RECIDIVISM REFORMATION: ELIMINATING DRUG PREDICATES IN CRIMINAL SENTENCING

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Abstract: Mandatory sentencing enhancements triggered by prior drug convictions—commonly known as "drug predicates"—represent a core driver of persistent mass incarceration. This article examines the legal mechanisms, empirical outcomes, and equal protection challenges associated with drug predicate statutes. It argues that re-classifying or eliminating prior non-violent drug offenses as mandatory sentence multipliers recalibrates criminal judicial discretion, reduces racial disparities in sentencing, and enhances public safety by shifting resources from long-term incarceration to evidence-based rehabilitation.

Keywords: Recidivism, drug predicate offenses, sentencing enhancements, mandatory minimums, criminal law reform, equal protection, criminal procedure

Annotatsiya: Avvalgi giyohvandlik bo'yicha sudlanganlik sababli jazoni majburiy og'irlashtirish ("dastlabki drug predikatlar") ommaviy qamoqqa olishning asosiy omillaridan biridir. Ushbu maqola giyohvandlik predikati statutlari bilan bog'liq huquqiy mexanizmlar, empirik natijalar va teng himoyalanish muammolarini tahlil qiladi. Maqolada zo'ravonlik bilan bog'liq bo'lmagan giyohvandlik jinoyatlarini jazoni ko'paytiruvchi omil sifatidan chiqarish sud suverenitetini tiklashi, jazolashdagi tengsizliklarni kamaytirishi hamda resurslarni uzoq muddatli qamoqdan reabilitatsiyaga yo'naltirish orqali jamoat xavfsizligini oshirishi ko'rsatib beriladi.

Kalit so'zlar: Retsidiv, giyohvandlik predikat jinoyatlari, jazoni og'irlashtirish, majburiy minimal jazolar, jinoyat huquqi islohoti, teng ximoyalanish, jinoiy protsess.

Аннотация: Обязательное ужесточение наказаний, вызванное наличием судимостей за преступления, связанные с наркотиками («наркотические предикаты»), является ключевым фактором массового лишения свободы. В данной статье рассматриваются правовые механизмы, эмпирические результаты и проблемы равной защиты прав, связанные с задействованием наркотических предикатов. Утверждается, что исключение ненасильственных наркопреступлений из категории обязательных отягчающих факторов восстанавливает судебную

дискрецию, снижает диспропорции в наказаниях и повышает общественную безопасность за счет перераспределения ресурсов на реабилитацию.

Ключевые слова: Рецидивизм, наркотические предикатные преступления, ужесточение наказания, обязательные минимумы, реформа уголовного права, равная защита, уголовный процесс.

The Armed Career Criminal Act (ACCA) imposes a minimum fifteen-year sentence for violating 18 U.S.C. § 922(g) after three "violent felony" or "serious drug offense" convictions. The ACCA disproportionately impacts people of color and imposes significant costs on the federal judiciary and the criminal justice system overall. This Essay contributes to ACCA recidivism analysis by studying, for the first time, all people sentenced under ACCA and released in 2009, 2010, and 2011 during an eight-year follow-up period. This Essay uses nonpublicly available criminal history information from the Federal Bureau of Investigation and recidivism data from the United States Sentencing Commission. People sentenced under the ACCA with fewer than three "violent felony" predicates (and one or more "serious drug offense" predicates) reoffended less than those sentenced under the ACCA with at least three "violent felony" predicates. This Essay therefore recommends that Congress eliminate drug offenses as ACCA predicates because people sentenced under ACCA with fewer than three "violent felon[ies]" recidivate at a rate no greater than the federal offender population as a whole.

For the last thirty years, Congress has shown a desire to consider criminal history in sentencing. This desire can be seen in the Sentencing Reform Act of 1984,[1] as well as in every statute prescribing enhanced penalties for recidivism.[2] One of these statutes is the Armed Career Criminal Act[3] (ACCA), which imposes a minimum fifteen-year sentence for unlawfully possessing a weapon or ammunition under 18 U.S.C. § 922(g)[4] after three prior convictions, committed on different occasions for (1) "violent felon[ies]," (2) "serious[5] drug offense[s]," or (3) some combination of both.[6] To examine recidivism rates for various categories of people sentenced under the ACCA, the author, as part of her Supreme Court Fellowship, designed a study and entered into an agreement with the Federal Bureau of Investigation (FBI) and the United States Sentencing Commission to obtain access to nonpublicly available criminal history data.[7]

Using that nonpublic data, this Essay compares the recidivism rate of people sentenced under the ACCA with fewer than three "violent felony" predicates (and one or more "serious drug offense" predicates) with those sentenced under the

ACCA with at least three "violent felony" predicates. Based on this comparison, this Essay recommends that Congress eliminate drug offenses as ACCA predicates because people sentenced under the ACCA who committed fewer than three "violent felon[ies]" recidivate at a rate no greater than the federal population as a whole.

Many scholars have criticized the ACCA for reasons ranging from its "randomized draconianism"[8] to its disproportionate impact on people of color.[9] This Essay is the first to provide an empirical basis upon which to make necessary changes. Former Sentencing Commissioner Professor Rachel Barkow recently argued that "Congress should have allowed the Sentencing Commission to use data and evidence to guide sentencing policy . . . instead of trying to take that task on for itself."[10] This Essay does just that — it recommends changes to the scope of the ACCA's penalties by providing empirical analysis regarding the scope, impact, and effectiveness of the current penalty structure.

This Essay concentrates on the utilitarian purposes of punishment: specific deterrence,[11] rehabilitation, and incapacitation.[12] Generally, criminal punishment seeks to serve four purposes: retribution, deterrence, rehabilitation, and incapacitation.[13] Retribution "supposes that crime inherently merits punishment"[14] and focuses on giving the offender what he deserves. Deterrence seeks to prevent future illegal conduct, both by the offender, through specific deterrence, and by the rest of the population, through general deterrence.[15]Rehabilitation attempts to assist the offender, perhaps through psychological counseling or job training, to improve himself to prevent his future misconduct.[16] Incapacitation protects society from the offender through imprisonment.[17]

At the time of the ACCA's passing, Congress intended that the ACCA would "substantial[ly] deter[]" crime and "incapacitat[e] career criminals."[18]Accordingly, this Essay uses recidivism as one of the key measures to determine whether it is necessary to incarcerate all people eligible for ACCA sentencing for fifteen years in order to achieve these utilitarian purposes.

Congress enacted the ACCA to combat violence,[19] yet as currently structured, the ACCA punishes some people who have never committed a violent offense. The triggering offense, 18 U.S.C. § 922(g), simply requires possession, receipt, transport, or shipment of a firearm or ammunition, not use. Additionally, the predicate convictions may be exclusively drug offenses.

The ACCA also imposes significant administrative costs on the judiciary. In *Taylor v. United States*,[20] the Supreme Court mandated that courts use the "categorical approach" to determine if a prior offense serves as an ACCA predicate.[21] Sentencing decisions applying the categorical approach are notoriously complicated and extensively litigated. In 2011, Ninth Circuit Judge Bybee wrote that "over the past decade, perhaps no other area of the law has demanded more of our resources."[22] Fourth Circuit Judge Agee lamented: "The dockets of our court and all federal courts are now clogged with [ACCA] cases."[23] Justice Alito opined that "only Congress can rescue the federal courts from the mire into which [the] ACCA's draftsmanship and *Taylor*'s 'categorical approach' have pushed us."[24] Federal court dockets are filled with ACCA cases, not only relating to the ACCA's "violent felony" provision but also regarding the "serious drug offense" clause.[25]

Relatedly, the ACCA also imposes notable costs on the criminal justice system overall. Federal public defenders have commented that "[t]he ACCA is not only poorly drafted, but its irrational harshness has become one of the engines driving mass over-incarceration in America."[26] In fiscal year 2021, 264 people (0.5% of all people sentenced in federal court) were sentenced under the ACCA.[27] Because of its lengthy minimum sentence, people convicted under the ACCA represent a larger percentage of the federal prison population than the percentage of the annual federal docket they comprise. As of June 27, 2020, 3572 incarcerated people were sentenced under the ACCA, comprising 2.5% of the federal prison population.[28]

However, rolling back mandatory minimum sentences can be politically problematic. Congressional representatives likely fear that released prisoners who recidivate will pose a political liability. Yet now may be the opportune moment for restructuring the ACCA. Congress has showed its willingness to revisit mandatory minimums, as in the First Step Act,[29] for example. Moreover, because COVID-19 spreads rapidly in prisons and jails, the current pandemic has further motivated policymakers to consider ways to reduce incarceration, not just for the sake of inmates but also for the protection of prison employees and surrounding communities. Most recently, President Joe Biden issued an executive order directing the Department of Justice not to renew contracts with privately operated criminal detention facilities,[30] creating further need to reduce the federal prison population.

This Essay makes a novel contribution to ACCA recidivism analysis by studying all people sentenced under the ACCA[31] and released in 2009, 2010, and 2011 during an eight-year follow-up period. Most prior recidivism studies involved only people released during one year[32] or follow-up periods of no more than a few years.[33] Generally, recidivism studies are only as accurate as the public information upon which they are based,[34] but this study utilizes nonpublicly available criminal history information from the FBI and recidivism data from the U.S. Sentencing Commission.[35]

This study compares the recidivism rates of three categories of people sentenced under the ACCA: (1) 616 people (83.4% of the total) with at least three "violent felony" predicates; (2) 33 people (4.5% of the total) with no "violent felony" predicates (who committed only "serious drug offense[s]"); and (3) 90 people (12.2% of the total) with one or two "violent felony" predicates (and one or more "serious drug offense[s]").[36] People with at least three "violent felony" predicates recidivated at the highest rate, followed by those with one or two "violent felony" predicates.[37] People with no "violent felony" predicates recidivated at the lowest rate.[38] No demographics appear to explain the recidivism disparities between the categories.

Part I explains how the ACCA works and how it relates to the firearms-possession statute, 18 U.S.C. § 922(g). Part II provides a detailed history of the ACCA, including its expansion at the same time the federal sentencing guidelines were coming into effect. Additionally, Part II details sentencing statistics under the ACCA for the last ten years. Part II also highlights the problems associated with the ACCA, such as its failure to achieve its intended goals of preventing violent crime and reducing sentencing inconsistencies; its harshness in comparison to the average sentences for various crimes; its costs to the judiciary and the criminal justice system overall; and the racial and geographic disparities in its application. Part III explains the methodology of this Essay's study and the demographics of the groups studied, comparing them to the demographics of people more recently sentenced under the ACCA. Part III then presents the overall recidivism rates for people in this Essay's study; the difference between the recidivism rates of those who committed drug and violent offenses in this study; and an analysis of the results. Finally, Part IV explains what the author recommends in light of these findings and why now is the opportune time for Congress, already focused on criminal justice reform, to implement these recommendations.

I. The Armed Career Criminal Act: The Armed Career Criminal Act (ACCA) imposes a minimum[39] fifteen-year sentence for violating 18 U.S.C. § 922(g) after committing, on different occasions, three prior "violent felon[ies]," "serious drug offense[s]," or both.[40]Specifically, the statute provides:

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . . .[41]

18 U.S.C. § 922(g) bans specific classes of people from transporting, possessing, receiving, or shipping firearms or ammunition and ordinarily carries a maximum ten-year penalty and no minimum penalty.[42]

The punishment for violating § 922(g) is found at § 924. The statute generally provides a maximum imprisonment of ten years. However, an enhanced penalty, a fifteen-year minimum sentence,[43] is provided where a person violates § 922(g) and possesses three previous convictions, committed on different occasions, for "violent felon[ies]," "serious drug offense[s]," or both.[44] "Violent felony" means:

any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that — (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 use of explosives . . . .[45]

A "serious drug offense" is a federal[46] or state controlled-substance offense[47] with a maximum term of imprisonment of ten years or more. The ACCA places no time or age limitation on predicate offenses other than requiring that the prior convictions occur before the 18 U.S.C. § 922(g) offense.[48]

People who provide "substantial assistance" may be sentenced below a statutory mandatory minimum.[49] Through the last ten years, approximately one-fifth of people sentenced under the ACCA were relieved from the mandatory minimum for providing "substantial assistance."[50] That percentage is generally higher than the percentage of people overall who receive "substantial assistance" departures from the Sentencing Guidelines. For example, 9.6% of all people convicted in federal court received such departures in fiscal year 2021.[51]

The ACCA sentence length during the last ten years for a person who received "substantial assistance" relief was generally ten years or less, ranging from 106 months to 122 months.[52] Sentences for people who remained subject to the ACCA's mandatory minimum ranged from 197 months to 214 months.[53]

II. The ACCA's History and Problems

A. The ACCA's History: Crime rates in the United States continuously increased beginning in the 1960s until they peaked in 1991.[54] Homicides doubled between 1960 and 1980.[55] During this time period, many experts predicted that the worst was yet to come.[56] The prevalence and fear of future crime motivated President Lyndon Johnson to announce a national "War on Crime" on March 8, 1965, and President Richard Nixon to announce the "War on Drugs" in June 1971.[57] It was against this backdrop that Congress began the road to the ACCA.

The Career Criminal Life Sentence Act of 1981[58] proposed a mandatory life sentence for a person with three robbery or burglary convictions if the third instance involved the use of a firearm.[59] Congress consulted with the Department of Justice and modified the Act to provide a fifteen-year minimum sentence and a maximum life sentence for a person illegally possessing a firearm with three prior robbery or burglary convictions, retitling it the "Armed Career Criminal Act of 1984."[60] The accompanying House Report cited recidivism statistics showing that a small number of repeat offenders commit a large percentage of crimes.[61] The purpose of the statute was to incapacitate habitual criminals with longer sentences.[62]

In the Career Criminals Amendment Act,[63] part of the Anti-Drug Abuse Act of 1986,[64] Congress introduced the ACCA in its present form by expanding it to include "violent felon[ies]" and "serious drug offenses" as predicates.[65] A Representative who supported adding drug offenses to the ACCA argued: "All the evidence . . . we have seen in our investigation indicates that drugs and violent crime go hand-in-hand."[66] The U.S. Sentencing Commission responded to the ACCA by promulgating section 4B1.4 (Armed Career Criminal) of the Federal Sentencing Guidelines to provide guidance about the enhanced penalties to courts sentencing people under the ACCA. In 1988, Congress amended the ACCA,[67]clarifying that predicate offenses must be "committed on occasions different from one another"[68] and including as "violent felon[ies]" "act[s] of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment . . . if committed by an adult."[69]

The goals of incapacitation and deterrence motivated Congress to create the ACCA. Congress "anticipated that the entry of the Federal Government into the field of prosecuting violent street crime w[ould] have a substantial deterrent effect."[70] In enacting the ACCA, legislators sought "to improve public safety and reduce violent crime by incapacitating career criminals, through lengthy incarceration"[71] and to target "the most dangerous, frequent[,] and hardened offenders."[72] Congress seemingly enacted the ACCA to combat violence, yet as currently structured, the ACCA punishes some people who never committed a violent offense.

The triggering offense, 18 U.S.C. § 922(g), simply requires possession, receipt, transport, or shipment — not use — of a firearm or ammunition,[73] and it may have been for any purpose, including self-defense or hunting.[74] Additionally, the required predicates include controlled-substance offenses. Thus, an ACCA defendant's predicates could consist entirely of drug offenses.

B. Failure to Target the Most Dangerous: As noted above, the ACCA originally included only robbery and burglary as predicates. One of the impetuses for adding drug predicates was the perceived relationship between drugs and violence.[75] However, more recently, empirical analysis has weakened this perception. For example, a study found that only 1.06% of drug crimes committed in 2010 involved physical injury to a victim.[76]Moreover, a Bureau of Justice Statistics study found that only 1.1% of people convicted of drug possession and 1.6% of people convicted of drug trafficking are rearrested for a violent felony, which is lower than the 1.9% average for all people with convictions.[77]

Even the enumerated "violent felon[ies]" may not involve violence or even physical contact with anyone, as is usually the case for burglary.[78] Most burglars target empty locations to reduce the likelihood of discovery.[79]Between 1998 and 2007, burglary co-occurred with a violent crime only 7.6% of the time, and physical injury occurred in only 2.7% of all burglaries.[80]

"Armed career criminals" may not be as dangerous as their name makes them sound. The most prevalent previous conviction for people sentenced under the ACCA in fiscal year 2019 was a public order offense, committed by 85.3% of them.[81] As might be expected, the second-most-common prior offense for people sentenced under the ACCA that year was drug trafficking, a potential[82] ACCA predicate.[83]

Granted, 83.7% of people sentenced under the ACCA in fiscal year 2019 previously committed an offense characterized as "violent."[84] However, in this analysis, as in ACCA predicate determinations generally, burglary[85] and robbery[86] are considered "violent" offenses, committed by 42.6% and 42.0%, respectively, of people sentenced under the ACCA that year.[87] Of the group, 59.3% were previously convicted of assault.[88] By contrast, only small percentages had committed prior homicides or rapes: 6.7% and 2.9%, respectively.[89]

C. Inconsistencies in Sentencing: Many scholars question whether such a lengthy period of incarceration is warranted for all people who qualify for

ACCA sentencing.[90] As noted above, the ACCA imposes a minimum fifteen-year sentence. As a point of comparison, the median prison time served for murder in the United States is 17.5 years,[91]and the median amount of time served for any violent offense is 2.4 years.[92]Sixth Circuit Judge Stranch commented:

Perhaps one of the greatest harms is that indiscriminate criminalization erodes the faith of our citizens in the federal criminal justice system. That loss of faith in the system entrusted with societal justice reverberates through our communities, damaging our families, our schools, and our workplaces — components that are necessary to an effective social structure in our nation.[93]

Only drug offenses with maximum terms of imprisonment of ten years or more are considered "serious" and serve as ACCA predicates. In *McNeill v. United States*,[94] the Supreme Court held that whether a prior conviction qualifies as a "serious drug offense" depends on "the maximum sentence applicable to a defendant's previous drug offense *at the time of his conviction for that offense*."[95]This is problematic because recently many drug sentences have been reduced to less than ten years, but they continue to serve as ACCA predicates for those defen-dants who committed the offense before the reduction.

However, the *McNeill* Court noted that it was not addressing "a situation in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense."[96] This creates strange anomalies. The Drug Law Reform Act of 2004[97] ("2004 Act") decreased maximum penalties for first-time New York class B and C felony drug convictions to nine years and five-and-a-half years, respectively.[98] The Drug Law Reform Act of 2009[99] ("2009 Act") made these decreased penalties available to defendants convicted of a class B offense before the 2004 Act.[100] In 2014, the Southern District of New York held that New York class B drug felonies, which after the reduction carried a maximum penalty of only nine years, were not ACCA predicate offenses because the 2009 Act applied the 2004 Act's reduction retroactively to offenses committed before the latter's adoption.

Reference:

1. Barkow, Rachel E. Prisoners of Politics: Breaking the Cycle of Mass Incarceration. Harvard University Press (2019).
2. Essays & Comments. "Recidivism Reformation: Eliminating Drug Predicates." Harvard Law Review Forum, vol. 135, pp. 418–435 (2022).
3. United States Sentencing Commission. Federal Armed Career Criminals: Prevalence, Patterns, and Pathways. USSC Report (2021).

4. Luna, Erik. "Mandatory Minimums." Academy for Justice: Criminal Justice Reform, vol. 4, pp. 117–144 (2017).
5. Pew Charitable Trusts. More Imprisonment Does Not Reduce State Drug Problems. Public Safety Performance Project Report (2018).
6. Schlabaugh, Misty L. "Concepcion v. United States: Compassionate Drug Sentencing Reform Against a Criminal Legal System Built On Racialized Social Credit." Denver Law Review Forum, vol. 100 (2023).
7. O'zbekiston Respublikasi Jinoyat Kodeksi. Rasmiy matn va sud amaliyoti tahlili.
8. O'zbekiston Respublikasi Oliy Sudi Plenumining Qarorlari. "Jazoni tayinlash hamda retsidiv jinoyatlarga oid sud amaliyoti to'g'risida".
9. Rustambayev, M. H. O'zbekiston Respublikasi Jinoyat Huquqi Kursi (Umumiy Qism). Toshkent Davlat Yuridik Universiteti (2020).
10. Наумов, А. В. Уголовное право России: Практический курс. Издательство «Юрайт» (2021).
11. Рарог, А. И. Проблемы субъективной стороны преступления и квалификации уголовных наказаний. Издательство «Проспект» (2019).