Preventing the Severe Consequences of Prior State Convictions on Federal Sentences

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Two recent cases out of the United States Supreme Court and the Eleventh Circuit Court of Appeals highlight the important impact that state convictions can have on future federal charges for criminal defendants. This is an area that may fall by the wayside due to the distinction between state and federal criminal court in many defense attorneys' practices. Whether it be public defenders or private practitioners, an understandable ignorance of federal sentencing law by those who practice primarily in state court, can have a monumental impact on clients who, unfortunately after our representation on state charges often do go on to commit new crimes, including possessing firearms, and unexpectedly find themselves struggling in the vast and overwhelming sea of federal sentencing.

In that case, an ounce of knowledge can provide a pound of prevention. An examination of these two recent cases can illustrate how the terms of a negotiated plea can harm our clients or continue protecting them long after the state sentence is served.

Armed Career Criminal Act (ACCA) Primer

The ACCA, 18 U.S.C. § 924(e)(1), imposes a ***fifteen year mandatory minimum*** sentence for those convicted of a 18 U.S.C. § 922(g) firearm offense (simply being a felon in possession of a firearm) that have three previous convictions for a "violent felony" or "serious drug offense" committed on "occasions different from one another."

The question of what offenses, especially state offenses, qualify as "violent felonies" for purposes of the ACCA has been hotly contested in federal courts for years. The

statute defines “violent felony” as “any crime punishable by imprisonment for a term exceeding one year . . . that (1) 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 U.S.C. § 924(e)(2)(B).

Generally, the federal district courts are to adopt a “categorical approach” to applying this sentencing enhancement, looking only at the “fact of conviction and the statutory definition of the prior offense.” *Taylor v. United States*, 495 U.S. 575, 602 (1990). However, because statutes often have various ways of being violated, to determine whether a conviction is for a violent or nonviolent offense, the courts utilize the “modified categorical approach,” looking at the trial record, including charging documents, plea agreements, transcripts of plea colloquies, and other findings of fact and conclusions of law. *Id.* Non-court documents like police reports and complaint applications are not to be considered in determining the nature of a prior offense. *Shepard v. United States*, 544 U.S. 13, 26 (2005).

To stress the importance of this statute, the all too common situation for a conviction under § 922(g) with sentencing under the ACCA, occurs where a defendant is stopped for a minor infraction like a traffic violation or possession of marijuana, is searched, and a firearm is found on him, in his home, or place of business. In that case a minor crime quickly turns into a fifteen year mandatory minimum federal sentence even where the firearm belongs to a family member for a legitimate reason. Once this happens, the customary complaint is “It’s too much time!” And it is. However, this statute is interpreted and applied strictly, and there is little room for mitigation even where a

defendant's prior history looks relatively minor with short or no previous prison sentences. The ACCA has withstood cruel and unusual punishment claims that have been brought up to this point,[1] and the Supreme Court has declined to examine the issue. Therefore, the best defense to such a sentence is to prevent the application of the ACCA at the moment of the prior conviction in state court.

Johnson v. United States

In *Johnson v. United States*, 130 S. Ct. 1265, 1270 (2010), a case on certiorari from the Eleventh Circuit, the Supreme Court held that Florida's felony battery statute, which requires the "actual and intentional touching" of another person, does not have the use of "physical force" as an element and thus does not constitute a "violent felony" for purposes of the ACCA.

The Florida battery statute had been interpreted by the Florida Supreme Court to include any intentional physical touching, "no matter how slight." *Id.* at 1269-70. According to the United States Supreme Court, for purposes of the ACCA, the "physical force" element of "violent felony" requires "violent force." *Id.* at 1271. Therefore, because a battery under Florida law, and in most states could be a slight touching, it would not necessarily qualify as a violent felony. *Id.* at 1272, 1274.

Johnson, being just the most recent of the high court's interpretation of the ACCA,[2] reminds us of the importance of the record even in guilty pleas. If a defendant is

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[1] *United States v. Collins,* 321 F.3d 691, 698-99 (8th Cir. 2003); *United States v. Johnson,* 22 F.3d 674, 683 (6th Cir. 1994); *United States v. Mitchell,* 932 F.2d 1027, 1028-29 (2d Cir. 1991); *United States v. Sanchez,* 859 F.2d 483, 486 (7th Cir. 1988); *United States v. Gilliard,* 847 F.2d 21, 27 (1st Cir. 1988); United States v. Boswell, 290 Fed. Appx. 482, 483-84 (3d Cir. 2008); United States v. Reynolds, 215 F.3d 1210, 1214 (11th Cir. 2000).

[2] *See James v. United States*, 550 U.S. 192 (2007) (attempted burglary is a violent felony even if, on *some* occasions, it can be committed in a way that poses no serious risk of physical harm); *Begay v.*

pleading to an offense, which by statute, may be committed in either a violent or a nonviolent way, it is necessary to determine what kind of record will serve the client most.

In the case where the facts are clearly of a violent nature or may be construed as such, barebones pleadings will be more likely to be ambiguous, thus preventing application of the ACCA. The Supreme Court accepts this as a consequence to its holding in *Johnson*. *Id.* at 173-74. In the case where the facts are not violent, specifics as to the facts should be placed on the record, and may even call for redrawing of indictments and careful structuring of plea colloquy language to be clear that the nonviolent provision of the statute was violated. As in most instances, careful consideration of each case's circumstances is necessary to prepare for this issue. Only by being aware of the possibility of future harm can we as attorneys properly prepare our clients for future consequences of their pleas.

United States v. Sneed

In *United States v. Sneed*, --- F.3d --- 2010 WL 1050272 (11th Cir. 2010), the Eleventh Circuit overruled its prior holding in *United States v. Richardson*, 230 F.3d 1297 (11th Cir. 2000), that police reports could be used to determine whether prior crimes were "committed on occasions different from one another" for ACCA purposes.

United States, 128 S. Ct. 1581 (2008) (DUI conviction is not a violent felony even though it involves conduct that "presents a serious risk of physical injury to another" (as required by residual clause of the ACCA) because it is unlike the examples provided in the ACCA (burglary, arson, extortion, or crimes involving the use of explosives) and does not involve purposeful, violent, and aggressive conduct); *Chambers v. United States*, 129 S. Ct. 678 (2009) - Illinois' crime of failure to report for penal confinement falls outside the scope of ACCA's "violent felony" definition, even though it falls under an escape statute. The courts must identify the category of escape and whether it is applicable to a violent felony.

Prior to *Richardson*, the court had held that the prior crimes must be for "crimes that are temporally distinct," *United States v. Sweeting*, 933 F.2d 962, 967 (11th Cir. 1991), and arose out of a "separate and distinct criminal episode." *United States v. Pope*, 132 F.3d 684, 689 (11th Cir. 1998). Small but distinct separation in the place and timing of the crimes is generally sufficient to sever the crimes into separate episodes. *Id.*

After the Eleventh Circuit's ruling in *Richardson*, the Supreme Court decided *Shepard*, disapproving the practice of examining police reports and complaint applications in deciding whether a prior crime was violent in light of Sixth Amendment concerns as decided in *Jones v. United States*, 526 U.S. 227 (1999) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Sneed*, the Eleventh Circuit applied the *Shepard* rule to the second clause of the ACCA regarding different occasions.

The facts of Mr. Sneed's case are instructive. His three prior drug convictions for purposes of the ACCA were three counts charged on a single indictment that did not provide a date or time. *Sneed*, at *1. The presentence investigation report relied on the police reports of those charges to determine that Sneed sold crack cocaine to confidential informants (1) on September 26, 2001 at 5:04 p.m., (2) on September 26, 2001 at 5:43 p.m., and (3) on October 11, 2001 at 5:29 p.m. *Id.* at *2.

In disapproving of the practice of looking at police reports, Sneed's sentence was remanded for reconsideration without the ACCA enhancement. *Id.* at *6. Sneed benefited from the fact that there was no date or time on his indictment. The government did not attempt to show his prior crimes by any means other than the police reports.

The facts of Sneed's prior convictions could have been shown by other *Shepard* approved material, but this is where the knowledgeable attorney comes in. Because even slight differences in the time and place of prior crimes will likely be considered distinct, a sparse record of the specific facts concerned in the plea of multiple offenses would more likely serve the client well in future federal sentencing. Also, it is advisable to avoid disposing of multiple pending charges at different times. Consolidating state charges in an indistinct way may prevent an ACCA enhancement. This again, may involve working with the prosecutor to reindict charges prior to a plea. In the case where all crimes were clearly committed on the same occasion, a specific record may be helpful. However in an effort to keep it simple, as a suggested rule of thumb: the less facts as to nature and timing that are present in the court record, the less chance an individual has of being enhanced under the ACCA.

This issue should become part of the equation in preparing for a state plea and sentencing. Of course, this issue is but one in the many factors that we must consider in negotiating pleas and arguing for mitigated sentences. Where the specific facts of a case are noteworthy for consideration by the sentencing judge, but may create a fact-specific record, the benefits of informing the court of those mitigating circumstances may outweigh the risk of future harm. In that case, the best way to protect our clients from future harm by the federal ACCA may be to warn them of it. As convicted felons, our clients cannot possess firearms and the federal punishment for such is harsh. In the event that a defendant's record may expose him to the ACCA in the future, his awareness of the mandatory minimum sentence can also be the ounce of knowledge that provides a pound of prevention.