SUPREME COURT OF THE UNITED STATES

No. 93–5209

DARREN J. CUSTIS, PETITIONER *v.*
UNITED STATES

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

[May 23, 1994]

JUSTICE SOUTER, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

The Court answers a difficult constitutional question that I believe the underlying statute does not pose. Because in my judgment the Armed Career Criminal Act of 1984, 18 U. S. C. §924(e) (ACCA), does not authorize sentence enhancement based on prior convictions that a defendant can show at sentencing to have been unlawfully obtained, I respectfully dissent.

The ACCA mandatory minimum sentence applies to defendants with "three previous convictions . . . for a violent felony or a serious drug offense." 18 U. S. C. §924(e). The Court construes "convictio[n]" to refer to the "*fact* of the conviction," *ante*, at 5 (emphasis in original), and concludes that "Congress did not intend to permit collateral attacks [during sentencing] on prior convictions under §924(e)," *ante*, at 8.[1] This

[1]The Court's opinion makes clear that it uses the phrase "collateral attack" to refer to an attack during sentencing. See, *e.g.*, *ante*, at 1 ("We granted certiorari to determine whether a defendant in a federal

sentencing proceeding may collaterally attack the validity of previous state convictions that are used to enhance his

interpretation of the ACCA will come as a surprise to the Courts of Appeals, which (with the one exception of the court below) have understood "convictio[n]" in the ACCA to mean "lawful conviction," and have permitted defendants to show at sentencing that a prior conviction offered for enhancement was unconstitutionally obtained, whether as violative of the right to have appointed counsel, see *Gideon* v. *Wainright*, 372 U. S. 335 (1963), the right to effective assistance of counsel, see *Strickland* v. *Washington*, 466 U. S. 668 (1984), the right against conviction based on an unknowing or involuntary guilty plea, see *Boykin* v. *Alabama*, 395 U. S. 238 (1969), or other constitutional rights.[2] The weight of appellate authority, in my opinion, reflects the proper construction of the ACCA.

The Court's contrary reading ignores the legal framework within which Congress drafted the ACCA, a framework with which we presume Congress was familiar. See, *e.g.*, *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–698 (1979). When the language that became the ACCA was first proposed in 1982, when it was enacted in 1984 (codified at §1202(a)(1)) and when it was reenacted in 1986 (codified at §924(e)), this Court's decisions in *Burgett* v. *Texas*, 389 U. S. 109

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sentence under the ACCA").

[2]See *United States* v. *Paleo*, 967 F. 2d 7, 11–13 (Breyer, C.J.), rehearing denied, 9 F.3d 988, 988–989 (CA1 1992) (containing additional discussion of statutory issue); *United States* v. *Preston*, 910 F. 2d 81, 87–89 (CA3 1990); *United States* v. *Taylor*, 882 F. 2d 1018, 1031 (CA6 1989); *United States* v. *Gallman*, 907 F. 2d 639, 642–643 (CA7 1990); *United States* v. *Day*, 949 F. 2d 973, 981–984 (CA8 1991); *United States* v. *Clawson*, 831 F. 2d 909, 914–915 (CA9 1987) (interpreting 18 U. S. C. §1202(a)(1) (1982 ed.), the predecessor of §924(e)); *United States* v. *Wicks*, 995 F. 2d 964, 974–979 (CA10 1993); *United States* v. *Ruo*, 943 F. 2d 1274, 1275–1277 (CA11 1991).

(1967), and *United States* v. *Tucker*, 404 U. S. 443 (1972), were on the books. Even under the narrow reading the Court accords those decisions today, they recognize at least a right to raise during sentencing *Gideon* challenges to prior convictions used for enhancement. See *ante*, at 10. Unless Congress intended to snub that constitutional right (and we ordinarily indulge a "strong presumption . . . that Congress legislated in accordance with the Constitution," *Textile Workers* v. *Lincoln Mills of Ala.*, 353 U. S. 448, 477 (1957) (Frankfurter, J., dissenting)), "convictio[n]" in §924(e) simply cannot refer to the mere fact of conviction, and the provision must have been meant to allow during sentencing at least some challenges to prior convictions offered for enhancement.

Nor is it likely that Congress's intent was informed by as narrow a reading of *Burgett* and *Tucker* as the Court adopts today. In the legal environment of the ACCA's enactment, *Burgett* and *Tucker* were thought to stand for the broader proposition that "[n]o consideration can be given [at sentencing] to a conviction that was unconstitutionally obtained," 3 C. Wright, Federal Practice and Procedure §526, p. 102 (1982), and Courts of Appeals consistently read the decisions as requiring courts to entertain claims that prior convictions relied upon for enhancement were unconstitutional for reasons other than *Gideon* violations.[3] The Congress that enacted the ACCA

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[3]See, *e.g.*, *United States* v. *Mancusi*, 442 F. 2d 561 (CA2 1971) (Confrontation Clause); *Jefferson* v. *United States*, 488 F. 2d 391, 393 (CA5 1974) (self-incrimination); *United States* v. *Martinez*, 413 F. 2d 61 (CA7 1969) (unknowing and involuntary guilty plea); *Taylor* v. *United States*, 472 F. 2d 1178, 1179–1180 (CA8 1973) (self-incrimination); *Brown* v. *United States*, 610 F. 2d 672, 674–675 (CA9 1980) (ineffective assistance of counsel); *Martinez* v. *United*

against this backdrop must be presumed to have intended to permit defendants to attempt to show at sentencing that prior convictions were "unconstitutionally obtained."

That presumption is strongly bolstered by the fact that Congress, despite the consistent interpretation of the ACCA as permitting attacks on prior convictions during sentencing, and despite amending the law several times since its enactment (see note following 18 U. S. C. A. §924 (listing amendments)), left the language relevant here untouched. Congress's failure to express legislative disagreement with the appellate courts' reading of the ACCA cannot be disregarded, especially since Congress has acted in this area in response to other Court of Appeals decisions that it thought revealed statutory flaws requiring "correct[ion]." S. Rep. No. 98–583, p. 7 and n. 17 (1984); see *id*., at 8 and n. 18, 14 and n. 31; see also *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 385–386 (1983) ("In light of [a] well-established judicial interpretation [of a statutory provision], Congress' decision to leave [the provision] intact suggests that Congress ratified" the interpretation). Accordingly, absent clear indication that Congress intended to preclude all challenges during sentencing to prior convictions relied upon for enhancement, the ACCA must be read as permitting such challenges.

The Court fails to identify any language in the ACCA affirmatively precluding collateral attacks on prior convictions during sentencing, as there is none. Instead, the Court hears a clear message in the statutory silence, but I find none of its arguments persuasive. The Court first invokes 18 U. S. C. §921(a)(20), under which a conviction "which has been expunged,

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States, 464 F. 2d 1289 (CA10 1972) (self-incrimination).

or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter." According to the Court, this "exemption clause" (as we have elsewhere called it, see *Beecham* v. *United States*, 511 U. S. __ (1994) (slip op., at 1) "creates a clear negative implication that courts *may* count a conviction that has *not* been set aside." *Ante*, at 5. *Expressio unius*, in other words, *est exclusio alterius*.

Even if the premise of the Court's argument is correct,[4] the bridge the Court crosses to reach its conclusion is notoriously unreliable and does not bear the weight here. While "often a valuable servant," the maxim that the inclusion of something negatively implies the exclusion of everything else (*expressio unius*, etc.) is "a dangerous master to follow in the construction of statutes." *Ford* v. *United States*, 273 U. S. 593, 612 (1927) (internal quotation marks and citation omitted). It rests on the assumption that all omissions in legislative drafting are deliberate, an assumption we know to be false. See Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 813 (1983); Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 873–874 (1930). As a result, "[s]cholars have long savaged the *expressio* canon," *Cheney R. Co.* v. *ICC*, 902 F. 2d 66, 68 (CADC 1990) (Williams, J.), at least

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[4]Despite the Court's unstated assumption to the contrary, a sentencing court that finds a prior conviction to have been unconstitutionally obtained can be said to have "set aside" the conviction for purposes of the sentencing, a reading that squares better than the Court's with the evident purpose of the exemption clause (as well as the statute that added it to §921(a)(20), the "Firearm Owner's Protection Act") of disregarding convictions that do not fairly and reliably demonstrate a person's bad character.

when it is made to do the work of a conclusive presumption, and our decisions support the proposition that "[s]ometimes [the canon] applies and sometimes it does not, and whether it does or does not depends largely on context." R. Dickerson, Interpretation and Application of Statutes 47 (1975); see also *id*., at 234–235.

In this case, the "contemporary legal context," *Cannon* v. *University of Chicago*, 441 U. S., at 699, in which Congress drafted the ACCA requires rejecting the negative implication on which the Court relies. That context, as I have described, understood defendants to have a constitutional right to attack at sentencing prior convictions that had not previously been invalidated, and in that legal setting it would have been very odd for Congress to have intended to establish a constitutionally controversial rule by mere implication. See *Lowe* v. *SEC*, 472 U. S. 181, 206 n. 50 (1985) ("In areas where legislation might intrude on constitutional guarantees, we believe that Congress, which has always sworn to protect the Constitution, would err on the side of fundamental constitutional liberties when its legislation implicates those liberties") (internal quotation marks and citation omitted). And in fact the legislative history indicates that quite a different intention informed the addition to §921(a)(20) in 1986, two years after the ACCA's enactment, of the exemption clause (and the related "choice-of-law clause," *Beecham* v. *United States*, *supra*, __ (slip op., at 1). Congress simply intended to clarify that the law of the convicting jurisdiction should be the principal reference point in determining what counts as a "conviction" for purposes of the federal "felon in possession" law, and to correct an oversight that had resulted in the omission of exemption language from one of two parallel provisions. See S. Rep. No. 98–583, *supra*, at 7; H. R. Rep. No. 99–495, p. 20 (1986). In amending §921(a)(20), Congress was not addressing the

question of where, in the course of federal litigation, a conviction could be challenged. Indeed, the legislative history of the amendment reveals no hint of any intention at all with respect to §924(e)'s sentence-enhancement provision, but rather an exclusive focus on the federal firearms disability in §922. Cf. *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, 714–715 (1942) (Frankfurter, J., dissenting) (relying on legislative history to counter a negative implication from a statute's text). As a result, the Court's argument by negative implication from §921(a)(20)'s exemption clause must fail. The fact that Congress in the exemption clause expressly precluded reliance upon unconstitutional convictions that have been set aside simply does not reveal an intent with respect to §924(e) to require reliance at sentencing on unconstitutional convictions that have not yet been set aside.

The Court's second statutory argument also seeks to establish congressional intent through negative implication, but is no more successful. The Court observes that Congress in other statutes expressly permitted challenges to prior convictions during sentencing, see *ante*, at 6–7 (citing 21 U. S. C. §851-(c)(2) and 18 U. S. C. §3575(e)), which is said to show that "when Congress intended to authorize collateral attacks on prior convictions at the time of sentencing, it knew how to do so." *Ante*, at 6. But surely the Court does not believe that, if Congress intended to preclude collateral attacks on prior convictions at the time of sentencing, it did not know how to do that. And again, the Court's effort to infer intent from the statutory silence runs afoul of the context of the statute's enactment; within a legal framework forbidding sentencing on the basis of prior convictions a defendant can show to be invalid, a Congress that intended to require sentencing on the basis of such convictions can be expected to have made its intention explicit.

Finally, the Court turns for support to *Lewis* v. *United States*, 445 U. S. 55 (1980), which held that the federal "felon in possession" law does not permit a defendant, during his prosecution, to challenge the constitutional validity of the predicate felony conviction. The Court's reliance on *Lewis*, however, assumes an equivalence between two different types of laws that *Lewis* itself disclaimed: between a law disabling convicted felons from possessing firearms (at issue in *Lewis*), and a law requiring sentence enhancement based on prior convictions (at issue here, as well as in *Burgett* and *Tucker*). *Lewis* explained that the "felon in possession" law is "a sweeping prophylaxis" designed "to keep firearms away from potentially dangerous persons," 445 U. S., at 63, 67, whereas a sentence-enhancement law "depend[s] upon the reliability of a past . . . conviction," *id*., at 67. While the unlawfulness of a past conviction is irrelevant to the former, it is not to the latter, or so the *Lewis* Court thought in expressly distinguishing *Burgett* and *Tucker:* "[e]nforcement of [the federal gun disability] does not `support guilt or enhance punishment' on the basis of a conviction that is unreliable." 445 U. S., at 67 (quoting *Burgett*, 389 U. S., at 115).

Because of the material way in which a "felon in possession" law differs from a sentence-enhancement law, *Burgett* and *Tucker* were not part of the relevant legal backdrop against which Congress enacted the law interpreted in *Lewis*, and the *Lewis* Court could thus fairly presume that "conviction" in the statute before it was used as shorthand for "the fact of a felony conviction." 445 U. S., at 60, 67. As *Lewis* itself recognized, however, *Burgett* and *Tucker* are part of the backdrop against which sentence-enhancement laws are enacted, and against that backdrop Congress must be presumed to have used "conviction" in §924(e) to mean "lawful conviction," and to have permitted defendants to show at

sentencing that prior convictions offered for enhancement were unconstitutionally obtained.

Even if I thought the ACCA was ambiguous (the most the Court's statutory arguments could establish), I would resolve the ambiguity in petitioner's favor in accordance with the "`cardinal principle'" of statutory construction that "`this Court will first ascertain whether a construction of the statute is fairly possible by which [a constitutional] question may be avoided.'" *Ashwander* v. *TVA*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring) (quoting *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932)); see also *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575 (1988); *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 499–501, 504 (1979); *Blodgett* v. *Holden*, 275 U. S. 142, 148 (1927) (Holmes, J., concurring in result). The *Ashwander* principle, to be sure, comes into play only when the constitutional question to be avoided is a difficult one, but that designation easily fits the question that the Court's reading of the ACCA requires it to decide, the question whether the Constitution permits courts to enhance a defendant's sentence on the basis of a prior conviction the defendant can show was obtained in violation of his right to effective assistance of counsel, see *Strickland* v. *Washington*, 466 U. S. 668 (1984), or that the defendant can show was based on an unknowing or involuntary guilty plea, see *Boykin* v. *Alabama*, 395 U. S. 238 (1969).

This is a difficult question, for one thing, because the language and logic of *Burgett* and *Tucker* are hard to limit to claimed violations of the right, recognized in *Gideon* v. *Wainright*, to have a lawyer appointed if

necessary. As indicated by the uniformity of lower court decisions interpreting them, see p. 3 and n. 3, *supra*, *Burgett* and *Tucker* are easily (if not best) read as announcing the broader principle that a sentence may not be enhanced by a conviction the defendant can show was obtained in violation of any "`specific federal right'" (or, as *Tucker* put it, that a sentence may not be "founded [even] in part upon misinformation of constitutional magnitude," 404 U. S., at 447) because to do so would be to allow the underlying right to be "denied anew" and to "suffer serious erosion," *Burgett*, 389 U. S., at 116 (citation omitted); see also *Tucker*, *supra*, at 449. The Court's references in both *Burgett* and *Tucker* to the right discussed in *Gideon* is hardly surprising; that was the "specific federal right" (and the record of the conviction obtained in violation of it the "misinformation of constitutional magnitude") that the defendants before it invoked. The opinions in both cases, moreover, made it quite clear that the discussion of *Gideon* was not meant to supply a limitation. *Burgett* described *Gideon* not as unique but as "illustrative of the limitations which the Constitution places on state criminal procedures," and it recounted as supportive of its holding cases involving coerced confessions, denials of the confrontation right, and illegal searches and seizures, 389 U. S., at 114; and *Tucker* made it clear that "the real question" before the Court was whether the defendant's sentence might have been different if the sentencing judge had known that the defendant's "previous convictions had been unconstitutionally obtained." *Tucker*, *supra*, at 448.[5]

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[5]The notion that *Burgett* and *Tucker* stand for the narrow principle today's majority describes has escaped the Court twice before. In *Parke* v. *Raley*, 506 U. S. __, __ (1992) (slip op., at 10), the Court rejected the argument that *Burgett* requires states to

Even if, consistently with principles of *stare decisis*, *Burgett* and *Tucker* could be read as applying only to some class of cases defined to exclude claimed violations of *Strickland* or *Boykin*, the question whether to confine them so is not easily answered for purposes of the *Ashwander* rule. *Burgett* and *Tucker* deal directly with claimed violations of *Gideon*, and distinguishing for these purposes between violations of *Gideon* and *Strickland* would describe a very fine line. To establish a violation of the Sixth Amendment under *Strickland*, a defendant must show that "counsel's performance was deficient," and that "the deficient performance prejudiced the defense" in that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U. S., at 687. It is hard to see how a such a defendant is any better off than one who has been denied counsel altogether, and why the conviction of such a defendant may be used for sentence enhancement if the conviction of one who

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place the burden on the government during sentencing to prove the validity of prior convictions offered for enhancement. Though the underlying claim in *Raley* was the same as one of the claims here (that a prior conviction resulted from an invalid guilty plea), the Court did not hold *Burgett* inapposite as involving a *Gideon* violation, but rather accepted *Burgett*'s applicability and distinguished the case on different grounds. See 506 U. S., at __ (slip op., at 10). And in *Zant* v. *Stephens*, 462 U. S. 862 (1983), the Court described *Tucker* as holding that a "sentence must be set aside if the trial court relied at least in part on `misinformation of constitutional magnitude' such as prior uncounseled convictions that were unconstitutionally imposed," 462 U. S., at 887, n. 23 (quoting *Tucker*, 404 U. S. , at 447), clearly indicating an understanding that *Tucker* was not limited to *Gideon* violations.

has been denied counsel altogether may not. The Sixth Amendment guarantees no mere formality of appointment, but the "assistance" of counsel, cf. *Strickland*, *supra*, at 685, 686 ("That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the [Sixth Amendment]" because "the right to counsel is the right to the effective assistance of counsel"), and whether the violation is of *Gideon* or *Strickland*, the defendant has been denied that constitutional right.

It is also difficult to see why a sentencing court that must entertain a defendant's claim that a prior conviction was obtained in violation of the Sixth Amendment's right to counsel need not entertain a defendant's claim that a prior conviction was based on an unknowing or involuntary guilty plea. That claim, if meritorious, would mean that the defendant was convicted despite invalid waivers of at least one of two Sixth Amendment rights (to trial by jury and to confront adverse witnesses) or of a Fifth Amendment right (against compulsory self-incrimination). See *Boykin*, 395 U. S., at 243. It is, to be sure, no simple task to prove that a guilty plea was the result of "[i]gnorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats," *id*., at 242–243, but it is certainly at least a difficult question whether a defendant who can make such a showing ought to receive less favorable treatment than the defendants in *Burgett* and *Tucker*.

Though the Court offers a theory for drawing a line between the right claimed to have been violated in *Burgett* and *Tucker* and the rights claimed to have been violated here, the Court's theory is itself fraught with difficulty. In the Court's view, the principle of *Burgett* and *Tucker* reaches only "constitutional violations ris[ing] to the level of a jurisdictional defect resulting from the failure to appoint counsel at all." *Ante*, at 11 (citing *Johnson* v. *Zerbst*, 304 U. S. 458 (1938)). But nowhere in *Burgett* or *Tucker* is a

distinction drawn between "jurisdictional" and "nonjurisdictional" rights, a fact giving no cause for surprise since long before (in *Waley* v. *Johnston*, 316 U. S. 101 (1942)) "the Court openly discarded the concept of jurisdiction—by then more a fiction than anything else—as a touchstone of the availability of federal habeas review." *Wainwright* v. *Sykes*, 433 U. S. 72, 79 (1977). Nor was *Johson* v. *Zerbst*, on which the Court today places much reliance, a ringing endorsement of a jurisdiction theory. For many years prior to that case, "the concept of jurisdiction . . . was subjected to considerable strain," *Fay* v. *Noia*, 372 U. S. 391, 450 (1963) (Harlan, J., dissenting), and *Johnson* v. *Zerbst* was actually the very last case to mention the idea, offering just "token deference to the old concept that the [habeas] writ could only reach jurisdictional defects." Wechsler, Habeas Corpus and the Supreme Court: Reconsidering the Reach of the Great Writ, 59 U. Colo. L. Rev. 167, 174 (1988)

In reviving the "jurisdiction" theory, the Court skips over the very difficulty that led to its abandonment, of devising a standard to tell whether or not a flaw in the proceedings leading to a conviction counts as a "jurisdictional defect." "Once the concept of `jurisdiction' is taken beyond the question of the court's competence to deal with the class of offenses charged and the person of the prisoner" (as it must be if the concept is to reach *Gideon* violations) "it becomes a less than luminous beacon." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 470 (1963). Thus, if being denied appointed counsel is a "jurisdictional defect," why not being denied effective counsel (treated as an equivalent in *Strickland*)? If a conviction obtained in violation of the right to have appointed counsel suffers from a "jurisdictional defect" because the right's "purpose . . . is to protect an accused from conviction resulting from his own

ignorance of his legal and constitutional rights," *Johnson* v. *Zerbst*, *supra*, at 465, how distinguish a conviction based on a guilty plea resulting from a defendant's own ignorance of his legal and constitutional rights?[6] It was precisely due to the futility of providing principled answers to these questions that more than 50 years ago, and a quarter of a century before *Burgett* and *Tucker*, "[t]he Court finally abandoned the kissing of the jurisdictional book." P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, Hart and Wechsler's The Federal Court and the Federal System 1502 (3d ed. 1988). The Court nevertheless finds itself compelled to re-embrace the concept of "jurisdictional defect," fraught as it is with difficulties, in order to answer the constitutional question raised by its reading of the ACCA. Because it is "fairly possible," *Ashwander*, 297 U. S., at 348, to construe the ACCA to avoid these difficulties and those associated with the other constitutional questions I have discussed, the *Ashwander* rule of restraint provides sufficient reason to reject the Court's construction of the ACCA.

The rule of lenity, "which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose," *Albernaz* v. *United States*, 450 U. S. 333, 342 (1981), drives me to the same conclusion. Though lenity is usually invoked when there is doubt about whether a

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[6]Judge Friendly suggested that a convicting court lacks jurisdiction if "the criminal process itself has broken down [and] the defendant has not had the kind of trial the Constitution guarantees." Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 151 (1970). Would not this definition easily cover the *Strickland* and *Boykin* claims Custis sought to raise at sentencing?

legislature has criminalized particular conduct, "[the] policy of lenity [also] means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ibid*. (internal quotation marks and citation omitted); cf. *Bell* v. *United States*, 349 U. S. 81, 83 (1955) ("It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of harsher punishment"). Because I "cannot say with assurance," *United States* v. *Granderson*, 511 U. S. __, __ (1994) (slip op., at 14), that Congress intended to require courts to enhance sentences on the basis of prior convictions a defendant can show to be invalid, the rule of lenity independently requires interpreting the ACCA to permit defendants to present such challenges to the sentencing judge before sentence is imposed.

The Court invokes "[e]ase of administration" to support its constitutional holding. *Ante*, at 11. While I doubt that even a powerful argument of administrative convenience would suffice to displace the *Ashwander* rule, cf. *Stanley* v. *Illinois*, 405 U. S. 645, 656 (1972), the burden argument here is not a strong one. The burdens of allowing defendants to challenge prior convictions at sentencing are not so severe, and are likely less severe than those associated with the alternative avenues for raising the very same claims.

For more than 20 years, as required by 21 U. S. C. §§851(c)(1) and (2), federal courts have entertained claims during sentencing under the drug laws that prior convictions offered for enhancement are "invalid" or were "obtained in violation of the Constitution," the unamended statute reflecting a continuing congressional judgment that any associat-

ed administrative burdens are justified and tolerable. For almost a decade, federal courts have done the same under the ACCA, see n. 2, *supra*, again without congressional notice of any judicial burden thought to require relief. See also *Parke* v. *Raley*, 506 U. S., at __ (slip op., at 11) ("In recent years state courts have permitted various challenges to prior convictions" during sentencing). As against this, the Court sees administrative burdens arising because "sentencing courts [would be required] to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any of the 50 States." *Ante*, at 11. It would not be sentencing courts that would have to do this rummaging, however, but defendants seeking to avoid enhancement, for no one disagrees that the burden of showing the invalidity of prior convictions would rest on the defendants.

Whatever administrative benefits may flow from insulating sentencing courts from challenges to prior convictions will likely be offset by the administrative costs of the alternative means of raising the same claims. The Court acknowledges that an individual still in custody for a state conviction relied upon for enhancement may attack that conviction through state or federal habeas review and, if successful, "may . . . apply for reopening any federal sentence enhanced by the state sentence." *Ante*, at 12. And the Court does not disturb uniform appellate case law holding that an individual serving an enhanced sentence may invoke federal habeas to reduce the sentence to the extent it was lengthened by a prior unconstitutional conviction. See J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure, §8.2, pp. 62–64 and n. 13.2, and §8.4, p. 89, n. 27 (1993 Supp.) (collecting cases).[7] From the perspec-

[7]*Maleng* v. *Cook*, 490 U. S. 488 (1989), holding that a federal habeas court has jurisdiction to entertain a

tive of administrability, it strikes me as entirely sensible to resolve any challenges to the lawfulness of a predicate conviction in the single sentencing proceeding, especially since defendants there will normally be represented by counsel, who bring efficiency to the litigation (as well as equitable benefits).

Because I cannot agree that Congress has required federal courts to impose enhanced sentences on the basis of prior convictions a defendant can show to be constitutionally invalid, I respectfully dissent.

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defendant's attack on a sentence to the extent it was enhanced by a prior, allegedly unconstitutional conviction, "express[ed] no view on the extent to which the [prior] conviction itself may be subject to challenge in the attack upon the sentenc[e] which it was used to enhance." *Id*., at 494 (citing 28 U. S. C. §2254 Rule 9(a)). Court of Appeals decisions postdating *Maleng* have uniformly read it as consistent with the view that federal habeas courts may review prior convictions relied upon for sentence enhancement and grant appropriate relief. See *Collins* v. *Hesse*, 957 F. 2d 746, 748 (CA10 1992) (discussing *Maleng* and citing cases). In addition, depending on the circumstances, the writ of *coram nobis* may be available to challenge a prior conviction relied upon at sentencing, see *United States* v. *Morgan*, 346 U. S. 502 (1954); *Crank* v. *Duckworth*, 905 F. 2d 1090, 1091 (CA7 1990); *Lewis* v. *United States*, 902 F. 2d 576, 577 (CA7 1990), and, if successful, the defendant may petition the sentencing court for reconsideration of the enhanced sentence, see Restatement (Second) of Judgments §16.