

Practice In Federal Court

CAP 2005

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ARMED CAREER CRIMINAL ACT- 18 USC 924(e)

Def convicted under 922(g) of possession of a firearm, explosive device or ammunition and have three (3) qualifying predicates: facing a mandatory minimum of 15 years and up to life in prison

Guideline section for the ACCA-USSG 4B1.4

This is a sentence enhancement statute

United States v. Brewer, 853 F.2d 1319 (6th Cir. 1988)

The three prior predicate convictions do not have to be proved at a trial

Predicates-

-Serious drug offense or violent felony- 924(2)(A) & (B)

-Committed on occasions different from one another

Can all be joined in one prosecution

- U.S. v. Hayes, 951 F.2d 707 (6th Cir. 1991) (Three prior felony convictions that were prosecuted in one indictment - the priors were separate criminal episodes)

- U.S. v Brady-988 F.2d 664 (6th Cir.) cert denied, 114 S. Ct. 166 (1993). (Two armed robberies of different victims committed 30 minutes apart held to have been committed on "occasions different from one another.")

-No statute of limitations for priors

-No notice requirement in statute

-Juvenile adjudications involving a violent felony may count

Defenses-

-Def had prior expunged, set aside, or pardoned

-Def had rights restored

-Custis challenge

-Prior predicate not fall within statutory definition

1. Expunged conviction

18 U.S.C. 921(20) sets forth definition of "crime punishable by imprisonment exceeding one year"

Definition not include State misdemeanors punished by one year of less

Not include expunged, set aside convictions

A conviction under HYTA will count unless there is an expungement

2. Defendant had civil rights restored

This also applies to a felon in possession of firearm charge under 922 (g)

Can challenge the prior felonies by arguing not a predicate under the statute- Eg, United States v. Bell, 983 F.2d 910 (1992)

Under 18 U.S.C. § 921 (20) look to state law, state of conviction

Therefore not a conviction for 922(g),(e) if rights restored

"unless such restoration of civil rights expressly provides that the person may not ship, transport, possess or receive firearms."

What do you look to determine if rights restored:

Whether defendant can hold public office, vote, and sit on a jury- United States v. Cassidy, 899 F.2d 543 (6th Cir. 1990)

Then have to determine whether such restoration restricts the right to possess firearms. United States v. Caron, 118 S.Ct 2007 (1998) Supreme Court held that where state restricts the right of a former felon to possess one type of firearm 921 (20) not apply. (Def could possess rifles but not handguns.)

Remember if a non-Michigan conviction-look to that state law for restoration of rights.

3. Challenge under United States v. Custis

Supreme Court held that cannot collaterally challenge predicate offenses at federal sentencing hearing unless Gideon, right to counsel violation. United States v. Custis, 114 S.Ct. 1732 (1994)

If predicate is a prior state conviction, have to begin in state court with collateral challenge and then go thru federal habeas - Turner v. United States, 183 F.3d 474 (6th Cir. 1999)

4. Prior conviction not fall within statutory definition

Breaking and entering of an automobile, not under generic definition of burglary- Taylor v. United States, 495 U.S. 575 (1990) held that Congress intended burglary to mean “an unlawful or unprivileged entry into or remaining in a building or other structure with intent to commit a crime.”

5. If negotiating a plea, look to whether the defendant committed some other offense that would not trigger the ACCA.

CAREER OFFENDER

A guideline provision that enhances a defendant's sentence if the defendant is convicted of a controlled substance offense or a crime of violence after two prior convictions for a controlled substance offense and/or a crime of violence.

USSG 4B1.1 and 4B1.2

Def has to be at least 18 years of age at time on instant offense

Current offense has to be a crime of violence or a controlled substance offense, or a conviction under 18 U.S.C. 924(c)

AND

The defendant has two prior convictions for either crime of violence or controlled substance offense and the sentences for at least two of these felony convictions are counted separately under §4A1.1 (a)(b)or(c).

State misdemeanors may count if it is punishable by imprisonment for a term exceeding one year.

There is a time limit on counting the predicate offenses. The prior convictions may only be counted if it comes within the 10 year and 15 year time limits established for criminal history under USSG 4A1.2(e)

Expunged convictions are not counted- USSG 4A1.2(j)

Set asides are counted if conviction is set aside for reason other than innocence-eg restoration of rights-USSG 4A1.2

No pre-trial notice requirement that defendant to be treated as career offender and government is not required to provide pretrial notice of prior convictions

it will rely upon under the career offender enhancement- United States v. Mans, 999 F.2d 966 (6th Cir.) cert. denied, 114 S. Ct. 567 (1993)

If defendant is a career offender, there is a separate guideline chart that applies-see 4 B1.1

United States v. LeBonte, 117 S.Ct. 1673 (1997)

Supreme Court held that when the enhancement directs a court to sentence a defendant at or near the maximum term, that phrase meant to apply to the enhanced maximum.

Even pre *Booker* court could depart from a career offender guideline sentence-eg. over representation of criminal history.

THREE STRIKES- 18 USC 3559(c)

Mandatory Life in Prison

Current Charge

Must be serious violent felony (Not triggered by a drug charge)

Defined in 18 USC § 3559 (c)(2)(F)(i) & (ii)

1-Enumerated felonies-murder, robbery, kidnaping, etc

2-Any other felony punishable by maximum term of 10 years or more and element use, attempted use, or threatened use of physical force against another

or by its nature involves substantial risk that physical force against a person may be used in the course of committing the offense

Predicates

1-Two prior serious violent felonies

or

one serious violent felony and one serious drug offense

2-Each conviction must be final and

Convictions must be on separate prior occasions -This is different from ACCA

That is-Each serious violent felony or drug offense was committed after def's conviction and sentence of preceding predicate offense

3-No time limit on priors

4-Argue that juvenile adjudications should not apply-no reference to them in the statute

5-Nonqualifying Predicates-3559 (c)(3)

1- Robbery, attempt to rob, conspiracy to rob, etc. not predicate if no firearm or other dangerous weapon used and no threat of use of firearm /dangerous weapon involved in the commission of the offense

Important word is involved-court looks to the acts of co-defs

AND

Offense not result in death or serious bodily injury to any person

2-Arson- if posed no threat to life and the def reasonably believed this

New 6th Circuit case- United States v. Gatewood, 184 F. 3d. 550 (6th Cir. 1999).

Def convicted of kidnaping and robbery and sentenced under three strikes

Def argued that the statute unconstitutionally put burden on def to establish that prior robbery was not a predicate by clear and convincing standard

Court agreed and struck the clear and convincing burden of proof

In Sixth Circuit the government must prove by a preponderance of evidence that the convictions counted as strikes are not nonqualifying

6- Notice Requirement-There is a notice requirement, government must file notice as set forth in 21 USC 851 (a)

Notice given before trial or prior to entry of plea of guilty

Notice must specify priors

Notice must be in writing and filed with the court and served on defendant or his counsel

But note-notice not adopt section of 851 that allows constitutional challenge to priors at federal sentencing proceeding. Probably would have to do this in a collateral proceeding unless right to counsel violation. (Def not represented by counsel for one of the strikes)

Guilty Pleas

Rule 11 Agreement

Sentence Cap/Recommendation

-C Plea

-hard cap

-soft cap

-B Plea: recommendation

No sentence outside guidelines

-exception: B plea

Restriction on objections/arguments

Plea to one or two counts

5K1.1 motion

3rd point for acceptance

Waive appeal rights

Open Plea

No Cap or Recommendation

Possible sentence outside guidelines

-below guidelines

-above guidelines

No restrictions on objections/arg.

Plea to all counts

Possible refusal to file 5K1.1

Possible loss of 3rd point

Right to appeal

FIP sentence ranges after plea (in months)

Criminal History Category

	I	II	III	IV	V	VI
No Prior cov/cso	10-16	12-18	15-21	21-27	27-33	30-37
1 prior cov/cso	24-30	27-33	30-37	37-46	46-57	51-63
2 prior cov/cso	37-46	41-51	46-57	57-71	70-87	77-96
3 prior cov/cso (ACCA)	Min 180	Min 180	Min 180	Min 180	Min 180	Min 180