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MEMORANDUM

TO: FEDERAL DEFENDERS
 FROM: STEVE SADY
 RE: ACCA AND THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE

Attached is a table of contents and the modified excerpt of our most recent briefing on the ACCA and the Doctrine of Constitutional Avoidance. Please let us know if you are litigating this issue.

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I. AS A MATTER OF STATUTORY CONSTRUCTION, THE ACCA DOES NOT PERMIT ENHANCEMENT OVER THE § 922(g) TEN-YEAR MAXIMUM BECAUSE THE GOVERNMENT FAILED TO PROPERLY PLEAD AND PROVE ENHANCING FACTORS IN EIGHT SEPARATE WAYS REGARDING THE SEQUENCE AND CHARACTERISTICS OF PRIOR CONVICTIONS.

In reliance on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the sentencing judge enhanced the defendant's sentence under 18 U.S.C. § 924(e) based on the sequence and characteristics of prior convictions that were neither alleged in the indictment nor admitted nor proved to a jury beyond a reasonable doubt. This application of *Almendarez-Torres* violates the Supreme Court's instructions in *Dretke v. Haley*, 541 U.S. 386 (2004), and *Shepard v. United States*, 125 S. Ct. 1254 (2005), that, in light of the Court's recent Sixth Amendment jurisprudence, statutes must be interpreted to avoid application of *Almendarez-Torres*. Just as, in light of the Supreme Court's recent Sixth Amendment jurisprudence, the Ninth Circuit reinterpreted the federal drug statutes to require pleading and proof beyond a reasonable doubt in *United States v. Buckland*, 289 F.3d 558 (9th Cir. 2002) (*en banc*), the statutory silence regarding pleading and proof in the ACCA must be reinterpreted to require the same pleading and proof required by the Fifth and Sixth Amendments.

Because intervening case law has undermined the bases for earlier rulings on the ACCA, the Court is addressing questions of first impression on the construction of the statute under the rule announced in *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (*en banc*). Properly construed, the enhancements over the statutory maximum should be reversed for eight independent reasons, which should be addressed seriatim because, if any aspect of the pleading and proof is statutorily insufficient, the next ground need not be addressed.

A. The District Court’s Reliance On *Almendarez-Torres* Violated Governing Supreme Court Precedent.

At sentencing, the district court held that *Almendarez-Torres* allowed the court to enhance punishment over the statutory maximum under the ACCA based on the sequence and characteristics of prior convictions even though those facts were not pleaded in the indictment or proven to a jury. The ACCA increases the ten-year statutory maximum under § 922(g) to life without parole based on three prior convictions for “a violent felony or a serious drug offense, or both, committed on occasions different from one another.” 18 U.S.C. § 924(e).

A “serious drug offense” is a controlled substance offense “for which a maximum term of imprisonment of ten years or more is prescribed by law.” 18 U.S.C. § 924(e)(2)(A)(i). A “violent felony” is any felony that “has as an element the

use, attempted use, or threatened use of physical force against the person of another” or “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). For acts of juvenile delinquency to qualify as a violent felony, the act must “involve the use or carrying of a firearm, knife, or destructive device.” 18 U.S.C. § 924(e)(2)(B).

The text of the ACCA says nothing about pleading and proof of the sequence and characteristics necessary for the enhancement. The trial court’s mere reliance on *Almendarez-Torres* ignored Supreme Court authority that foreclosed such an extension of the case.

1. *Almendarez-Torres Created An Exception For Prior Convictions Limited To The Fifth Amendment’s Right To Grand Jury Indictment.*

Almendarez-Torres covers a narrow exception to the constitutional requirement that elements of a federal crime be pleaded in the indictment. *See United States v. Cotton*, 535 U.S. 625, 627 (2002). In his guilty plea colloquy, Mr. Almendarez-Torres admitted that his earlier deportation “had taken place ‘pursuant to’ three earlier ‘convictions’ for aggravated felonies.” *Almendarez-Torres*, 523 U.S.

at 227. Because the indictment did not charge the prior aggravated felony, the defendant argued that the statutory maximum was two years.

The *Almendarez-Torres* majority found that the fact of a prior felony judgment did not need to be alleged in the indictment because Congress intended to create a sentencing factor in 8 U.S.C. § 1326(b)(2), rather than an element. 523 U.S. at 235-39. The Court only addressed the indictment clause of the Fifth Amendment, expressly disavowing any holding regarding the manner and standard of proof, based on Mr. Almendarez-Torres's admissions during the plea colloquy:

We mention one final point. Petitioner makes no separate, subsidiary, standard of proof claims with respect to his sentencing, perhaps because he admitted his recidivism at the time he pleaded guilty and would therefore find it difficult to show that the standard of proof could have made a difference to his case. Accordingly, *we express no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of sentence.*

Almendarez-Torres, 523 U.S. at 248 (emphasis added; citation omitted). In contrast, the present case involves no such admission regarding the sequence and characteristics of his prior convictions.

2. *Apprendi Explicitly Narrowed And Limited Almendarez-Torres.*

The Court narrowed *Almendarez-Torres* to its specific facts in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi* involved a New Jersey statute that increased

the statutory maximum for assault based on an explicit sentencing factor: discriminatory motivation. The Court held the statute unconstitutional, stating: “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.” *Apprendi*, 530 U.S. at 490. The Court went on to state:

“[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.”

Apprendi, 530 U.S. at 490 (quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1999) (Scalia, J., concurring)). The Court expressly noted that the *effect* of the disputed fact, not the legislature’s labeling, determined whether it constituted an element of the crime. *Apprendi*, 530 U.S. at 494.

Rather than overrule *Almendarez-Torres* outright, the Court cabined the case to its specific facts:

Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested . . . we need not revisit it for purposes of our decision today to treat the case as *a narrow exception to the general rule* we recalled at the outset.

Apprendi, 530 U.S. at 489-90 (emphasis added; footnote omitted). The majority stated that *Almendarez-Torres* “represents at best an exceptional departure from the historic practice that we have described.” *Apprendi*, 530 U.S. at 487. Justice Thomas joined the *Apprendi* majority, specifically renouncing his swing vote in *Almendarez-Torres*, 530 U.S. at 520 (Thomas, J., concurring).

3. *The Supreme Court’s Post-Apprendi Decisions In Haley and Shepard Require Application Of The Doctrine Of Constitutional Avoidance To The Continued Validity And Extension of Almendarez-Torres.*

In light of post-*Apprendi* Sixth Amendment decisions, the validity and any extension of *Almendarez-Torres* raise serious constitutional questions. In cases such as *Blakely v. Washington*, 542 U.S. 296 (2004), and *Ring v. Arizona*, 536 U.S. 584, 602-03 (2002), the Supreme Court expressly rejected the label of “sentencing factors” as an exception to Fifth and Sixth Amendment trial rights. The Supreme Court has twice explicitly stated that both the continuing validity and the extension of *Almendarez-Torres* raise “difficult constitutional questions . . . to be avoided if possible.” *Haley*, 541 U.S. at 396; accord *Shepard*, 125 S. Ct. at 1262-63.

The Doctrine of Constitutional Avoidance provides that, “if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ [courts] are

obligated to construe the statute to avoid such problems.” *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). The Doctrine of Constitutional Avoidance is not a *constitutional* doctrine, but rather a *statutory* doctrine providing courts with guidance in the interpretation of written law:

The canon [of constitutional avoidance] is not a method of adjudicating constitutional questions by other means Indeed, one of the canon's chief justifications is that it allows courts to avoid the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.

Clark v. Martinez, 125 S. Ct. 716, 724-25 (2005). The Doctrine of Constitutional Avoidance must be used before applying or extending *Almendarez-Torres*.

In *Haley*, the petitioner sought habeas relief from a sentence under a Texas recidivist statute that, like the ACCA, depended on temporally separate prior convictions. 541 U.S. at 389. The Court refused to address the validity and extension of *Almendarez-Torres*:

Respondent contends that *Almendarez-Torres* should be overruled or, in the alternative, that it does not apply because the recidivist statute at issue required the jury to find not only the existence of his prior convictions but also the additional fact that they were sequential. *These difficult constitutional questions . . . are to be avoided if possible.*

Haley, 541 U.S. at 395-96 (emphasis added). Thus, the Supreme Court has held that a statute indistinguishable from the ACCA -- which also requires findings regarding

the sequence of prior convictions -- raises a serious constitutional doubt regarding the application or extension of *Almendarez-Torres*.

The Court followed the same approach in *Shepard* when it held that extending the *Almendarez-Torres* exception for judicial factfinding to the ACCA would create a serious risk of unconstitutionality. *Shepard*, 125 S. Ct. at 1262-63. In *Shepard*, the district court refused to sentence the defendant as an armed career criminal because it could not tell from the indictment and jury instructions whether the defendant's state burglary convictions qualified as violent felonies under § 924(e). 125 S. Ct. at 1257.

The Supreme Court held that district courts may not look beyond judicial documents to determine whether prior burglary convictions qualify as violent felonies. *Shepard*, 125 S. Ct. at 1263. Under the Doctrine of Constitutional Avoidance, the Court refused to place facts about the prior burglary conviction within the *Almendarez-Torres* exception:

While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute. The rule of reading statutes to avoid serious risks of unconstitutionality . . . therefore counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea.

Shepard, 125 S. Ct. at 1262-63 (citation omitted). The Supreme Court has therefore already applied the Doctrine of Constitutional Avoidance to characteristics of prior convictions in *Shepard* and their sequence in *Haley*. See also *United States v. Washington*, 404 F.3d 834, 841 (4th Cir. 2005) (reversing enhancement for “crime of violence” where trial court went beyond mere fact of conviction).¹

B. This Court Must Reinterpret The ACCA In Light Of Intervening Supreme Court Authority That Undermines The Reasoning And Mode Of Analysis Of Prior ACCA Cases, Which Presents This Court With Questions Of First Impression.

The key contention that makes this case one of first impression is that the defendant is challenging the extension of *Almendarez-Torres* to the sequence and characteristics of ACCA predicates, not directly challenging the continued validity of *Almendarez-Torres*. While only the Supreme Court has authority to overrule its own cases, *United States v. Weiland*, 420 F.3d 1062, 1079 n.16 (9th Cir. 2005), *Haley* and *Shepard* instructed the courts to avoid application and extension of *Almendarez-Torres* through the Doctrine of Constitutional Avoidance.

Because this Court’s previous rulings regarding pleading and proof under the ACCA either rely on *Almendarez-Torres* or pre-date the Supreme Court’s recent

¹In *Shepard*, Justice Thomas specifically noted that the defendant did not raise the application of *Almendarez-Torres* to the ACCA. *Shepard*, 125 S. Ct. at 1264 (Thomas, J., concurring).

Sixth Amendment jurisprudence, this Court is not bound by prior authority that is undermined by intervening Supreme Court authority. *Miller*, 335 F.3d at 892-93. Because the cases upholding the ACCA without pleading and proof of the sequence and characteristics of ACCA predicates do not involve claims regarding statutory construction applying the Doctrine of Constitutional Avoidance, the precedential effect of cases is limited by the issues raised and decided in those cases. *Texas v. Cobb*, 532 U.S. 162, 169 (2001) (“Constitutional rights are not defined by inferences from opinions which did not address the question at issue.”); *see also United States v. Booker*, 125 S. Ct. 738, 753-54 (2005) (affording no *stare decisis* effect to cases in which Sixth Amendment issues were not raised). Just as the Ninth Circuit reinterpreted the federal drug statutes in light of intervening Supreme Court authority in *Buckland*, the ACCA must be reinterpreted to require pleading and proof that avoids serious Fifth and Sixth Amendment questions.

1. *The ACCA’s Silence Regarding Pleading And Proof Allows For Interpretation Consistent With The Fifth And Sixth Amendments.*

On its face, the ACCA is silent as to the procedure by which it must be charged and proven. The statute does not specify who must determine the facts about the defendant’s past convictions under the ACCA. Nor does the statute identify the appropriate burden of proof for this determination or the method by which the charge

must be pled. As the Seventh Circuit observed in a related context, the statute merely “attaches effects to facts, leaving it to the judiciary to sort out who determines the facts, under what burden.” *United States v. Brough*, 243 F.3d 1078 (7th Cir. 2001) (interpreting 18 U.S.C. § 841).

Although the Fifth Circuit initially interpreted the ACCA to constitute a separate offense in *United States v. Davis*, 801 F.2d 754, 755-56 (5th Cir. 1986), the Ninth Circuit came to a contrary opinion in *United States v. West*, 826 F.2d 909 (9th Cir. 1987). In the absence of statutory text regarding pleading and proof, the Court found, by reviewing legislative history, that the ACCA established a “sentence enhancement,” rather than a separate offense. *West*, 826 F.2d at 911. *See also United States v. Dunn*, 946 F.2d 615, 619 (9th Cir. 1991) (affirming that the ACCA establishes a sentence enhancement and “need not be included in the indictment and proved at trial”).

Intervening Supreme Court decisions have undermined the reasoning of *West* and *Dunn* because “[T]he relevant inquiry is one not of form, but of effect -- does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?” *Apprendi*, 530 U.S. at 494; *accord Kaua v. Frank*, No. 05-15059, at 340 (9th Cir. Jan. 11, 2006). After *Apprendi*, *Blakely*, *Booker*, and *Ring*, “the constitutionally novel and elusive distinction between ‘elements’ and ‘sentencing

factors” does not determine whether constitutional protections apply. *Apprendi*, 530 U.S. at 494. If the disputed fact exposes the defendant to a “greater punishment than that authorized by the jury’s guilty verdict,” even if considered a sentencing factor, then the full constitutional protection is required. *Apprendi*, 530 U.S. at 494.

The reasoning of *Apprendi* and its progeny undermined the reasoning of *West* and *Dunn* for two reasons: *West* and *Dunn* expressly relied on the rejected distinction between elements and sentencing factors; and *Haley* and *Shepard* required that, prior to applying *Almendarez-Torres*, the courts must apply the Doctrine of Constitutional Avoidance. The Ninth Circuit’s post-*Apprendi* cases reaffirming this interpretation have uniformly relied, directly or indirectly, on *Almendarez-Torres*’s holding regarding prior convictions. See, e.g., *Weiland*, 420 F.3d at 1079; *United States v. Smith*, 390 F.3d 661, 667 (9th Cir. 2004); *United States v. Summers*, 268 F.3d 683, 689 n.3 (9th Cir. 2001); *United States v. Tighe*, 266 F.3d 1187, 1191 (9th Cir. 2001). Because *Apprendi*, *Blakely*, *Haley*, *Shepard*, and *Booker I* (the substantive opinion by Justice Stevens) undermined the reasoning of these cases, they are not binding under the *Miller* analysis.

2. *The Present Case Places In Issue Not Only The Direct Application But The Extension Of Almendarez-Torres.*

In contrast to the sentencing court’s mechanical application of *Almendarez-Torres* to the ACCA in the present case, the courts have recognized that facts that extend beyond the mere fact of conviction implicate *Apprendi*, not *Almendarez-Torres*.

In *Dillard v. Roe*, 244 F.3d 758, 772 (9th Cir. 2001), the Court applied the principles underlying *Apprendi* to the California three-strikes statute to hold that factors beyond the mere existence of a prior judgment are elements of the offense. The court considered a state statute that, like the ACCA, increased the statutory maximum based on prior conviction of a certain type of offense -- a “serious felony” where the defendant “personally uses a firearm.” The Court found that the decision was controlled by the Sixth Amendment guarantee of a jury determination of facts resulting in an increased statutory maximum. *Dillard*, 244 F.3d at 772-73. The court’s analysis of the statuterrequired review of facts beyond the mere fact of conviction:

Our determination concerning whether the fact that Dillard “personally use[d] a firearm” is an “element” or a “sentencing factor” requires that we look beyond the enumerated elements of the crime for which Dillard was convicted. We must analyze “the operation and effect of the law” mandating the two five-year sentence enhancements “as applied and

enforced by the state.” . . . We must then determine whether, in this instance, “*Winship*’s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged.”

Dillard, 244 F.3d at 772 (citations omitted). The Court then viewed the additional facts that needed to be determined beyond the existence of a judgment and held that these factors must be submitted to a jury and determined beyond a reasonable doubt: “We conclude, therefore, that the additional fact found by the trial judge in this case is an element that transforms the offense for which Dillard was charged and convicted into a different, more serious offense that exposes him to greater and additional punishment.” *Id.* at 773. *See also Tighe*, 266 F.3d at 1192-95 (*Apprendi* barred use of juvenile adjudication for ACCA enhancement).

Similarly, in *United States v. Kortgaard*, 425 F.3d 602 (9th Cir. 2005), the Court held that a pre-*Booker* upward departure violated the Sixth Amendment because only the judge made findings regarding over-representative criminal history under U.S.S.G. § 4A1.3. The Court rejected the government’s contention that the inquiry regarding the effect of prior convictions were excluded from *Booker I*, following *Tighe* in stating that *Almendarez-Torres* constituted a narrow exception to the rule of *Apprendi*. *Kortgaard*, 425 F.3d at 610. “Even if the prior conviction exception legitimately includes facts that follow necessarily or as a matter of law from the fact of a prior conviction, we have already concluded that the findings

required to support an upward departure under § 4A1.3 are not of that nature because they require the judgment of the factfinder.” *Id.*; see also *Kaua, supra* (Hawaii multiple offender statute implicates *Apprendi*); *United States v. Ngo*, 406 F.3d 839, 840-44 (7th Cir. 2005) (career offender sentence reversed because determination of “common scheme or plan” under U.S.S.G. § 4A1.2 must be submitted to the jury).

The Minnesota Supreme Court applied *Apprendi*, not *Almendarez-Torres*, to the state career offender statute in *Minnesota v. Henderson*, 706 N.W.2d 758 (Minn. 2005). The Minnesota statute required that facts establishing “a pattern of criminal conduct” be found before an upward departure was permitted. Because these facts were found by a judge by a preponderance of the evidence, the court reversed the career offender sentence based on the Sixth Amendment holdings of *Apprendi* and *Blakely*. The *Henderson* court relied on *Apprendi*’s limitations on the reach of *Almendarez-Torres*.

This Court is free to rule in the first instance on the statutory construction of the ACCA applying the Doctrine of Constitutional Avoidance.

3. *Extension Of Almendarez-Torres To The ACCA Is Inconsistent With Almendarez-Torres's Rationale And Has Generated Opinions Demonstrating Constitutional Doubt.*

Extension of *Almendarez-Torres* to the ACCA is especially inappropriate given that *Almendarez-Torres* is limited to immigration prosecutions. For example, the *Almendarez-Torres* opinion's rationale of protecting defendant's rights against exposure to prior convictions is especially inapplicable in the ACCA context. 523 U.S. at 234-35. Unlike immigration cases, the jury must already know that the defendant is a convicted felon in order for gun possession to be illegal.² Further, as noted in *Shepard*, "any defendant who feels the risk of prejudice is too high can waive the right to have a jury decide questions about his prior convictions." 125 S. Ct. at 1263 n. 5; see *Old Chief v. United States*, 519 U.S. 172 (1997). Moreover, the definition of conviction is much more limited under the immigration statute, as opposed to the firearms statute's reference to the vagaries of state law. Compare 8 U.S.C. § 1101(a)(48) with 18 U.S.C. § 921(a)(20).

²In the defendant's case, the indictment included five prior convictions but omitted any reference to the sequence or characteristics that implicated the ACCA. The Supreme Court specifically noted that § 922(g) contrasted with illegal reentry because the prior conviction is a necessary element to make the gun possession illegal. *Almendarez-Torres*, 523 U.S. at 230 ("But cf. 18 U.S.C. § 922(g)(1) (prior felony conviction an element but conduct *not* otherwise unlawful.")).

The Fourth Circuit demonstrated the serious constitutional questions raised by failure to apply Sixth Amendment protections to the sequence and characteristics of prior convictions under the ACCA. Without resort to statutory construction, apparently because the defendant did not raise statutory interpretation, the court split on the constitutionality of the ACCA in *United States v. Thompson*, 421 F.3d 278 (4th Cir. 2005). Chief Judge Wilkins's dissent sets out a powerful argument that the Fifth and Sixth Amendments apply to the ACCA predicate facts without *Almendarez-Torres* being overruled. *Thompson*, 421 F.3d at 287-95.

The *Thompson* dissent demonstrates the need to avoid constitutional question through statutory construction, as required by the Supreme Court's holdings in *Haley* and *Shepard*. Because no prior case has addressed the Doctrine of Constitutional Avoidance in construing the sequence and characteristics of ACCA predicates, the Court should address the issue as a question of first impression.

4. *Reinterpretation Of The ACCA Is Directly Analogous To The Buckland Decision's Reinterpretation Of The Federal Drug Statutes.*

In *Buckland*, this Court addressed the effect of *Apprendi* on the federal narcotics trafficking statute -- 21 U.S.C. § 841. 289 F.3d at 564-66. Previously, courts had uniformly interpreted this statute to allow drug quantity to be determined

by a judge using a preponderance of the evidence standard. *Id.* at 564 n.2. In the wake of *Apprendi*, the Court reexamined the statute seeking to avoid a finding that it was unconstitutional. *Buckland*, 289 F.3d at 564 (“[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ we are obligated to construe the statute to avoid such problems”) (quoting *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001)).

Despite the existence of a clearly labeled “penalty” provision, the Court “eschews the distinction between sentencing factors and elements of a crime: ‘the relevant inquiry is not one of form, but of effect -- does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?’” *Buckland*, 289 F.3d at 566 (quoting *Apprendi*, 530 U.S. at 494). The *Buckland* court overruled prior authority treating sentencing factors as immune from Fifth and Sixth Amendment protections based on construction of the statute:

We honor the intent of Congress and the requirements of due process by treating drug quantity and type, which fix the maximum sentence for a conviction, as we would any other material fact in a criminal prosecution: it must be charged in the indictment, submitted to the jury, subject to the rules of evidence, and proved beyond a reasonable doubt.

Buckland, 289 F.3d at 568.

Buckland provides a perfect analogy to previous Ninth Circuit precedent on the ACCA. In *West*, the Court found that statutory silence allowed increase of the statutory maximum without compliance with Fifth and Sixth Amendment requirements, just as pre-*Buckland* cases had ruled on drug quantity. Now, just as in *Buckland*, the statute must be revisited in light of the Supreme Court's Sixth Amendment and constitutional avoidance decisions and must be construed to require charge by grand jury indictment and proof as required by the Sixth Amendment.

C. The Procedures For Pleading And Proof Of ACCA Predicates Failed To Meet The Minimum Statutory Standards, In At Least Eight Fundamental Ways.

The ACCA is one of the harshest provisions of the federal criminal code, requiring up to life without parole for simple possession of a weapon, not matter how stale the priors and how innocuous the possession. To invoke and to impose an ACCA sentence, the statutory pleadings and proof must be reassessed in light of the Doctrine of Constitutional Avoidance. The procedures in the present case -- based on a defective document upon which the defendant was never arraigned and never pleaded -- were woefully inadequate on a number of levels, any one of which requires vacation of the sentence.

1. *The Notice Only Refers To An Intent For Future Reliance.*

As a statutory minimum, the Court should require at least a formal charging document like an indictment or information. The notice filed in the present case states only that the government “will rely” on certain convictions to enhance the sentence. Notice in this form is nowhere authorized by statute and has no analogy that meets the minimum formality appropriate to impose a required mandatory minimum of fifteen years imprisonment and enhanced statutory maximum to life without parole.

2. *The Notice Only Purports To Rely On “Prior Violent Felony Convictions,” Then Lists A 1977 Robbery And Two Categorically Non-Violent Drug Offenses.*

The statute should at least require that the government establish the facts to which the notice referred. Although the statute provides two categories of predicate convictions -- violent felonies and serious drug offenses -- the government’s notice in this case only claims reliance on “prior violent felony convictions of the defendant.” By its plain language, the notice only refers to violent felonies; in the absence of such proof, the enhancement must fail. The listed drug trafficking offenses are not crimes of violence. *Downey v. Crabtree*, 100 F.3d 662, 668 (9th Cir. 1996) (drug offenses are categorically nonviolent under 18 U.S.C. § 3621(e)); *United*

States v. Arrellano-Rios, 799 F.2d 520, 523 (9th Cir. 1986) (same under 18 U.S.C. § 924(c)). The notice on its face is insufficient to invoke the ACCA because the defendant's only arguable crime of violence was a 1977 conviction for robbery in the second degree for which the initial sentence was probation.

3. *The Notice Does Not Allege The Sequence And Characteristics Of The ACCA Prior Convictions.*

The notice does not even include the facts necessary to invoke the enhanced penalties available under the ACCA. There is no claim that the defendant was ever convicted of a "serious drug offense" in the notice. There is no claim that the offenses "occurred on occasions different from one another," as required to qualify under the ACCA. Given the defendant's age at the time of the 1977 offense -- 17 years old -- there is no allegation or admission of weapons possession. Given the drastic consequences of ACCA treatment, the statute requires at least the dignity and formality of a complete list of the ACCA predicate facts.

4. *The ACCA Should Be Construed To Foreclose Enhancement Because The Defendant Was Never Arraigned On The Notice And Never Pleading Guilty To It.*

The minimum formalities for invocation of the ACCA should include arraignment and, in the guilty plea context, admissions regarding all the ACCA

predicate facts. Neither occurred in the present case. The notice was never provided in open court, the defendant never entered a plea on it, and he never admitted the facts alleged in the notice in the guilty plea colloquy. The first time counsel and defendant saw the notice was after entry of the guilty plea.³ The statute should be interpreted to require judicial formalities commensurate with the importance of the charge.

5. *The ACCA Should Be Construed To Require That The ACCA Predicate Facts Be Alleged By Grand Jury Indictment.*

If the Court finds the notice adequate under the statute, the failure to charge by grand jury indictment violates the statute. To avoid deciding whether application of *Almendarez-Torres* to an ACCA charge would be unconstitutional, the Court should construe the statute to require participation and approval of the grand jury in determining whether the ACCA should be invoked.

6. *The Failure To Require Admissions Regarding The ACCA Predicate Facts During The Plea Colloquy Renders The ACCA Statutorily Inapplicable.*

The statute should be construed to require the minimum dignity and formality of admission during the plea colloquy. The defendant specifically reserved whether his guilty plea to § 922(g) exposed him to ACCA treatment. In *Blakely*, the Court

³The prosecutor mentioned the notice in connection with detention at the initial appearance.

repeatedly referred to admission during the plea colloquy as a substitute for Sixth Amendment rights. In the absence of such an admission, the statute has not been properly invoked. The admissions, which lacked any statement regarding the sequence and characteristics of the admitted priors, only allow the ten-year maximum under § 922(g).

7. *The Documents Submitted In Support Of ACCA Treatment Did Not Establish “Serious Drug Offenses.”*

The Court should find the ACCA was not established, even if the notice were adequate and the judicial determination were permissible, because the government failed to establish a state offense “for which a maximum term of ten years or more is prescribed by law.” 18 U.S.C. § 924(e)(A)(ii). The judgments allege convictions under the Oregon sentencing guidelines, which are governed by *Blakely*. *State v. Dilts*, 337 Or. 645, 103 P.3d 95 (2004). On the face of the judgments, the exposure to imprisonment for both drug offenses was substantially less than ten years. *See* BLACK’S LAW DICTIONARY 1220 (8th ed. 2004) (defining “prescribe” as “to dictate, ordain, or direct; to *establish authoritatively (as a rule or guideline)*”) (emphasis added). Therefore, the maximum term prescribed by law did not qualify the defendant for ACCA treatment.

On the 1997 judgment, the maximum punishment prescribed by the sentencing guidelines law is 24 months. No greater sentence could be imposed without charging additional factors and obtaining additional admissions. *Blakely*, 542 U.S. at 303; *Dilts*, 337 Or. at 649, 103 P.3d at 97. A sentence for which the defendant could receive no more than 24 months is not a “serious drug offense” under the ACCA’s definition. To the same extent, the 2002 drug conviction involved a maximum term of imprisonment of far less than ten years. As reflected in the judgment, the defendant’s guideline grid was found to be 8 and A, which results in a range of 41 to 45 months. The judgment also reflects a departure based on the staleness of the person offense, resulting in a 28-month sentence. The offense falls far below the standard for the ACCA.

8. *The Documents Submitted In Support Of ACCA Treatment Did Not Establish A “Violent Felony” Because No Weapon Was Charged Or Proven.*

The government failed to prove that the 1977 case qualifies as a “violent felony.” The defendant was 17 at the time of the offense. For an act of “juvenile delinquency” to qualify as a “violent felony,” the statute specifies that it must involve “the use or carrying of a firearm, knife, or destructive device” 18 U.S.C. § 924(e)(2)(B). Neither the judgment nor any extrinsic facts involve such aggravated

conduct. OR. REV. STAT. 164.405. The act of a 17-year old, regardless of ultimate outcome, is juvenile delinquency. The policy of requiring an extra level of seriousness for offenses committed by juveniles is a sound one, especially considering that the defendant, at age 46, is looking at guidelines 20 years higher based on a conviction he received 28 years ago. The act of juvenile delinquency is not an ACCA predicate.⁴

This Court should treat the elements of the ACCA as elements of an enhanced crime to be “charged by indictment, submitted to the jury, subject to the rules of evidence, and proved beyond a reasonable doubt.” *Buckland*, 289 F.3d at 568. The guilty plea to § 922(g) constitutes jeopardy under the Fifth Amendment. *United States v. Patterson*, 381 F.3d 859, 864-65 (9th Cir. 2004).

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⁴If there were ambiguity whether “juvenile delinquency” refers to the act or the disposition, the ambiguity would be resolved in the defendant’s favor under the rule of lenity. *United States v. R.L.C.*, 503 U.S. 291, 305 (1992).