U.S.S.G. § 4A1.1(a), (b), or (c)
“on occasions different from one another” <i>Barbour</i>	prior convictions would count separately under U.S.S.G. § 4A1.1(a), (b), or (c)
“serious drug offense” - involves manufacturing, distributing, or possession with intent to distribute a controlled substance - maximum term of imprisonment 10+ years	“controlled substance offense” - manufacture, import, export, distribution, dispensing, or possession with intent to do the same [not simple possession] - max. term of imprisonment exceeds 1 year
“violent felony” (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 the use of explosives or otherwise involves conduct that presents a serious potential risk of physical injury to another	“crime of violence” § 4B1.2(a) (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another
“violent felony” and juvenile delinquency - crime involves use or carrying of firearm, knife, or destructive device - would be punishable by imprisonment exceeding one year if committed by adult	Conviction = adult conviction Offense committed prior to age 18 is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted
When objecting, do not forget to object to base offense level under U.S.S.G. § 2K2.1(a)	

CASES

Sentencing, generally

Apprendi v. New Jersey, 530 U.S. 466 (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 (2004)

Facts that are neither admitted by the defendant or found by a jury beyond a reasonable doubt cannot be used to increase a sentence beyond the statutory maximum without violating the Sixth Amendment

Alleyne v. United States, 133 S.Ct. 2151 (2013)

Any fact that increases a mandatory minimum is an element that must be proven beyond a reasonable doubt.

FN1 - *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) - fact of a prior conviction is a penalty provision that does not have to be proven beyond a reasonable doubt.

United States v. Booker, 543 U.S. 220 (2005)

Sixth Amendment as construed in *Blakely* applies to federal sentencing guidelines and deemed the guidelines advisory, as something that must be considered under 18 U.S.C. § 3553

Sentencing, Career Offender/ACCA - Supreme Court - Crime of Violence/Violent Felony

Taylor v. United States, 495 U.S. 575 (1990)

ACCA enumerated burglary is a “generic burglary” - unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.

“modified categorical approach”

May look to indictment, jury instructions, and/or verdict sheet, to see if jury had to find all the elements of a generic burglary in order to convict.

Shepard v. United States, 544 U.S. 13 (2005)

“Modified categorical approach” also applies to examination of guilty pleas.

Appropriate documents to look at (a.k.a. *Shepard* documents):

bench trial: formal rulings of law and findings of fact

guilty plea: charging document, written plea agreement, transcript of plea

colloquy, and any explicit factual finding by the trial judge to which the defendant assented.

James v. United States, 550 U.S. 192 (2007)

To decide whether a crime is a predicate offense, courts should examine the language of the statute and how the state courts apply the statute. In question was Florida attempted

burglary of a dwelling. Supreme Court examined the language of the statute, and how the Florida Supreme Court applied the statute. The “pivotal question” was “whether overt conduct directed toward unlawfully entering or remaining in a dwelling, with the intent to commit a felony therein, is ‘conduct that presents a serious potential risk of physical injury to another.’” *James*, p. 203

DOES NOT say all attempts of enumerated offenses are predicate offenses

Begay v. United States, 553 U.S. 137, 128 S.Ct. 1581 (2008)

A “violent felony” (or “crime of violence”) must be similar in kind to the listed offenses and must involve purposeful, violent and aggressive conduct.

Mostly now used to hold crimes that can be accomplished by *negligent* conduct are not predicate offenses.

Sykes v. United States, 131 S.Ct. 2267 (2011)

A crime of violence or violent felony must present a potential risk of physical injury similar to that presented to the closest related enumerated offense.

Awesome dissent by Scalia, arguing ACCA is unconstitutionally vague.

Descamps v. United States, 133 S.Ct. 2276 (2013)

If a statute is indivisible, court cannot go to *Shepard* documents to see if the particulars of the prior conviction in question meet an ACCA/CO/etc. definition.

FN6 - the government forfeited any residual clause argument, so that issue is not decided here.

Johnson v. United States, 134 S.Ct. — (Docket No. 13-7120)

Is possessing a short barrelled shotgun a “violent felony”

“Hey, this is the perfect case to use for residual clause analysis”

Career Offender/ACCA - Circuit Courts of Appeals - Crime of Violence/Violent Felony

United States v. Martin, 753 F.3d 485 (4th Cir. 2014)

Incredible history and discussion of convoluted ACCA jurisprudence

(also holds MD 4th degree burglary not a predicate because can be committed with negligent conduct)

opinion available free here:

<http://www.gpo.gov/fdsys/pkg/USCOURTS-ca4-12-05001/pdf/USCOURTS-ca4-12-05001-0.pdf>

(or just google “Romelus Martin”)

United States v. Barbour, 750 F.3d 535 (6th Cir. 2014)

It is the government’s burden to show prior offenses happened on occasions different from one another. Here, government did not show first robbery ended before second began

cf. United States v. Wilson, 27 F.3d 1126 (6th Cir. 1994) - rapes committed against two different victims on different floors of the same house, on the same day = occasions

different from one another

United States v. Prater, 766 F.3d 501 (6th Cir. 2014)

It is the government's "burden of proof with regard to the various penalties it seeks to have imposed under the sentencing guidelines" (p. 512) This applies to ACCA as well.

United States v. Hockenberry, 730 F.3d 645 (6th Cir. 2013)

The presentence report listed prior convictions. By failing to object to the presentence report, a defendant accepts all of the factual allegations contained in it.¹

United States v. Gomez, 690 F.3d 194 (4th Cir. 2012)

When every part of a statute can be accomplished with or without use of physical force, it is not possible to apply the modified categorical approach.

The case pre-dates *Descamps*, but foreshadows its holding

"Serious drug offense"

United States v. Simmons, 649 F.3d 237 (4th Cir. 2011)

Defendant's prior marijuana trafficking conviction was not "punishable by imprisonment for more than one year" because under North Carolina's sentencing structure, it would have been impossible for him to be sentenced to more than 8 months in jail.

This case related to § 851 notices, but has application to CO and ACCA

United States v. Morton, 17 F.3d 911 (6th Cir. 1994)

Under the Tennessee sentencing scheme, some drug trafficking convictions are punishable by no more than six years in jail, and so are not a "serious drug offense"

¹ Once the *existence* of a prior conviction is established, if a defendant wants to challenge the *validity* of that prior conviction, the burden shifts to the defendant. *Parke v. Raley*, 506 U.S. 20 (1992).

Supreme Court cases discussing *Shepard* documents that DO NOT include Judgments in the list:

Rangel-Reyes v. United States, 547 U.S. 1200 (2006); *James v. United States*, 1550 U.S. 192 (2007); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007); *Watson v. United States*, 552 U.S. 74 (2007); *United States v. Rodriguez*, 553 U.S. 377 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); *Nijhawan v. Holder*, 557 U.S. 29 (2009); *United States v. Hayes*, 555 U.S. 415 (2009); *Johnson v. United States*, 559 U.S. 133 (2010); *Marreo v. United States*, 133 S.Ct. 2732 (2013); *Descamps v. United States*, 133 S.Ct. 2276 (2013); *Montcrieffe v. Holder*, 133 S.Ct. 1678 (2013); *United States v. Castleman*, 134 S.Ct. 1405 (2014)

2006 - *Rangel-Reyes v. United States*, 547 U.S. 1200, 126 S.Ct. 2873 (2006)

2007 - *James v. United States*, 1550 U.S. 192, 127 S.Ct. 1586 (2007)

2007 - *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 127 S.Ct. 813 (2007)

2007 - *Watson v. United States*, 552 U.S. 74, 128 S.Ct. 579 (2007)

2008 - *United States v. Rodriguez*, 553 U.S. 377, 128 S.Ct. 1783 (2008)

2009 - *Chambers v. United States*, 555 U.S. 122, 129 S.Ct. 687 (2009)

2009 - *Nijhawan v. Holder*, 557 U.S. 29, 129 S.Ct. 2294 (2009)

2009 - *United States v. Hayes*, 555 U.S. 415, 129 S.Ct. 1079 (2009)

2010 - *Johnson v. United States*, 559 U.S. 133, 130 S.Ct. 1265 (2010)

2013 - *Marreo v. United States*, 133 S.Ct. 2732 (2013)

2013 - *Descamps v. United States*, 133 S.Ct. 2276 (2013)

2013 - *Montcrieffe v. Holder*, 133 S.Ct. 1678 (2013)

2014 - *United States v. Castleman*, 134 S.Ct. 1405 (2014)

(in other words, NO Supreme Court case mentions the Judgment as a *Shepard* document)