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In The
Supreme Court of the United States

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KEVIN SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI
WITH APPENDIX VOLUME I OF II
(Pages 1a – 356a)

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QUESTIONS PRESENTED

- I. Whether the District Court erred in violation of Mr. Smith's Fifth and Sixth Amendment Rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *United States v. Booker*, 543 U.S. 220 (2005) by deciding, without submitting the issue to a jury, fact issues necessary to decide that the predicate convictions for Mr. Smith's Armed Career Criminal Act of 1984 ("ACCA") determination were on "occasions different from one another," when the effect is to increase his sentence from a discretionary ten years to a mandatory fifteen years.
- II. Whether, after *Johnson v. United States*, 135 S. Ct. 2551 (2015), *et al.*, 18 U.S.C. § 924(e) is void for vagueness pursuant to the Fifth Amendment because the determination of whether felonies were "committed on occasions different from one another," which is a determination requiring nuanced judgments about the various ways in which conduct may or may not be connected and the priorities to each, similarly requires the inadequately constrained abstract judgment by the sentencing judge and Section 924(e) lacks sufficient guidance to restrain adequately the discretion of those who enforce it -- just as the residual clause of the ACCA.
- III. Whether, pursuant to the Fifth Amendment, 18 U.S.C. § 922(g)(1) is void for vagueness under *Johnson*, because "constructive possession" of a firearm is a judicially manufactured abstraction of almost unrestricted breadth to which the statute gives neither sufficient notice to those who must understand how

to comply with the statute nor sufficient guidance to restrain the discretion of the police, prosecutors, and courts who enforce it.

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**IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeal's appears at Appendix (1a) to the petition, it is not reported in the Federal Reporter but is available at 2017 U.S. App. LEXIS 15047; 2017 WL 3475062 (Aug. 14, 2017). The judgment without written opinion of the United States District Court for the Western District of North Carolina appears at Appendix (10a).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), as Appellant Kevin Smith appeals the final judgment in a criminal case entered by the United States District Court for the Western District of North Carolina and affirmed by the Fourth Circuit Court of Appeals. The District Court had jurisdiction under 18 U.S.C. § 3231. The District Court imposed a sentence from the bench on February 12, 2016 and the written reasons and final judgment were entered March 3, 2016. Notice of appeal was filed March 4, 2016. The Fourth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The Fourth Circuit Court of Appeals issued a judgment and written opinion affirming the District Court's judgment and sentence on August 14, 2017.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions involved are the Fifth Amendment and Sixth Amendment to the United States Constitution, which read as follows:

FIFTH AMENDMENT:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The statutes involved are 18 U.S.C. § 922(g) and 18 U.S.C. § 924(e), which read as follows:

18 U.S.C. § 922(g):

- (g) It shall be unlawful for any person –
- (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
 - (2) who is a fugitive from justice;
 - (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
 - (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
 - (5) who, being an alien –
 - (A) is illegally or unlawfully in the United States; or

- (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));
- (6) who has been discharged from the Armed Forces under dishonorable conditions;
- (7) who, having been a citizen of the United States, has renounced his citizenship;
- (8) who is subject to a court order that –
 - (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
 - (B) restrains such person from harassing, stalking or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
 - (C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
 - (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or
- (9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. 924(e):

- (1) 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, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection –

(A) the term “serious drug offense” means –

- (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
- (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term “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, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

STATEMENT OF THE CASE: FACTUAL BACKGROUND

Mr. Smith was indicted January 23, 2014 in Count 53 pursuant to 18 U.S.C. § 922(g)(1)-Possession of Firearms by a Convicted Felon. (App. 41a). Mr. Smith was indicted on four other counts, all of which were dismissed prior to trial.¹ Under Count 53, Mr. Smith was charged with possession of a firearm based upon the following facts. On August 15, 2013, Charlotte-Mecklenburg police executed a

¹ Count 1 (18 U.S.C. § 1349-Conspiracy to Commit Bank Fraud), Count 11 (18 U.S.C. § 1344-Bank Fraud), Count 12 (18 U.S.C. § 1344-Bank Fraud), Count 50 (18 U.S.C. § 513-Possession of Counterfeit Securities), and Count 52 (18 U.S.C. § 1708-Possession of Stolen Mail). (App. 21a, 34-35a, 40a, 41a).

search warrant at a residence located at 4017 Carlyle Drive in Charlotte. (App. 112a). The police found four firearms—a Bryco Jennings model T-380 semi-automatic pistol, a Ruger Blackhawk .357 revolver, a Benelli Super Vinci 12 gauge shotgun, a Remington Arms model 700 30-06 rifle, and ammunition. (App. 81-105a). The revolver was found under a couch in the living room. (App. 84-85a). Ammunition was also found in the living room. (App. 85-86a). The .380 caliber pistol was found underneath the bed in the master bedroom. (App. 88-89a). Also found in that bedroom, was a white ashtray and a number of Nike tennis shoes. (App. 88a). The shoes were men's size 8 1/2. (App. 93a). A North Carolina identification card for Mr. Smith was also found in the bedroom. (App. 90-91a). The identification card for Mr. Smith showed his address to be different from the Carlyle address; it showed 3829 Perennial Terrace Drive, Apartment K, Charlotte, North Carolina. (App. 93a). The identification card had been issued about eight months earlier, on December 5, 2012, and the photograph on the card was that of Mr. Smith. (App. 93-94a).

The rifle was found in a washroom adjacent to the kitchen/dining room at the back of the house. (App. 95a). The rifle was found in a hard black case with additional ammunition inside the case. (App. 97-98a). The rifle had a telescopic scope attached to it. (App. 115a). Finally, the shotgun was recovered from a coat closet just inside the front door of the house in the living room. (App. 99a).

Mr. Smith denied possession of those firearms. Nevertheless, having previously been convicted of one or more crimes punishable by imprisonment for a

term exceeding one year, Mr. Smith was charged with possession of a firearm by a felon—e.g., “he did knowingly possess one or more firearms in and affecting commerce.” (App. 41a). Mr. Smith’s jury trial began on June 4, 2014 before the Honorable Robert J. Conrad, Jr. and concluded on June 5, 2014. (App. 45-335a).

Mr. Smith did not testify at trial. The Defense denied his possession of the guns. (App. 301-314a). Responding to the charge as tried—that he was in constructive possession of the guns—the Defense denied that he was a resident of the house on Carlyle Drive (App. 301-314a) and asserted that Mr. Smith was residing with his sister in another location throughout this period of time. (App. 301-314a). The woman who was the undisputed resident of the home was Mia Matthews. (App. 297a). A cooperating witness, Olwin Brown, charged in the same indictment (App. 17a), testified Ms. Matthews was Mr. Smith’s girlfriend. (App. 244a).

Testimony and exhibits established that Mr. Smith’s fingerprints were not found on any of the guns or the ammunition. (App. 160-65a). Similarly, DNA testing found no DNA of Mr. Smith on any of the guns or ammunition. (App. 224-26a). The Government did not subpoena Ms. Matthews to testify, and the Government offered no evidence that the guns did not belong to Ms. Matthews.

The material evidence in support of the Government’s constructive possession argument started with CMPD officer Derrick Lail, who testified that he had seen Mr. Smith at the Carlyle Drive address or had seen his car at the Carlyle Drive address on multiple occasions between mid-July 2013 and August 15, 2013. (App.

78-80a). Later, the Government offered evidence from three cooperating co-conspirators who testified under the cooperating provisions of their plea agreements. The first was Stanley Rutledge. Mr. Rutledge offered testimony that Mr. Smith lived at the Carlyle Drive residence (App. 123-25a) and that he had seen Mr. Smith with a gun in May of 2013 at a gas station about a one-minute drive from the Carlyle Drive address. (App. 126a). The gun was described as chrome with a black handle. (App. 127a). Stanley Rutledge testified also that on an occasion two-months earlier than the first incident, he saw Mr. Smith with a gun that was chrome with a black handle while the two were at a different gas station. (App. 127-28a). Stanley Rutledge did **not** testify that he had seen Mr. Smith with any of the four guns in question. Indeed, he was **not** asked if had ever seen Mr. Smith in possession of any of the guns.

Cooperating co-conspirator Jakari Rutledge, the brother of testifying cooperator Stanley Rutledge, also testified pursuant to a plea agreement he had reached as a result of his participation in the underlying check fraud conspiracy. (App. 167-68a). Jakari Rutledge testified he saw Mr. Smith at the house on Carlyle Drive and on one occasion Mr. Smith had referred to the house as “my house”. (App. 170-72a). Jakari Rutledge gave no testimony about any guns.

Co-conspirator Olin Brown also testified as the result of a plea agreement. Mr. Brown testified that he had seen Mr. Smith with a gun at the Carlyle house. (App. 245-46a). However, according to Mr. Brown’s testimony, the gun had a black handle. (App. at 248a). Thus, his description of the gun did not match any of the

guns charged in the indictment. Mr. Brown was **not** asked to identify any of the guns charged in the indictment as ever having been in the possession of Mr. Smith. Mr. Brown testified that on two other occasions at gas stations he had seen Mr. Smith with a gun with a black handle. (App. 249a). Again, the description did not match any of the guns charged in the indictment and Mr. Brown was **not** asked to identify any gun found at the Carlyle Drive house as being a gun he had seen. Mr. Brown testified that on another occasion Mr. Smith had told him that he was in possession of a “9”, which Mr. Brown testified, for him, was a reference to a gun. (App. 253–54a). Finally, Mr. Brown testified to a discussion he and Mr. Smith allegedly had about squirrels in which Mr. Smith had shown him a scope, not a weapon, that Mr. Brown identified as the same scope found on the rifle. (App. 250–51a). On cross-examination Mr. Brown admitted that in two prior interviews he had made no mention of a gun. (App. 258–59a).

STATEMENT OF THE CASE: PROCEDURAL BACKGROUND

After the jury returned a conviction for violation of 18 U.S.C. § 922(g), neither party asked for the jury to be polled. The sentencing hearing was held February 12, 2016. The District Court imposed a sentence of 188 months and a period of supervised release of two years. (App. 350–351a).

The pre-sentence report stated that Mr. Smith had at least three prior convictions for a violent felony offense that had been committed on different occasions, and, therefore, Mr. Smith was an armed career criminal subject to an enhanced sentence under 18 U.S.C. § 924(e) as reflected in U.S.S.G § 4B1.4(b)(3)(B).

(App. 366-68a). The offenses supporting the armed career criminal determination were the following:

On January 22, 1997, at the age of 16, Mr. Smith was arrested for and subsequently convicted of the crime of robbery with a dangerous weapon in North Carolina. *See* docket number 97-CRS1164. (App. 365-66a). Court records indicate that on January 21, 1997 he used a handgun to steal \$120 from two individuals at J's Mini-Mart in Cabarrus County, North Carolina. (App. 366a). The second offense stemmed from a North Carolina docket number in the same proceeding, 97-CRS1167, in which it was charged that on January 22, 1997, Mr. Smith used a handgun to threaten an individual to steal that individual's 1981 Chevrolet Corvette automobile. (App. 366a). The third offense again stemmed from yet another docket number in the same proceeding, 97-CRS1168, in which it was alleged that, on the day before, January 21, 1997, Mr. Smith used a firearm to steal currency and jewelry from an individual. (App. 366a).

The fourth offense was in a separate proceeding, Docket Number 97-CRS001398, in which it was charged that on or about January 3, 1997, again when Mr. Smith was 16, Mr. Smith committed robbery with a dangerous weapon in Union County. (App. 366a). The pre-sentence report states that, according to the Union County Clerk of Court, the documents regarding this last offense have been destroyed. (App. 365-66a). Notably, all of the offenses used to establish Mr. Smith's status as an armed career criminal occurred when he was a minor.

As an armed career criminal, Mr. Smith faced a mandatory minimum term of imprisonment of 15 years and a maximum of life imprisonment pursuant to 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(e)(1). With a total offense level of 33 and a criminal history category of IV, the proscribed sentencing guideline range was 188 months to 235 months. (App. 371a). Had Mr. Smith not been found by the District Court to be an armed career criminal, he would have faced a maximum sentence for violation of 18 U.S.C. § 922(g) of 10 years pursuant to 18 U.S.C. § 924(a)(2). Under the Sentencing Guidelines, with a criminal history category of IV and a total offense of 28, Mr. Smith would have faced a Guidelines range of 110 to 137 months with a statutory maximum of 120 months.

At sentencing, the District Court found that there were four separate convictions at issue for robbery with a dangerous weapon: (i) one on January 21, 1997 involving use of a handgun to commit a robbery at J's Mini-Mart; (ii) one on January 21, 1997 involving use of a handgun to steal currency and jewelry from an individual; (iii) one the next day on January 22, 1997 involving use of a handgun in what the court incorrectly described as an attempted "carjacking"; and (iv) one that occurred in a different county (Union County) on a different day (January 3, 1997). (App. 342-46a). On this basis, the District Court identified as the key question whether the offenses that occurred on January 21 and 22 "occurred on occasions different from one another." (App. 342-43a). The District Court found that the parties had analyzed the appropriate factors and identified the factors determinative of the outcome to be:

- Whether the offenses arose in different geographic locations;
- Whether the nature of the offenses was substantially different;
- Whether there were different victims;
- Whether there were different criminal objectives; and
- Whether, after the commission of the first offense, Mr. Smith had the opportunity to make a conscious and knowing decision to commit the next in time offense.

(App. 343-45a).

The District Court found that the offenses committed on January 21 and 22 were committed on occasions different from one another and were not the result of a single criminal impulse. (*Id.*) The District Court relied upon the fact that the robbery in J's Mini-Mart had occurred in a geographically different location than the "carjacking" (as the District Court erroneously characterized the second robbery), which again, was charged under the same N.C. Gen. Stat. 14-87. (*Id.*) On this basis, the District Court found that the offenses were two separate and distinct criminal episodes. The District Court determined that the geographic locations of those two offenses were different, that there were two different victims, and that the crimes had "different objectives." (App. 344a). The District Court did not explain how two offenses with the same essential elements had "different objectives." Finally, the District Court found that there was sufficient time between the two episodes for Mr. Smith "to cease and desist from criminal activity or to consciously decide to commit another crime." (*Id.*) The District Court made no reference to the fact Mr. Smith was 16 years old at the time and how that might impact his ability to decide consciously to commit another crime. Additionally, the

District Court did not elaborate further on its rationale for determining that the two N.C. Gen. Stat. § 14-87 convictions in question qualified as separate episodes.

On appeal, the Fourth Circuit Court of Appeals affirmed the District Court's judgment related to the arguments in this petition based on the reasoning that Mr. Smith had failed to establish plain error. The Fourth Circuit did not provide a rationale in regard to Mr. Smith's vagueness arguments, with the exception of a footnote stating that *Johnson* was not directly applicable.

REASONS FOR GRANTING THE PETITION

The ACCA, 18 U.S.C. § 924(e)(1), imposes a sentencing minimum if a person has three previous convictions for a "violent felony" "committed on occasions different from one another." Here, Mr. Smith's sentence was increased unconstitutionally for the following reasons.

First, the Fourth Circuit Court of Appeals violated Mr. Smith's Fifth and Sixth Amendment rights when it affirmed the District Court's conclusion that Mr. Smith's prior convictions occurred on "occasions different from one another." The District Court engaged in a fact intensive analysis of specific events that occurred almost a decade prior, which are beyond the fact of conviction and the statutory essential elements of the relevant offenses. The District Court erroneously made fact determinations, and whether the prior convictions occurred on occasions different from one another should have been reserved for a jury to determine. Here, Mr. Smith's sentence went from a **discretionary** 120 months to a **mandatory** minimum 180 months based upon the District Court's factual determinations that

were necessary to decide if the essential elements of a Section 924(e) offense were met. By imposing a ***mandatory*** minimum sentence based upon fact-finding by the District Court, Section 924(e) constitutes a statutory offense subject to *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and is outside *United States v. Booker*, 543 U.S. 220 (2005) because the District Court lost discretion to impose any shorter sentence. Thus, Section 924(e) is not properly analyzed as a mere sentencing provision, but rather as a substantive statutory offense. The District Court’s fact finding violated Mr. Smith’s constitutional rights.

Second, this Court should find that the ACCA is void for vagueness in light of the recent holding in *Johnson v. United States*, because the determination of whether felonies were “committed on occasions different from one another” is so standardless that it requires an unconstrained abstract judgment that invites arbitrary enforcement. At the same time, it fails to give fair notice to defendants.

Third, 18 U.S.C. § 922(g)(1), as written and applied, is void for vagueness under *Johnson* because “constructive possession” is a standardless abstraction that invites arbitrary enforcement while it fails to give fair notice to defendants. “Constructive possession” appears nowhere in the statute and is untethered to any objective benchmark to be found outside the statute’s text. The intention and the effect of grafting “constructive” (and a remarkably broad interpretation of constructive) onto the statutory term, “possession,” has been to expand the reach of the statute beyond any citizen’s ability to comprehend its boundaries; or any court’s ability to control the reach of the statute. Thus, the statute suffers from fatal

uncertainty as to what behavior is or is not sufficient to constitute an offense. The United States Supreme Court has made clear that its “holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.” *Johnson* at 2560-61. The fact that some cases might be clear does not save the statute as applied when the courts permit prosecutors to bolt “constructive” onto possession.

I. The District Court Violated Mr. Smith’s Fifth Amendment and Sixth Amendment Rights under *Apprendi* and *Booker* by Deciding, Without Submitting the Issue to the Jury, That the Predicate Offenses for the ACCA Determination Were on “Occasions Different from One Another.”

One purpose of the categorical approach to sentencing is to avoid having courts make factual determinations that are properly the province of the jury. Under 18 U.S.C. § 924(e)(1), the District Court made a variety of factual determinations about the mental state and the “criminal impulse” of Mr. Smith in 1997, when the offenses occurred, what specific behaviors Mr. Smith might have been engaged in, how distant the locations of the offenses occurred one from another, and whether ultimately there was a connection between the different crimes. Here, as a result of the District Court’s fact-finding and speculation, Mr. Smith’s sentence was unconstitutionally increased from a statutory maximum of 10 years to a mandatory minimum of 15 years.

The ACCA fails to define the phrase “on occasions different from one another.” However, courts have concluded “that Congress intended to include within the scope of the ACCA *only those predicate offenses that can be isolated with a*

beginning and an end - ones that constitute an occurrence unto themselves.” United States v. Letterlough, 63 F.3d 332, 335 (4th Cir. 1995) (emphasis added) (holding that convictions occur on occasions different from one another if each of the prior convictions arose out of a “separate and distinct criminal episode.”). In assessing whether predicate convictions have occurred on different occasions, the Fourth Circuit considers the following factors:

- (1) Whether the offenses arose in different geographical locations;
- (2) Whether the nature of each offense was substantively different;
- (3) Whether each offense involved different victims; and
- (4) Whether the defendant had the opportunity after committing the first-in-time offense to make a conscious and knowing decision to engage in the next-in-time offense.

United States v. Carr, 592 F.3d 636, 644 (4th Cir. 2010) (citing *United States v. Leeson*, 453 F.3d 631, 640 (4th Cir. 2006)). Courts are limited to considering only those sources approved in *Shepard v. United States*, 544 U.S. 13, 26 (2005) to establish the factual basis of the prior convictions, such as prior judgments and indictments.

In this case the documents submitted by the Government convey only the following information:

- (1) In case number 97CRS1164, the indictment alleges Smith took \$120 from Sun Jung and Jun Jung at J’s Mini-Mart in Cabarrus County on January 21, 1997 (App. 398a);
- (2) In case number 97CRS1167, the indictment alleges Smith took a 1982 Chevrolet Corvette from Gerald Wayne McClamrock in Cabarrus County on January 22, 1997. (App. 398a);

- (3) In case number 97CRS1168, the indictment alleges Smith took \$100 and seven gold rings valued at \$1,375 from Erece Silete Moore in Cabarrus County on January 21, 1997 (App. 398a).

When considered in light of the Fourth Circuit factors, these indictments do not support a finding that these incidents were committed on occasions different from one another. *First*, while the first case alleges that the robbery occurred at a J's Mini-Mart, neither of the other indictments places the robbery at a particular geographic location within Cabarrus County, and there is no information in the record to permit the District Court's apparent conclusion that the other two robberies did *not* occur at J's Mini-Mart. *Second*, all three incidents were robberies of a person, rendering all three offenses of the same nature, a conclusion the District Court rejected without explanation. *Third*, while each incident involves different victims and different property, the third page of Government's Exhibit #1 is the second page of the judgment in 97CRS1164. (App. 405a). This page lists the victims and restitution amounts. *Id.* This list includes not only the victim in 97CRS1164, Sun Jung, but also the victim in 97CRS1168, Erece Moore. *Id.* It also lists a third victim and restitution amount that is unexplained and unnamed in any other documentation. *Id.* This intermingling of the victims and restitution for multiple counts on a single judgment points toward all three robberies occurring on a single occasion. At a minimum, the overlap of the judgments renders this factor inconclusive. *Fourth*, the documents list January 21, 1997 as the date of offense for robberies (1) and (3) and January 22, 1997 as the date of offense for robbery (2). However, there is no indication as to

what *time* these incidents occurred. For example, these incidents could have occurred in rapid succession between 11:59 PM on January 21, 1997 and 12:01 AM on January 22, 1997 at the same place in Cabarrus County North Carolina.

The speculative “fact finding” and the associated conclusion that these offenses occurred on occasions different from one another was made under the guise of a categorical sentencing analysis. Yet, the District Court actually engaged in a fact-intensive analysis of the specific events that occurred almost a decade ago, on January 21 and 22, 1997—fact determinations that should be reserved for submission to a jury. Such an analysis by the court is exactly the type of judicial determination that the Supreme Court ruled unconstitutional in *Booker*, 543 U.S. at 230, when, as here, Mr. Smith went from a discretionary, statutory maximum of 10 years to a mandatory, statutory minimum of 15 years.

“The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an ‘element’ or ‘ingredient’ of the charged offense.” *Alleyne v. United States*, 133 S. Ct. 2151, 2158 (2013); *see also*, *Booker*, 543 U.S. at 230 (“It is equally clear that the ‘Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.’” (citing *United States v. Gaudin*, 515 U.S. 506, 511 (1995)); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (“[A] criminal defendant [is entitled] to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.’”); *Staples v. United States*, 511 U.S. 600, 604 (1994) (“[T]he definition of the elements

of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.” (citing *Liparota v. United States*, 471 U.S. 419, 424 (1985)); *Estelle v. McGuire*, 502 U.S. 62, 69-70 (1991) (In the federal courts, “[a] simple plea of not guilty . . . puts the prosecution to its proof as to all elements of the crime charged.” (citing *Mathews v. United States*, 485 U.S. 58, 64-65 (1988)); *Patterson v. New York*, 432 U.S. 197, 204 (1977) (“To convict, the jury was required to find each element of the crime beyond a reasonable doubt . . .”).

As outlined above, the District Court made a number of factual determinations which are essential elements of Section 924(e)(1) to determine the requirements of that section had been met. The test relied upon by the District Court is set forth by the Fourth Circuit in *United States v. Letterlough*, 63 F.3d 332, 335 (4th Cir. 1995). An essential element of the test in *Letterlough* is, for one example, whether the defendant had the opportunity after committing the first-in-time offense to make a conscious and knowing decision to engage in the next-in-time offense. This determination is an essential element and is a finding of fact that was made by the District Court in violation of *Booker* and *Apprendi*. The same is true for the other factual elements of Section 924(e)(1). The fiction is that the record of conviction will supply the answers to the question of whether the offenses were committed on a different occasion, but the intense factual analysis based upon a reading between the lines of 19-year-old court records below proves the fallacy of this presumption.

Here, Mr. Smith’s sentence went from a *discretionary* 120 months to a *mandatory* minimum 180 months based upon the District Court’s fact-determinations necessary to decide if the essential elements of a Section 924(e) offense were met. The imposition of a *mandatory* minimum sentence based upon fact-finding by the District Court regarding Section 924(e) constitutes a statutory offense subject to *Apprendi* and is outside *Booker* because the District Court lost discretion to impose any shorter sentence. Thus, Section 924(e) is not properly analyzed as a mere sentencing provision and its application in this case violated Mr. Smith’s constitutional rights.

II. Similar to the Reasoning Used in *Johnson*, 18 U.S.C. § 924(e) Is Void for Vagueness Because the Determination of Whether Felonies Were “Committed on Occasions Different from One Another” Requires the Same Unconstrained Abstract Judgment and the Statute Lacks Sufficient Guidance.

The ACCA, codified at 18 U.S.C. § 924(e)(1), states:

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 . . .

18 U.S.C. § 924(e)(1) (emphasis added). In *Johnson*, the Supreme Court held that the residual clause of the ACCA, 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague because its definition of a “violent felony” “required courts to assess the hypothetical risk posed by an abstract generic version of the [underlying] offense.” See *Welch v. United States*, 136 S. Ct. 1257, 1262 (2016). The Court held that the process by which courts categorize convictions as violent is unacceptably “wide-

ranging” and “indeterminate.” *Johnson*, 135 S. Ct. at 2557. While leaving undisturbed the “many laws that ‘require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*,’” *Welch*, 136 S. Ct. at 1262 (quoting *Johnson*, 135 S. Ct. at 2561 (emphasis in *Johnson*)), the Supreme Court found the residual clause was impermissibly vague because it required courts to envision conduct that a crime involves in the “ordinary case” and “to judge whether that abstraction presents a serious risk of potential injury.” *Johnson*, 135 S. Ct. at 2557.

The Court first reaffirmed that, under *Taylor v. United States*, 495 U.S. 575 (1990), the residual clause requires the categorical approach to determine whether a particular offense is a crime of violence. *Johnson*, 135 S. Ct. at 2557, 2562. That is, courts must assess whether an offense is a violent felony “in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.” *Id.* at 2557 (quoting *Begay v. United States*, 553 U.S. 137, 141 (2008)).

One flaw addressed by the Supreme Court was the fact the residual clause lacked a meaningful gauge for determining when the quantum of risk under the “ordinary case” of a particular statute was enough to constitute a “serious potential risk of physical injury.” *Id.* at 2558. Although the level of risk required under the residual clause could arguably be similar to that of the enumerated offenses (burglary, arson, extortion, or crimes involving use of explosives), *Johnson* rejected the notion that comparing the risk posed by an “ordinary case” to the risk posed by

enumerated offenses would cure the constitutional problem. *Id.* at 2554. The Court held that the indeterminacy, unpredictability, and arbitrariness inherent in the “ordinary case” analysis is more than the “Due Process Clause tolerates.” *Id.* Thus, *Johnson* not only invalidated the ACCA residual clause; it invalidated the “ordinary case” analysis in determining the violence inherent in crimes. *See id.*

Because Section 924(e)(1) suffers from essentially the same flaws that compelled the Supreme Court to declare Section 924(e)(2)(B)(ii) unconstitutionally vague, Section 924(e)(1) is similarly unconstitutional. The sentencing transcript (*See App. 342-45a*) demonstrates that Section 924(e)(1) required the District Court to imagine the conduct of Mr. Smith without an adequate record or guidance in order to make a judgment as to whether the conduct that resulted in his convictions nineteen years ago was committed on “occasions different from one another.” Given the paucity of North Carolina state court records, the analysis was necessarily abstract with no guidance in the statute as to what Congress meant.

Moreover, exacerbating the problem is the fact that Section 924(e)(1) lacks any meaningful gauge for a court to determine what is an “occasion” and what is an “occasion” that is “different” from “another.” Here, for example, the District Court was faced with three offenses that were merely outlined in a record going back to 1997. The record did not provide the court with information regarding, for example, the time of day on January 21 and 22 the offenses occurred, what conduct did or did not occur in between that would indicate whether the course of conduct was continuous, the means or methods involved, or whether the location of one offense

had any relationship to the other. Despite the fact that both the Government and the Defense agreed that the District Court could consider only sources approved in *Shepard*, the District Court went far beyond the permissible limits of *Shepard* and ultimately the District Court found itself speculating about a 16-year-old boy's "criminal impulse[s]" almost a decade ago to determine whether the conduct was the result of a "single criminal impulse." (App. 342-45a). It could not be clearer that the statute provides no meaningful guidance.

In *Taylor*, the Supreme Court rejected a regime that would allow fact-finding of prior convictions with respect to the question of how to define the qualifying offenses. The same logic applies to the determination of whether the offenses occurred on occasions different one from another:

[t]he practical difficulties and potential unfairness of a factual approach are daunting. In all cases where the Government alleges that the defendant's actual conduct would fit the generic definition of burglary, the trial court would have to determine what that conduct was. In some cases, the indictment or other charging paper might reveal the theory or theories of the case presented to the jury. In other cases, however, only the Government's actual proof at trial would indicate whether the defendant's conduct constituted generic burglary. Would the Government be permitted to introduce the trial transcript before the sentencing court, or if no transcript is available, present the testimony of witnesses? Could the defense present witnesses of its own and argue that the jury might have returned a guilty verdict on some theory that did not require a finding that the defendant committed generic burglary? If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial? Also, in cases where the defendant pleaded guilty, there often is no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement....

Id. at 601-02.

Here, to defend against the District Court's approach, Mr. Smith would have had to present evidence from a 1997 trial (with no transcript available) regarding the time from the first offense to the second offense on January 21 and January 22. Theoretically, then the Government would introduce rebuttal evidence. Here, of course, the Government bears the burden of proof. This is exactly the type of exercise the Supreme Court refused to endorse in *Taylor*.

Indeed, in January 1997, Mr. Smith was charged with the same offense, violation of N.C. Gen. Stat. 14–87. (App. 384-85a). Nevertheless, the District Court describes the robbery of the automobile as a “carjacking,” which has different essential elements. (App. 343a). The District Court found erroneously that they occurred in different locations even though the indictments on the other two robberies do not disclose the specific locations of the offenses other than within the same county. The District Court found without explanation that the robberies had different objectives. (App. 344a). However, the essential elements of the three offenses are exactly the same...at the most objective level, the purpose in each was the taking of property. The objectives of the three are the same.

The fact that the District Court could engage comfortably in such an exercise of speculation and bolting on foreign concepts (carjacking) demonstrates both that there is insufficient guidance in the statute and that the District Court substituted speculation for adherence to *Shepard* and the categorical approach.

Further, Section 924(e)(1) “leaves uncertainty about how much ... [time, geography, intention, etc.] it takes for a crime to qualify as [one that is the same or

different from another]. It is one thing to apply an imprecise ‘serious potential risk’ standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction.” *Johnson*, 135 S. Ct. at 2558. And, that is just what the District Court did below. The language employed by Congress is simply too colloquial to survive Constitutional scrutiny when the impact is as severe as it is in the designation of a defendant as an armed career criminal. And, if the language could survive in some instances, when as in this case there is any question about separation of occurrences, the only Constitutional approach is to rule the ACCA cannot be applied.

III. 18 U.S.C. § 922(g)(1), as Written and as Applied, Is Void for Vagueness under the Rationale in *Johnson* Because Constructive Possession Is an Abstraction as to Which the Statute Gives Neither Sufficient Notice nor Guidance to Restrain the Discretion of Those Who Enforce It.

“[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Where a criminal law is so vague that it fails to give ordinary people fair notice of the conduct it punishes, the law is said to violate the Due Process Clause of the Fifth Amendment by impermissibly taking life, liberty, or property. *See Johnson*, 135 S. Ct. 2556-57 (a criminal statute fails to pass constitutional muster if it fails to provide notice that will enable “ordinary people” to understand what conduct it prohibits.); *Kolender*, 461 U.S. at 357-358; *see also Smith v. Goguen*, 415 U.S. 566,

572 n.8 (1974) (“statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law”); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (vagueness “violates the first essential of due process.”); accord *United States v. Morison*, 844 F.2d 1057, 1070-71 (4th Cir. 1988).

A law also violates the Due Process Clause of the Fifth Amendment where it is so standardless that it invites arbitrary enforcement. See *Kolender*, 461 U.S. at 357-358. The void for vagueness doctrine is concerned with both “actual notice to citizens and arbitrary enforcement,” but the latter requirement of sufficient guidelines for law enforcement authorities is paramount. *Id.* at 358. “Where the legislature fails to provide such minimal guidelines, a criminal statute may permit ‘a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.’” *Id.* (quoting *Smith*, 415 U.S. at 575) (holding void for vagueness on its face a statute that prohibited treating the U.S. flag contemptuously in public).

The trial here demonstrates just that standardless sweep of arbitrary enforcement. We start with the fact that the text of the statute does not encompass “constructive” possession; only possession is found in the text. Read to be what it is—actual, physical possession—the statute is not controversial. It is plainly understood and applied. The prosecutorial effort, approved by the lower courts, to

expand its reach has rendered it unconstitutionally vague, flexible, and overreaching.

In *United States v. Blue*, 957 F.2d 106, 107 (4th Cir. 1992) the Fourth Circuit Court of appeals ruled: “[T]o establish constructive possession, the government must produce evidence showing ownership, dominion, or control over the contraband itself or the premises or vehicle in which the contraband is concealed.” None of these terms is anchored in the statute. With this first disconnect from the text, the Government was required to prove ownership, dominion, or control over each of the four guns or the premises in which the guns were found. Mr. Smith was convicted under Section 922(g)(1) based upon constructive possession of weapons in a house based upon a policeman’s testimony that he saw a car Mr. Smith was known to drive at the house and the testimony of others that they had seen him there. (App. 76-80a, 123-24a, 152-53a). That testimony is insufficient as a matter of law to establish ownership, dominion or control of the house. There was no physical evidence Mr. Smith had ever touched one of the weapons. No witness could testify he had ever seen Mr. Smith with even one of the four guns charged in the indictment. (e.g., App. 119-26a, 220-26a). And, no evidence was offered by the Government that the guns did not belong to the owner of the house. Again, such evidence is insufficient as a matter of law to establish ownership, dominion or control of any of the four guns. These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences. *Johnson*, 135 S. Ct. at 2556-57 (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)).

The arbitrary enforcement of constructive possession under Section 922(g)(1) has spawned incongruous results across circuit courts nationwide. See, e.g., *United States v. Clark*, 184 F.3d 858 (D.C. Cir. 1999) (finding constructive possession based on defendant’s “reaching actions” behind his seat, despite inconsistent testimony from the arresting officers and testimony from another individual admitting that the gun belonged to her and that she had forgotten it under the driver’s seat several days prior to the arrest); *United States v. Jameson*, 478 F.3d 1204 (10th Cir. 2007) (finding constructive possession of a handgun after it was found on the floor in the backseat of the driver’s car among garbage where defendant had been sitting—despite the absence of his fingerprints); *United States v. Liranzo*, 385 F.3d 66 (1st Cir. 2004) (finding constructive possession based on the “angled position” of the handgun in the car despite testimony there were no fingerprints and no one had seen defendant with a gun).

Section 922(g)(1) does not contain the word “constructive.” When paired with the standardless and arbitrary enforcement as shown in the preceding examples and Mr. Smith’s case, an inescapable consequence is that there is absolutely no way for a convicted felon reading the statute to know that being in the same house or car with a gun that is owned by someone else and may or may not be within reach at a particular point in time subjects that felon to a charge under Section 922(e). The statute does not “provide notice that will enable ordinary people to understand what conduct it prohibits.” *Johnson*, 135 S. Ct. 2556-57. Accordingly, because 922(g)(1) is unconstitutionally vague, the Fourth Circuit Court of Appeal’s opinion affirming

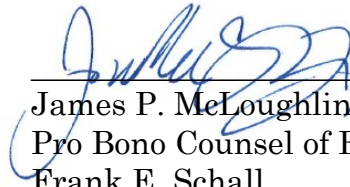
the increase of Mr. Smith's sentence should be reversed and remanded because it violated Mr. Smith's due process rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

This 13th day of November 2017.

Respectfully submitted,



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