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Legal Sidebar

Loan Sharking Isn't a Violent Crime?

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The term "loan shark" conjures up images of usurious loans and violent collection methods. Nevertheless, the federal crime of loan sharking does not qualify as a violent felony under the Armed Career Criminal Act (ACCA) according to a recent decision of the United States Court of Appeals for the Sixth Circuit (Sixth Circuit). The Sixth Circuit's decision in *Raines v. United States* is in part the result of fallout from the Supreme Court's decision in *Johnson v. United States*, which held the ACCA's residual clause unconstitutionally vague. (For further information concerning judicial construction of the term "violent felony" and similar terms, see CRS Report R45220).

The ACCA requires a court to impose a sentence of imprisonment for not less than 15 years imprisonment for a defendant convicted of unlawful possession of a firearm who has three or more prior violent felony or serious drug offense convictions. The ACCA defines a violent felony in three alternative clauses as a felony that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is … extortion … [(iii)] or otherwise involves conduct that presents a serious potential risk of physical injury to another." This third clause is sometimes referred to as the "residual clause."

Raines pleaded guilty to unlawful possession of a firearm. At the time, Raines had prior convictions for aggravated assault, distribution of crack cocaine, and debt collection by extortionate means (loan sharking) which raised the possibility of an ACCA sentence enhancement. When considering whether to apply an ACCA sentence enhancement, rather than examine the facts underlying the prior convictions, courts compare the breadth of the statute underlying the prior convictions to the ACCA definitions. To qualify for an ACCA enhancement under this "categorical" approach, the reach of the statutes underlying the prior convictions must match, or be narrower than, one of the ACCA's three clauses. The U.S. District Court for the Western District of Michigan concluded Raines qualified for an ACCA sentence enhancement based on his prior convictions. The Sixth Circuit affirmed the district court's decision.

Then, the Supreme Court announced its decision in *Johnson v. United States*. There, the Court ruled that an ACCA enhancement may not be based on the ACCA's "residual clause," the third ACCA clause defining a violent felony (a felony that "otherwise involves …"). Raines unsuccessfully petitioned the

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district court for habeas corpus relief on the basis of the *Johnson* decision. The Sixth Circuit was more receptive on appeal and ordered the district court to resentence Raines for unlawful possession of a firearm without the ACCA sentencing enhancement.

The Sixth Circuit held that "the district court erred in concluding that Raines's [extortion] offense qualifies as an enumerated offense under the ACCA." The Sixth Circuit explained that, "because the offense cannot count under the use-of-force clause or the enumerated-offense clause, it could necessarily count only under the now-invalidated residual clause. Raines is therefore entitled to relief under *Johnson*."

The difficulty for the government, as the Sixth Circuit saw it, was that the federal loan sharking statute covers too much. The statute is more all-encompassing than either of the ACCA's two valid clauses. The ACCA's use-of-force clause is confined to any felony "that has as an element the use, attempted use, or threatened use of physical force against the person of another." The loan sharking statute, however, condemns not just violence, but "other criminal means to cause harm" as well. Generic extortion in the ACCA's enumerated-offense clause comes with an element of wrongfully induced victim consent, an element that the loan sharking statute lacks, at least in the eyes of the Sixth Circuit.

Should Congress wish to confirm, reject, or modify the Sixth Circuit's decision by amending the ACCA or the loan sharking statute, it has the power to do so within constitutional bounds. One possible approach would be to eliminate "violent felonies" as an ACCA enhancement requirement. The Restoring the Armed Career Criminal Act (S. 3335) (Sen. Hatch), for example, in addition to other provisions, would amend the ACCA so that three or more prior "serious felony convictions" would be required to trigger the ACCA penalty enhancements. It would eliminate the "serious drug offense" and "violent felony" triggers. It would define "serious felony convictions" to encompass convictions under statutes with a statutory maximum of not less than 10 years. The ACCA sentencing enhancement is now less than 15 years or more than life imprisonment. Under S. 3335 the permissible sentence range would run from not less than 15 to not more than 30 years imprisonment.

A second possible approach would be to delegate the definition of "violent felony" in the ACCA to the Attorney General, thereby affording flexibility to adjust the definition to reflect evolving judicial interpretations. The Safer Streets Act of 2018 (H.R. 4767) (Rep. Cohen) would employ a variation of this approach in other context. It would authorize the Attorney General to award grants to local jurisdictions with high rates of "violent crime." It would then empower the Attorney General to set the standard by way of the definition in the Uniform Crime Reporting Program.

Further options include repealing the ACCA or leaving it unchanged.