

What Prior State Offenses Trigger the Severe Federal Sentencing Provisions of the Armed Career Criminal Act?

by Douglas A. Berman

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Case at a Glance

The federal Armed Career Criminal Act (ACCA) significantly increases the minimum and maximum sentences for any felon who illegally possess a firearm if he has “three previous convictions by any court ... for a violent felony or a serious drug offense, or both.” In these two cases, the Supreme Court will resolve circuit splits over (1) whether driving while intoxicated qualifies as a “violent felony” and (2) whether a state’s recidivism laws should be considered in determining whether a prior drug conviction qualifies as a “serious drug offense.”

Douglas A. Berman is the William B. Saxbe Designated Professor of Law at The Ohio State University Moritz College of Law. He is the creator and sole contributor to the weblog, Sentencing Law and Policy, <http://sentencing.typepad.com>, and helped draft an amicus brief submitted in *United States v. Rodriquez*. He can be reached at berman.43@osu.edu or (614) 688-8690.

ISSUES

Do Larry Begay’s prior felony convictions for driving while intoxicated qualify as violent felonies under 18 U.S.C. § 924(e) to trigger the ACCA’s severe sentencing terms?

Does Gino Rodriquez’s prior state drug-trafficking offense, for which he was subject to a maximum term of imprisonment of ten years only because he was a repeat offender, qualify as a serious drug offense under 18 U.S.C. § 924(e) to trigger the ACCA’s severe sentencing terms?

FACTS

In September 2004, after threatening family members with a rifle, Larry Begay was arrested and charged in federal court with possessing a firearm as a felon. Begay pleaded guilty to the felon-in-possession charge; at sentencing it was undisputed that he had been convicted over a dozen times of driving

while intoxicated (DWI), and that at least three of those DWI convictions constituted felonies under New Mexico law. The district court decided Begay was subject to sentencing under the ACCA after concluding his DWI offenses were “violent felonies” because they involved “conduct that presents a serious potential risk of physical injury to another.” (An ACCA provision, 18 U.S.C. § 924(e)(2)(B)(ii), explains that a “violent felony” includes any conviction punishable by over a year in prison that “involves conduct that presents a serious potential risk of physical injury to another”). The district court thus found Begay subject to the ACCA’s mandatory minimum of 180 months of imprisonment, and ultimately sentenced him to 188 months of imprisonment under the federal sentencing guidelines.

In a split opinion, the Tenth Circuit affirmed. Applying the so-called categorical approach suggested by the Supreme Court, the Tenth Circuit decided that felony DWI, as defined

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by New Mexico law, is encompassed by the ACCA's statutory language because DWI "certainly presents" a serious potential risk of physical injury to another. The two judges in the majority wrote separate opinions explaining why they believed the plain language of ACCA required treating DWI as an ACCA predicate offense. A dissenting judge asserted that the legislative history and the purpose of the ACCA, as well as statutory construction principles, suggests that DWI should not qualify as a predicate offense triggering ACCA's sentence enhancements.

In a separate case, Gino Rodriquez was convicted after a jury trial of possessing a firearm as a convicted felon. At sentencing, the government introduced proof that Rodriquez had two convictions in California for burglary (which clearly qualify as ACCA predicates) and three convictions in Washington State for drug trafficking. But the district court did not apply the ACCA, reasoning that the Washington convictions were not "serious" drug offenses because the maximum term of imprisonment for first-offenders under Washington law was only five years. (An ACCA provision, 18 U.S.C. § 924(e)(2)(A)(ii), explains that a "serious drug offense" includes any state drug conviction "for which a maximum term of imprisonment of ten years or more is prescribed by law"). With the ACCA deemed inapplicable, the district court sentenced Rodriquez to only 92 months of imprisonment, roughly half the minimum prison term that would be required if ACCA was applicable.

The Ninth Circuit affirmed in a unanimous opinion, relying heavily on a 2002 Ninth Circuit decision that excluded recidivism enhancements in determining the maximum penalty provided by state law for a particular conviction. The Ninth Circuit explained that, despite the

reality that Rodriquez had in fact been subject to a ten-year maximum term under Washington law as a repeat offender, "the district court properly concluded that it could consider only the five-year maximum penalty" provided for first-time offenders when assessing ACCA's applicability.

CASE ANALYSIS

Because the Armed Career Criminal Act significantly increases both the minimum and maximum sentences faced by defendants convicted of possessing a firearm as a felon, the application of the ACCA can have a profound impact on the imprisonment terms given to repeat offenders sentenced for firearm offenses in federal court. Of particular note, ten years of imprisonment is the maximum a defendant convicted of felon-in-possession can receive if the ACCA is not applicable, but that same defendant faces a *minimum* sentence of 15 years of imprisonment if the ACCA is triggered.

Predicate offenses triggering ACCA's severe sentences are described in the statute using deceptively simple terms: a defendant simply needs to have "three previous convictions by any court ... for a violent felony or a serious drug offense, or both." But because state offenses can be so varied in their particulars, and because the ACCA also sets forth a complicated exposition of what can constitute a "violent felony" or a "serious drug offense," many lower federal courts have struggled to determine ACCA's applicability in a variety of settings.

In *Begay*, the defendant contends that the Tenth Circuit's application of ACCA, based on Begay's prior state convictions for DWI is "contrary to the language of the statute and far from what Congress intended when it enacted the ACCA in 1984 and amended it in 1986 to

deter violent career criminals from possessing firearms." Begay stresses that "the purpose of the Armed Career Criminal Act is to keep firearms out of the hands of 'career offenders ... who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons'" (quoting the Supreme Court's first major ACCA ruling in *Taylor v. United States*, 495 U.S. 575, 587-88 (1990)).

Begay further contends that canons of statutory construction and prior ACCA rulings by the Supreme Court suggest that ACCA predicate offenses must have "the following attributes: they must involve active violence; they must be property offenses that are typically committed by career criminals to provide a means of livelihood; they must become more dangerous when committed with a firearm; and they must have a *mens rea* requirement" under which the prosecution must show that a defendant had a particular bad criminal intent. Begay then asserts that "New Mexico recidivist DWI satisfies none of these requirements. DWI does not involve active violence...; DWI is not a property offense; DWI is not a characteristic offense of career criminals; DWI does not become more dangerous if a firearm is present; and in New Mexico DWI has no *mens rea* requirement." Begay also asserts that finding DWI to be an ACCA predicate offense "raises serious constitutional questions that warrant application of the constitutional avoidance doctrine." Begay concludes by asserting that "at the very least, grave doubt exists that Congress intended" the ACCA to include his DWI conviction and thus the "rule of lenity requires" resolving this doubt through an interpretation that favors him.

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In its arguments to the Court in *Begay*, the government asserts simply that “felony convictions for driving while intoxicated constitute ‘violent felon[ies]’ within the meaning of the Armed Career Criminal Act because that offense ‘involves conduct that presents a serious potential risk of physical injury to another.’ 18 U.S.C. § 924(E)(2)(B)(ii).” In the government’s view, any “person who exercises control of a vehicle while intoxicated runs a substantial risk that he will injure or even kill pedestrians, passengers, and other drivers.” The government asserts that like offenses Congress specifically enumerated in ACCA—“namely, burglary, arson, extortion, and offenses involving the use of explosives—recidivist drunk driving poses serious risks of harm.”

Responding to *Begay*’s various statutory interpretation points, the government asserts that “Congress drafted the ACCA’s definitional provision deliberately, and that provision itself identifies the sole defining characteristic of crimes that fall within the scope of Section 924(e)(2)(B)(ii): that the offenses involve conduct that presents a serious risk of physical injury to others.” The government contends that *Begay*’s reliance on legislative history, the canon of constitutional avoidance, and the rule of lenity are insufficient “to prevent application of the plain statutory text.” According to the government, “a straightforward application of the text [entails that] felony DWI qualifies as a predicate offense under the ACCA.”

In *Rodriquez*, the government complains about the Ninth Circuit’s limited reading of the ACCA term “serious drug offense” to exclude the increased sentence maximum that Washington state law provides for recidivist offenders. The government asserts that the “ACCA, which is itself designed to impose more significant penalties on certain recidivists,

is logically understood to recognize that a defendant’s prior crimes may be more serious—*i.e.*, may have carried a higher sentence under state law—because the defendant was already a recidivist.” The government claims that “a prior offense may have one maximum sentence for a first-time offender, but a higher one for a repeat offender.” Consequently, according to the government, because *Rodriquez* “was a repeat offender subject to a ten-year maximum sentence on each of his convictions for drug-trafficking offenses [under Washington law], his offenses constitute ‘serious drug offense[s]’ for purposes of the ACCA.”

The government claims an assessment of the maximum sentence for a drug-trafficking offense based on a hypothetical first-time offender “is inconsistent with the text of the ACCA, [and] would produce paradoxical results” because a “statute aimed at incapacitating and punishing serious serial offenders” would not be applied to certain repeat offenders. The government claims that the Ninth Circuit interpretation of the phrase “maximum term of imprisonment” is inconsistent with the ACCA’s underlying objectives because it “would eliminate a significant category of predicate offenses from the ACCA’s scope: *i.e.*, state law (or federal) offenses committed by repeat offenders who were subject to ten-year maximum sentences solely because of their recidivist status.”

In his arguments to the Court in *Rodriquez*, the defendant claims that a more limited approach to the ACCA term “serious drug offense” is more consistent with the “plain language and clear policy of the ACCA.” In the defendant’s view, “status as a recidivist has no connection at all to whether the offense committed by the defendant was a ‘serious’ one”; he says this conclusion “is supported by the congres-

sional intent ... which requires a ‘categorical’ treatment of offenses under the statute.”

The defendant further argues that the government’s claim of multiple maximum terms for prior offenses “is unworkable, requiring federal courts to determine what sentence the defendant ‘actually faced’ by engaging in difficult inquiries regarding novel questions of state law and complex factual determinations regarding long-forgotten proceedings in state court.” The defendant also asserts that the government’s position “suffers from a fatal flaw of logic” because it considers recidivist provisions but not mandatory state sentencing guidelines in assessing maximum sentencing terms. According to the defendant, “the government’s insistence that recidivist enhancements count under the ACCA—but that binding caps from state sentencing guidelines do not—demonstrates the fundamental incoherence of its approach.”

SIGNIFICANCE

Though there are many intricate and severe components of federal sentencing law, the provisions of the ACCA may be the most intricate and severe. Application of the ACCA turns on the precise nature of a defendant’s various prior crimes—specifically, whether they qualify as “a violent felony or a serious drug offense”—and application of the ACCA can lead to a huge increase in the mandated federal sentence. Consequently, many repeat offenders prosecuted in federal courts for firearm offenses contest the application of the ACCA when invoked by the government, and lower federal courts are thus regularly required to determine in diverse factual and legal settings which past state crimes trigger the ACCA’s severe sentencing terms.



As highlighted by divergent circuit court rulings and the parties' arguments in *Begay* and *Rodriguez*, many ACCA disputes have no obvious solution. Lower court judgments in this arena often turn—implicitly, if not explicitly—on judges' views as to whether Congress sought to have ACCA's severe sentence enhancements apply very broadly or relatively narrowly. As the arguments in *Begay* and *Rodriguez* showcase, sound textual and policy arguments can be readily developed for both a broad reading and a narrow reading of ACCA. The underlying facts in these cases further spotlight how competing textual and policy arguments play out in specific factual contexts. Both defendants in these cases have extended criminal histories that might readily justify "throwing the book" at them for their latest federal firearm offenses. Yet, neither their current offense nor their (relatively minor) prior offenses suggests that these defendants were the prototypical recidivists that Congress had in mind when it created severe mandatory minimum prison terms for "Armed Career" criminals.

Though technically raising pure issues of statutory interpretation, these ACCA cases implicate a number of cross-cutting jurisprudential and policy considerations. On the statutory construction front, the Justices frequently debate and disagree about whether to focus only on the express text enacted by Congress or on the broader legislative purposes and history that might help inform the text. Also, in the criminal justice context, some Justices (including some perceived to be conservative) regularly invoke various due process and fairness principles to reject expansive interpretations of federal criminal statutes urged by the Department of Justice. In addition, many Justices have expressed concerns in opin-

ions and speeches about rigid mandatory sentencing terms that sometimes unduly limit district judges' discretion to achieve case-specific justice at sentencing. Further, in a series of (technically unrelated) recent constitutional rulings, a majority of Justices have consistently held that the Sixth Amendment's jury trial right prevents district judges from making certain factual findings that increase the defendant's maximum available sentence term.

Perhaps because of this mélange of jurisprudential and policy considerations, the Supreme Court has recently taken up a large number of ACCA cases. In addition to *Begay* and *Rodriguez*, the Supreme Court already has another ACCA case on its docket for 2008; in 2007, it resolved two other ACCA disputes. Moreover, the mélange of jurisprudential and policy considerations has produced unusual alignments of Justices in some ACCA cases: last term in *James v. United States*, 127 S. Ct. 1586 (2007), Justice Alito delivered the opinion of the Court, in which Chief Justice Roberts and Justices Kennedy, Souter and Breyer joined; Justice Scalia penned the main dissent in *James*, in which Justices Stevens and Ginsburg joined, and Justice Thomas filed a distinct dissenting opinion.

Though *Begay* and *Rodriguez* will not conclusively clarify all the intricate questions that ACCA raises, these cases present the Supreme Court with a significant opportunity to decide whether ACCA's severe sentencing terms should be applied very broadly or relatively narrowly. The specific outcome in these particular cases will be, of course, very consequential to the fates of the defendants involved in these appeals. But if the justices rule consistently for either the government or the defendants in both cases, the

symbolism of their rulings concerning the reach and application of the ACCA will have the greatest long-term import.

ATTORNEYS FOR THE PARTIES

For Petitioner United States (Paul D. Clement, Solicitor General (202) 514-2217)

For Respondent Gino Gonzaga Rodriguez (Andrew J. Pincus (202) 263-3220)

For Petitioner Larry Begay (Margaret A. Katze (505) 346-2489)

For Respondent United States (Paul D. Clement, Solicitor General (202) 514-2217)

AMICUS BRIEFS

In Support of Petitioner United States

National Association of Criminal Defense Lawyers (Jeffrey L. Fisher (650) 724-7081)

Professors of Criminal Law (Meir Feder (212) 326-7870)

In Support of Petitioner Larry Begay

Families Against Mandatory Minimums Foundation (Mary Price (202) 822-6700)

National Association of Criminal Defense Lawyers (Barbara E. Bergman (505) 277-3304)

National Association of Federal Defenders (Jeffrey T. Green (202) 736-8000)