

# United States v. Borden: Why imposing mandatory minimums under the ACCA for reckless crimes offends due process

By Danielle Bruno McDermott



Danielle Bruno McDermott

The Armed Career Criminal Act, 18 U.S.C. §924(e), imposes a mandatory minimum sentence of 15 years in prison when a person who has three prior convictions for a “violent felony” or a “serious drug offense” is subsequently convicted of possessing a firearm under 18 U.S.C. § 922(g). If the ACCA does not apply, a person convicted of unlawful possession of a firearm faces a maximum penalty of 10 years’ imprisonment (with no mandatory minimum). *(The language of the ACCA also implies an increased maximum sentence of life imprisonment – “such person shall be fined under this title and imprisoned not less than fifteen years[.]” 18 U.S.C. §924(e).)* 18 U.S.C. §922(g).

Under the ACCA, a defendant convicted of §922(g) who has three prior convictions for violent felonies is subject to enhanced penalties under §924(e) – however, courts are in disagreement as to whether crimes of recklessness should qualify as “violent felonies” under the ACCA.

On Nov. 3, 2020, the United States Supreme Court heard oral argument in the case of *Borden v. United States* to determine that very question. Of particular import to the Justices were various scenarios where reckless acts could hypothetically fall under the provisions of the ACCA, such as drunk driving; texting while driving; and swinging a bat recklessly resulting in

serious injury to another. In *Borden*, the defendant was convicted of reckless aggravated assault in violation of Tenn. Code Ann. §39-13-102(a)(1)(B), which the Sixth Circuit has held qualifies as a crime of violence under USSG §4B1.2(a). *See Davis v. United States*, 900 F.3d 733, 736 (6th Cir. 2018). Should that conviction of reckless aggravated assault qualify as a “violent felony” under the ACCA, the defendant will be subject to a mandatory minimum sentence of 15 years in prison.

The heart of the issue in *Borden* is whether individuals who have been convicted of acting recklessly – as opposed to intentionally, knowingly or willfully – should be subject to the harsh punishment of a mandatory 15

year prison sentence (with a possible maximum sentence of life imprisonment) under the ACCA, which was created to penalize violent, repeat armed criminals. In defining the term “violent felony,” the ACCA’s “force clause” employs the phrase “the use ... of physical force against the person of another.” This is essentially the same language that the Supreme Court analyzed in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), where the Court held that 18 U.S.C. §16(a) excludes offenses committed negligently. Even if *Leocal* should apply, there remains a question of whether crimes committed recklessly were intended to qualify as “violent felonies” that would warrant the imposition of such severe penalties.

The potential effects of the Supreme Court’s decision *Borden* are vast, and the potential for a ripple effect should be of significant concern to the Court and practitioners alike. The term “crime of violence” appears in a wide variety of federal statutes, including Title 18. Section 373 makes it a felony to solicit or persuade another person to commit a crime of violence. 18 U.S.C. §373(a) (incorporating the same force clause). Section 931 makes it a felony for any person to purchase, own, or possess body armor if they have been convicted of a crime of violence. 18 U.S.C. §931(a). Section 1959(a) prohibits threatening to commit a “crime of violence” in aid of racketeering. 18 U.S.C. §1952(a). The phrase is also used in various sentencing enhancements, including 18 U.S.C.

§25(b) (use of a minor to commit a crime of violence); 18 U.S.C. §3663A(c)(1)(a)(i) (mandatory restitution for victims of crimes of violence); and 18 U.S.C. §924(c)(1)(A)(i) (which imposes a mandatory minimum five years’ imprisonment for a person who uses or carries a firearm during and in relation to any “crime of violence”).

Mandatory sentencing provisions permit little discretion, and the history of criminal sentencing legislation and jurisprudence instructs that such provisions must be constructed with an exacting certainty of potential outcomes. While there is room for disagreement on what underlying crimes should justify the harsh punishment mandated by §924(e), the question is whether the statute clearly provides that crimes committed recklessly – and not with intentional, knowing or willful conduct – were intended to be punished under this provision. In *Morrisette v. United States*, Supreme Court Justice Robert Jackson – a former U.S. Attorney General and special prosecutor during the Nuremberg trials – wrote the following:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Continued on page 11

## UNITED STATES V. BORDEN continued from page 7

342 U.S. 246, 250 (1952). While our society has decided that some crimes can be committed recklessly or negligently, it is clear that a person who commits such an act is deemed far less culpable than a person who commits an intentional act with the purpose of harming another. Irreparable harm will result from imposing a mandatory minimum sentence of 15 years in prison for defendants that lack a culpable state of mind. Moreover, imposing such severe penalties in the absence of a culpable state of mind offends the notions of fairness and due process upon which our criminal justice system is based. These principles instruct that we must closely evaluate whether innocent acts were meant to be made criminal, and if so, we must require such provisions to be spelled out clearly in the law. ■

Danielle Bruno McDermott is an associate at the Pittsburgh office of Schnader Harrison Segal & Lewis LLP, where she focuses on criminal defense, white collar defense, commercial litigation, and internal investigations.