

When a State Felony is not A Federal Felony

Carachuri-Rosendo v. Holder

Federal Felony

Definition, generally:

a conviction punishable by
a term that exceeds one year
imprisonment

If the term “exceeding one year” is measured by Client’s individual criminal history classification – which corresponds to no more than twelve months in prison – it does not qualify as a federal felony.

The Record of Conviction

On the other hand, if that term is measured by the most severe penalty that could be imposed on the hypothetical worst-recidivist convicted of that same crime, it does qualify.

Hypothetical Worst Offender

SENTENCING RANGE – NONDRUG OFFENSES

Category →	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanor	1 Misdemeanor No Record
I	653 620 592	618 586 554	285 272 258	267 253 240	246 234 221	226 214 203	203 195 184	186 176 166	165 155 147
II	493 467 442	460 438 416	216 205 194	200 190 181	184 174 165	168 160 152	154 146 138	138 131 123	123 117 109
III	247 233 221	228 216 206	107 102 96	100 94 89	92 88 82	83 79 74	77 72 68	71 66 61	61 59 55
IV	172 162 154	162 154 144	75 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 38
V	186 130 122	128 120 114	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	38 36 34	34 32 31
VI	46 43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25	26 24 22	21 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

“Record of Conviction”

- ❑ not actual sentence
- ❑ not possible charges
- ❑ but maximum sentence that could have been imposed
- ❑ *Carachuri*

Hypothetical Worst Offender

- ❑ Worst anyone convicted of that crime could receive
- ❑ Under Kansas sentencing grid, that's "A"
- ❑ Not linked to defendant's record of conviction but to a hypothetical defendant.
- ❑ *US v. Hill*

SENTENCING RANGE – NONDRUG OFFENSES

Category →	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanor	1 Misdemeanor No Record
I	653 620 592	618 586 554	285 272 258	267 253 240	246 234 221	226 214 203	203 195 184	186 176 166	165 155 147
II	493 467 442	460 438 416	216 205 194	200 190 181	184 174 165	168 160 152	154 146 138	138 131 123	123 117 109
III	247 233 221	228 216 206	107 102 96	100 94 89	92 88 82	83 79 74	77 72 68	71 66 61	61 59 55
IV	172 162 154	162 154 144	75 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 38
V	186 130 122	128 120 114	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	38 36 34	34 32 31
VI	46 43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25	26 24 22	21 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

Statutory Maximum

- ❑ Most statutory sentencing structures have a floor and ceiling, then some advisory guideline, like the federal system.
- ❑ Kansas does not: grid is the statutory floor and ceiling.
- ❑ North Carolina

SENTENCING RANGE – NONDRUG OFFENSES

Category →	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanor	1 Misdemeanor No Record
I	653 620 592	618 586 554	285 272 258	267 253 240	246 234 221	226 214 203	203 195 184	186 176 166	165 155 147
II	493 467 442	460 438 416	216 205 194	200 190 181	184 174 165	168 160 152	154 146 138	138 131 123	123 117 109
III	247 233 221	228 216 206	107 102 96	100 94 89	92 88 82	83 79 74	77 72 68	71 66 61	61 59 55
IV	172 162 154	162 154 144	75 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 38
V	186 130 122	128 120 114	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	38 36 34	34 32 31
VI	46 43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25	26 24 22	21 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

When it Matters

- ❑ Element of a crime
- ❑ statutory sentencing enhancement
- ❑ guideline enhancement
- ❑ *not* really about criminal history points
 - ❑ fewer than 13 months is always good

Elements of a crime

- ❑ Felon-in-possession
 - ❑ element: prior felony
 - ❑ punishable by more than one year in prison
- ❑ Immigration
 - ❑ Aggravated reentry
 - ❑ Element or Sentencing Factor
- ❑ Other

ACCA

- ❑ felon-in-possession
- ❑ 15 year mandatory minimum
- ❑ three prior
 - ❑ crimes of violence
 - ❑ drug trafficking
 - ❑ *if* punishable by more than 10 years in prison

SENTENCING RANGE- DRUG OFFENSES

Categories→	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felony	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanors	1 Misdemeanor No Record
I	204 194 185	196 186 176	187 178 169	179 170 161	170 162 154	167 158 150	162 154 146	161 150 142	154 146 138
II	144 136 130	137 130 122	130 123 117	124 117 111	116 111 105	113 108 101	110 104 99	108 100 96	103 98 92
III	83 78 74	77 73 68	72 68 65	68 64 60	62 59 55	59 56 52	57 54 51	54 51 49	51 49 46
IV	51 49 45	47 44 41	42 40 37	36 34 32	32 30 28	26 24 23	23 22 20	19 18 17	16 15 14
V	42 40 37	36 34 32	32 30 28	26 24 23	22 20 18	18 17 16	16 15 14	14 13 12	12 11 10

Presumptive Probation
Border Box
Presumptive Imprisonment

- Fines not to exceed \$500,000 (SL1-SL2), \$300,000 (SL3-SL4), \$100,000 (SL5)
- Severity level of offense increases one level if controlled substance or analog is distributed or possessed w/ intent to distribute or win 1000 \$ of any school property.

ACCA: Drug Prior with a 10-Year Max

Drug Trafficking

❑ 851

- ❑ doubles mandatory minimum 5 to 10
- ❑ 10 to 20 to life

❑ based on prior felony convictions

- ❑ drug convictions
- ❑ even simple possession
- ❑ cannot age out

Three Strikes, 3559(c)

- ❑ Not common, but know it is there
- ❑ Mandatory life for third “serious violent felony”
- ❑ certain felonies, or those 10 year-plus

Felon-in-possession

- ❑ Guideline Section 2K2.1
- ❑ Offense level increased by:
 - ❑ prior crimes of violence or
 - ❑ drug trafficking
- ❑ 10 level difference

Immigration, 2L1.2

Raises offenses level by eight or fewer for prior agg felonies, but greater increases are based on the defendants actual sentence.

“Felony means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

Career Offender, 4B1.1

Charged with COV or drug trafficking
with two prior felony convictions for COV or
drug trafficking or both

Penalties skyrocket

Felony must be sentence exceeding one year

SENTENCING RANGE – NONDRUG OFFENSES

Category →	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanor	1 Misdemeanor No Record
I	653 620 592	618 586 554	285 272 258	267 253 240	246 234 221	226 214 203	203 195 184	186 176 166	165 155 147
II	493 467 442	460 438 416	216 205 194	200 190 181	184 174 165	168 160 152	154 146 138	138 131 123	123 117 109
III	247 233 221	228 216 206	107 102 96	100 94 89	92 88 82	83 79 74	77 72 68	71 66 61	61 59 55
IV	172 162 154	162 154 144	75 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 38
V	186 130 122	128 120 114	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	38 36 34	34 32 31
VI	46 43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25	26 24 22	21 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

***Brooks* Sentencing**

- ❑ First Sentencing
- ❑ Appeal Waiver
- ❑ Make the Government Appeal
- ❑ Ineffective Assistance of Counsel
- ❑ Amended Plea agreement
- ❑ Court's Ruling: Cannot Overrule *Hill*

Pre-conviction

- ❑ felon-in-possession
 - ❑ other predicates
 - ❑ user-in-possession
- ❑ immigration
- ❑ 851 challenge
- ❑ pre-plea determination of ACCA

District Court

File the motion to dismiss or the objection, and argue that the Court has authority and obligation to follow *Carachuri* rather than *Hill*

See materials

Direct Appeal

- ❑ Amend or supplement
- ❑ Notice of Appeal outside of time
- ❑ Attack appeal waiver
 - ❑ *Hahn* miscarriage of justice exception
- ❑ Remand

Post-Appeal

Habeas attack on the conviction:
felon-in-possession or immigration
substantive due process claim

“actually innocent”

US v. Miller, (4th Cir 2013)

Post-Appeal

Habeas attack on the sentence:

Statutory enhancements

“Actually innocent” of ACCA or 851

Steeper hill to climb on guideline error

Finally

. . . . ineffective assistance of counsel,
Strickland v. Washington:

- 1) deficient performance; and
- 2) prejudice -- higher sentence is prejudicial.

Descamps v. US

133 SCt 237 (2013)

What's a violent felony for ACCA

Can't use modified categorical approach on indivisible statutes

Descamps

Divisible :

various ways to
violate the statute

ex: agg assault
fleeing & eluding

Indivisible:

Broad definition but
not divisible

ex: obstruction/
interference

Criminal Threat

Alleyne v. US

133 SCt 2151 (2013)

“A fact that increases a sentencing floor, thus, forms an essential ingredient of the offense.”

Alleyne v. US

“As noted, the essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.”

Cert Grants This Term

In *Navarette*, the issue presented is whether police, after getting an anonymous tip about drunken or reckless driving, must actually observe that kind of misconduct before they may stop a vehicle.

Cert Grants This Term

In *Castleman*, the Court will address whether the respondent's conviction for misdemeanor domestic assault by intentionally or knowingly causing bodily injury to the mother of his child qualifies as a conviction for a "misdemeanor crime of domestic violence" under 18. U.S.C. § 922(b)(9).

Cert Grants this Term

Abramski v. US

Whether a gun buyer's intent to sell a firearm to another lawful buyer in the future is a material to the lawfulness of the sale of the firearm; and

whether a gun buyer's . . . is a piece of information "required to be kept" by a federally licensed firearm dealer