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ONE DAY CRIMINAL CAREERS: THE ARMED CAREER CRIMINAL ACT'S DIFFERENT OCCASIONS PROVISION

JENNY W.L. OSBORNE*

I. INTRODUCTION

It took Thomas Hudspeth and two accomplices exactly thirty-six minutes to burglarize three adjacent stores in an Illinois shopping mall, chopping through the wall to get from one store to another, an escapade that led to a three-count felony indictment. Although he was no doubt unaware of it at the time, Mr. Hudspeth had become a career criminal in just over half an hour. Eight years later, when Mr. Hudspeth was caught with a gun in violation of federal law,¹ his ill-advised night at the mall caught up with him. The Court of Appeals for the Seventh Circuit held that his three mall burglaries had been “committed on occasions different from one another,” triggering a mandatory minimum fifteen-year sentence under the Armed Career Criminal Act (“ACCA”).²

Joe McElyea was luckier. Like the hapless Mr. Hudspeth, he too burgled adjoining stores in a strip mall, and even employed the same tactic of chopping through the wall to get from one store to the other. When he was later caught with a gun, however, he was spared the fifteen-year enhancement because the court said it could not determine whether the strip mall burglaries had actually occurred on different occasions.³ The record did not indicate how long Mr. McElyea had remained in each store or whether it had perhaps been his accomplice who had entered the other store. While the record had been equally vague in Hudspeth’s case, the

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1. 18 U.S.C. § 922(g)(1) (2006) prohibits possession of a firearm by a convicted felon.

2. *United States v. Hudspeth*, 42 F.3d 1015, 1020 (7th Cir. 1994). The ACCA, Pub. L. No. 98-473, 98 Stat. 2185, codified as amended in 18 U.S.C. § 924(e) (2006), provides: “[A] person who violates section 922(g) of this title and has three previous convictions by any court . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another . . . shall be . . . imprisoned not less than fifteen years . . .”

3. *United States v. McElyea*, 158 F.3d 1016, 1021 (9th Cir. 1998).

court relied on police reports,⁴ concluding that he committed three separate burglaries against three separate victims in three separate locations.⁵

Repeat offenders have been the subject of enhanced sentencing laws since colonial times.⁶ There are at least two federal recidivist statutes in addition to ACCA,⁷ and nearly every state has its own sentencing enhancement provision for repeat offenders.⁸ ACCA is different. Intended to target the small group of “hard core” habitual offenders responsible for the lion’s share of violent crime, ACCA has instead been applied as frequently to defendants with relatively minor criminal records and no history of serious violence.⁹ The offender who commits several burglaries (or makes several drug sales) in the space of a few hours is fundamentally different from the career criminal who we imagine to be in and out of detention—the so-called “revolving door” criminal. Yet, the courts have interpreted ACCA to make no distinction. As a result, the fifteen-year enhancement has been applied to hundreds of defendants like Thomas Hudspeth and Joe McElyea, who most people would not describe as “career criminals.”

There seems to be no logical reason why Mr. Hudspeth’s strip mall burglaries made him a career criminal, while Mr. McElyea’s did not. This Article argues that the outcome in Hudspeth’s case should have been the same as in McElyea’s as far as the purpose of ACCA is concerned, and that it would have been the same if both courts had followed the same procedure for considering the record

4. *Hudspeth*, 42 F.3d at 1018 n.3, 1021.

5. *Id.*

6. See *Almendarez-Torres v. United States*, 523 U.S. 224, 243 (1998) (“Recidivism laws have a long tradition in this country that dates back to colonial times” (citing *Parke v. Raley*, 506 U.S. 20, 26 (1992))).

7. See 21 U.S.C. § 841(b) (2006) (“If any person commits a violation of this subparagraph or of section 409, 418, 419, or 420 [21 U.S.C.S. §§ 849, 859, 860, or 861 (2006)] after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence.”); 18 U.S.C. § 3559(c)(1)(A)-(B) (2006) (“[A] person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if the person has been convicted . . . of two or more serious violent felonies; or one or more serious violent felonies and one or more serious drug offenses . . .”).

8. See, e.g., ALA. CODE ANN. § 13A-5-9 (2011) (providing enhanced penalties for “[r]epeat or habitual offenders”); ARK. CODE ANN. §§ 5-4-501, 5-4-504 (1987) (same); ARIZ. REV. STAT. § 13-703 (2011) (same); CAL. PEN. CODE § 667 (2010) (same); COLO. REV. STAT. § 18-1.3-801 (2004) (same); 11 DEL. CODE ANN. § 4214 (2011) (same).

9. See David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guideline Era*, 79 U. COLO. L. REV. 1, 53 (2008) (noting ACCA’s application to “petty offenders . . . [who] had never been to state prison for their crimes . . .”).

of prior convictions. It argues further that the procedure followed by the Ninth Circuit in *McElyea* is now compelled by the Supreme Court's decision in *Shepard v. United States*,¹⁰ and also by the Sixth Amendment right to a jury trial. *Shepard* restricts the evidence that a sentencing court may rely upon to prove a prior conviction under ACCA in order to avoid the sort of judicial fact-finding found constitutionally impermissible in *Apprendi v. New Jersey*.¹¹ In *Apprendi*, the Court held that under the Sixth Amendment, any fact except the fact of a prior conviction that increases a sentence beyond the maximum authorized by statute must be found by a jury beyond a reasonable doubt. Although ACCA sentences rely on the fact of a prior conviction—the *Apprendi* exception—it is the inquiry into the circumstances of those prior convictions that concerned the *Shepard* Court. With the Sixth Amendment in mind, the *Shepard* Court specifically prohibited the use of police reports—which informed the Seventh Circuit's factual conclusion in *Hudspeth*—to determine whether a prior felony was violent for purposes of ACCA.

Shepard was just one of nine ACCA cases to reach the Supreme Court in the last six years.¹² All but three of these cases challenged the definition of a violent felony under the statute's residual clause.¹³ Much of the ACCA scholarship has focused on this issue as well.¹⁴ But equally, if not more, troubling is the way

10. *Shepard v. United States*, 544 U.S. 13 (2005).

11. *Apprendi v. New Jersey*, 530 U.S. 446 (2000). In *Apprendi*, the Court held that under the Sixth Amendment any fact—except the fact of a prior conviction—that increases a sentence beyond the maximum authorized by statute must be found by a jury beyond a reasonable doubt.

12. *Shepard*, 544 U.S. 13; *James v. United States*, 550 U.S. 192 (2007); *Logan v. United States*, 552 U.S. 23 (2007); *United States v. Rodriguez*, 553 U.S. 377 (2008); *Begay v. United States*, 553 U.S. 137 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); *Johnson v. United States*, 130 S. Ct. 1265 (2010); *Sykes*, 131 S. Ct. 2267; *McNeill v. United States*, 131 S. Ct. 2218 (2011).

13. A violent felony under ACCA is defined as “any crime punishable by imprisonment for a term exceeding one year . . . that has as an element the use, attempted use, or threatened use of physical force against the person of another; or is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B) (2006) (emphasis added). The following cases address the definition of violent felony under ACCA's residual clause: *Shepard*, 544 U.S. 13; *James*, 550 U.S. 192; *Begay*, 553 U.S. 137; *Chambers*, 555 U.S. 122; *Johnson*, 130 S. Ct. 1265; *Sykes*, 131 S.Ct. 2267.

14. See, e.g., Jeffrey C. Bright, *Violent Felonies Under the Residual Clause of the Armed Career Criminal Act: Whether Carrying a Concealed Handgun Without a Permit Should Be Considered a Violent Felony*, 48 DUQ. L. REV. 601 (2010) (discussing whether carrying concealed handgun should be considered a violent felony); David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 CONN. L. REV. 209 (2010) (proposing a more faithful interpretation of ACCA's residual clause after *Begay* and *Chambers*); Zlotnick, *supra* note 9, at 52-53 (discussing

in which prior convictions are counted towards the severe fifteen-year sentencing enhancement. A challenge to the interpretation of an “occasion” has yet to reach the Supreme Court despite ongoing inconsistencies in the lower courts, and Congress has made no changes to the statute since 1988. However, with continuous Supreme Court attention to ACCA’s residual clause¹⁵—and Justice Scalia’s recent call to declare ACCA constitutionally void for vagueness¹⁶—Congress may decide to intervene.¹⁷ If it does, such an intervention would present an opportunity to amend the different occasions provision by requiring an intervening conviction or arrest between prior offenses.

Until then, this Article proposes that courts place a higher burden on the government to prove the separateness of prior convictions before applying an ACCA enhancement. In doing so, courts should explicitly apply the *Shepard* source restriction to the different occasions inquiry and clarify what sources are permissible under *Shepard*. But this is only part of the problem. The interpretation of an occasion that treats Thomas Hudspeth’s mall burglaries as offenses occurring on different occasions defies a common sense understanding of the word. It also results in inconsistent and arbitrary outcomes. In the face of a vaguely drafted statute, it is within the power of the courts to develop a sensible standard that more faithfully considers the purpose of ACCA.

Part II of this Article discusses ACCA’s overinclusive and arbitrary application. It begins by examining the statute’s legislative history and explores how this history led to ACCA’s expansive application and the courts’ problematic interpretation of the different occasions provision. Part III analyzes the judicial and

judicial reaction to the broad definition of a violent felony under ACCA); Thomas W. Hillier, *Comparing Three Strikes and the ACCA: Lessons to Learn*, 7 FED. SENT. R. 78 (1994) (noting the broad range of conduct counts as a violent felony under ACCA); James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 558 (2009) (proposing amendments to the substantive categories of predicate offenses that count as violent crime under ACCA’s residual clause).

15. As Justice Scalia noted in his dissent in *Sykes*, “[t]he residual-clause series will be endless, and we will be doing ad hoc application of ACCA to the vast variety of state criminal offenses until the cows come home.” 131 U.S. at 2287.

16. In the fourth ACCA case to reach the Supreme Court since 2007, Justice Scalia declared “[f]our times is enough. We should admit that ACCA’s residual provision is a drafting failure and declare it void for vagueness.” *Id.* at 2284.

17. Indeed, Senator Specter, one of the original drafters of the statute, introduced an ACCA reform bill in the 111th Congress before he left office that proposed to clarify the definition of a violent felony under the Act. Armed Career Criminal Sentencing Act of 2010, S. 4045, 111th Cong. (2010).

scholarly proposals for limiting the scope of the different occasions provision, many of which would require congressional amendment of the statute. Part IV considers a new development in Supreme Court precedent that has presented an additional tool grounded in the Sixth Amendment to limit ACCA's reach. It examines how the different occasions inquiry has been affected by the Supreme Court's decision in *Shepard* and suggests that the best hope of a more appropriate application of the statute lies in this direction. Specifically, this Article argues in Part IV that *Shepard* has narrowed *Apprendi's* prior conviction exception with significant implications for ACCA. Finally, in Part V, this Article proposes that to avoid raising Sixth Amendment concerns, and to limit ACCA enhancements to cases in which they are truly warranted, the government should be required to establish through reliable judicial records that the offenses underlying prior convictions occurred on genuinely different occasions.

II. ACCA'S OVERINCLUSIVE AND ARBITRARY APPLICATION

A. Legislative History of ACCA

The Armed Career Criminal Act was enacted during a period of growing federal concern about violent street crime.¹⁸ In particular, Congress was concerned with those few criminals who were responsible for a disproportionate share of violent crime, and sought to ensure that they were punished severely under federal law.

What eventually became ACCA was first introduced in 1983 as a three strikes bill with a mandatory life sentence after a third armed burglary or robbery.¹⁹ Congress rejected this version of the bill in response to concerns that a life sentence may not be warranted in every case,²⁰ and Senator Arlen Specter reintroduced

18. Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUSTICE 377, 394 (2006) (describing the growing federal emphasis on prosecuting violent crimes). Congress came on board to support the war on crime and drugs, passing a series of laws in the 1980s and 1990s that increased penalties for traditionally state law offenses, primarily those involving drugs and firearms. See, e.g., Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473; Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449; Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; Comprehensive Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789; and the Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, Pub. L. No. 103-322.

19. *Career Criminal Life Sentence Act of 1981: Hearing on S. 1688, S. 1689, and S. 1690 Before the Subcomm. on Juvenile Justice of the S. Comm. on the Judiciary*, 97th Cong. (1982) [hereinafter *CCLSA Hearings*].

20. See S. REP. NO. 97-585, at 77 (1982) ("[I]t was recognized that requiring a life sentence for robbery and burglary was unprecedented.").

the bill with a reduced mandatory penalty of fifteen years.²¹ Violent crime, and robbery and burglary in particular, were on the rise and state prosecutions were not doing enough to keep violent repeat offenders in prison.²² ACCA was intended to devote federal resources to the prosecution of these repeat robbers and burglars.²³ The advantages of federal prosecutions in a limited number of cases would be "(1) faster trials; (2) more restrictive bail; and (3) longer, surer sentences."²⁴ Congress cautioned prosecutors, however, to seek ACCA enhancements in federal court on a limited basis.²⁵ Recognizing that the statute federalized the traditionally local crimes of armed robbery and armed burglary when committed a third time, the bill emphasized that local prosecutors would retain primary control over potential ACCA cases.²⁶

These federalism concerns ultimately killed the three strikes bill when President Reagan refused to sign the crime package into law, citing concerns with the relationship between federal and local prosecutors.²⁷ Senator Specter and Congressman Ron Wyden (D-OR) introduced a revised bill in the 98th Congress that

21. S. 1688, 97th Cong. (1982). Persons committing armed robbery or armed burglary after having been twice convicted of such crimes were subject to a mandatory minimum fifteen year sentence. *Id.* The mandatory minimum was set at fifteen years based on research indicating a criminal career usually begins at age fifteen and ends at age thirty. *See* S. REP. NO. 97-585, at 77 (explaining the rationale behind the fifteen-year mandatory minimum).

22. *See* S. REP. NO. 98-190, at 3, 6 (1983). "Robbery and burglary are more prevalent and have increased faster than any other type of violent crime." *Id.* at 3.

23. *See Armed Career Criminal Act: Hearing on H.R. 1627 and S. 52 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 98th Cong. 19 (1984) (noting the benefits of the Act on both federal and state prosecutions).

24. S. REP. NO. 98-190, at 2.

25. *See* S. REP. NO. 97-585, at 6 ("The bill contemplates diverting a limited number of selected cases from State to Federal court for prosecution.") *See also id.* at 8 ("S. 1688 is intended to supplement state prosecutions, not supersede them. . . . In those jurisdictions, those times, and those specific types of armed robberies and burglaries where the results in the State courts are not adequate, S. 1688 would provide an auxiliary means for protecting public safety."); *see id.* at 65-66:

It is likely that in the vast majority of the several thousand county courts in the United States, few if any cases, would be brought under S. 1688. The statute would only be seriously reviewed for possible application in a relatively small number of jurisdictions when in a relatively small percentage of the cases there was a real question about the ability of the state courts to achieve justice.

26. *See* S. REP. NO. 97-585, at 10 ("S. 1688 contemplates that ordinarily prosecutions under the Act would be initiated upon request of the local prosecuting authority.")

27. *See* S. REP. NO. 98-190, at 3 ("President Reagan declined to sign the [larger crime package of which the bill was a part]. . . . He . . . expressed concern about the jurisdictional nature of the local prosecutor's 'veto' power over Federal prosecutions contained in the career criminal portion of the bill.")

attempted to address the Administration's concerns.²⁸ President Reagan pocket vetoed the bill.

The House eventually proposed making ACCA a penalty provision for violating the federal law prohibiting people with felony convictions from possessing firearms.²⁹ As finally enacted in 1984,³⁰ ACCA applied a fifteen-year mandatory penalty to individuals with three prior convictions for armed robbery or armed burglary who were found to be in possession of a firearm.³¹ By triggering the statute's application after the violation of a federal crime, the bill eliminated federalism concerns.³² However, by using what is essentially a status offense as a trigger, the House bill paved the way for a greatly expanded application of the statute. It placed no time limitations on what might qualify as a prior conviction—despite Senator Specter's conclusion that a criminal career usually ends at age thirty³³—and included no requirement that predicate convictions be separated in time from one another, or indeed even from the triggering offense. In 1986, after concerns over undue interference with local prosecutors dissipated,³⁴ the statute was amended to broaden the scope of prior offenses to “a crime of violence or a serious drug offense.”³⁵ The inclusion of drug offenses was based on the belief that “drugs and violent crime go hand-in-hand.”³⁶ Congress's failure to define precisely the offenses that would count as ACCA predicates would occupy the Supreme Court's docket for years to come.³⁷

28. S. 52, 98th Cong. (1984); H.R. 6248, 98th Cong. (1984).

29. H.R. REP. NO.98-1073, at 5 (1984).

30. Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat. 2185 (1984).

31. *Id.*

32. *Id.*

33. See S. REP. NO. 97-585, at 7 (noting that a criminal career “usually starts at about age 15 and continues to about age 30”).

34. *The Armed Career Criminal Act Amendments: Hearing on S. 2312 Before the Subcomm. on Crim. Law of the S. Comm. on the Judiciary*, 99th Cong. 1 (1986).

35. *Id.* at 2.

36. *Id.* at 5 (statement of Rep. Ron Wyden).

37. *Taylor v. United States*, 495 U.S. 575 (1990) (developing a categorical approach to determine whether a prior offense constitutes a violent felony under ACCA's residual clause); *Shepard*, 544 U.S. at 19 (limiting the sources upon which a sentencing court may rely when determining whether an offense underlying a guilty plea constitutes an ACCA predicate); *James*, 550 U.S. 192 (concluding that attempted burglary is a violent felony for purposes of ACCA); *Rodriguez*, 553 U.S. 377 (interpreting the maximum term of imprisonment for purposes of a “serious drug offense” under ACCA to incorporate recidivist enhancements); *Begay*, 553 U.S. at 148 (“We . . . conclude that . . . ‘driving under the influence’ falls outside the scope of [ACCA's residual clause.]”); *Chambers*, 555 U.S. at 130 (“[W]e conclude that [failure to report to a penal institution] falls outside the scope of ACCA's definition of ‘violent felony.’”); *Johnson*, 130 S. Ct. at 1272 (holding that Florida's definition of battery is not

1. Identifying the Career Criminal

The original bill made clear the statute's intended narrow reach.³⁸ The Senate Report on the bill that originally passed in both the House and the Senate stated that the bill targeted the "most dangerous, frequent, and hardened offenders,"³⁹ those "small number of repeat offenders [who] commit a highly disproportionate amount of the violent crime plaguing America today."⁴⁰ The bill was "very narrowly aimed at the hard core of career criminals with long records for robbery and burglary offenses who now have 'graduated' to the point of dangerousness and recklessness that they are using firearms to commit further robberies and burglaries."⁴¹ This narrow focus was incorporated into the later ACCA bills.⁴² At a House hearing on the bill that was finally passed into law, then Assistant Attorney General Stephen Trott testified about the type of people the statute would target:

These are people who have demonstrated, by virtue of their definition, that locking them up and letting them go doesn't do any good. They go on again, you lock them up, you let them go, it doesn't do any good, they are back for a third time. At that juncture, we should say, "That's it; time out; it is all over. We, as responsible people, will never give you the opportunity to do this again."⁴³

In other words, the statute, according to Trott, envisioned individuals who continued committing crimes after being convicted and serving time in prison.

The statute was drafted based, in part, on recidivism research indicating that two prior robbery or burglary convictions were a reliable proxy for a higher rate of reoffending.⁴⁴ Incorporating the

a violent felony under ACCA's residual clause); *Sykes*, 131 S. Ct. at 2277 ("Felony vehicle flight is a violent felony for purposes of ACCA."); *McNeill*, 131 S. Ct. 2218 (holding that drug offenses with a maximum term of imprisonment of ten years or more at time of conviction are serious drug offenses under ACCA).

38. S. REP. NO. 97-585, at 4.

39. *Id.* at 5.

40. *Id.* at 20. The report relied on research indicating that "approximately six percent of the offenders commit between 50 and 70 percent of the violent crime." *Id.*

41. *Id.* at 62-63. The original bill strictly limited ACCA prosecutions to those robberies and burglaries that are committed with a firearm and by repeat offenders with "substantial" criminal records who "specialize[] in robbery and burglary offenses." *Id.* at 62.

42. See S. REP. NO. 98-190, at 3 ("S. 52 [the revised bill] is substantially similar to S. 1688 [the original bill]" and only "technical changes were made.").

43. *Armed Career Criminal Act: Hearing on H.R. 1627 and S. 52 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 98th Cong. 64 (1984).

44. See S. REP. NO. 97-585, at 21 (reporting on a study by the Rand Corporation which found that a representative sample of California state prisoners who had been convicted for robbery offenses at some point in the past would have committed large numbers of robberies and burglaries in the

likelihood of recidivism into the statute was meant to reduce the need for judges to sentence on a case-by-case basis.⁴⁵

During early hearings on the bill, a testifying researcher discussed eight factors to identify offenders with higher rates of offending.⁴⁶ A record of prior convictions for robbery or burglary was just one of the eight factors. Leading criminologists have criticized the attempt to apply recidivism research to an inflexible decision-making process because even when multiple factors are considered, such predictive modeling is nonetheless prone to substantial error rates.⁴⁷ Perhaps most importantly, for the purposes of this Article, the researcher also noted that the total number of convictions is unrelated to the rate of offending: "The fact that someone is being prosecuted for multiple counts does not have anything to do with the rate of offending. Typically it has to do with one criminal episode rather than a long string of crimes."⁴⁸

2. *The 1988 Petty Amendment*

In 1988, Congress amended ACCA to specify that the three predicate convictions must be for offenses "committed on occasions different from one another."⁴⁹ The statute was amended in response to *United States v. Petty*,⁵⁰ a case in which the defendant

year prior to their most recent incarceration); *see also CCLSA Hearings, supra* note 19, at 98 (statement of Peter Greenwood, Senior Researcher, The Rand Corp., Santa Monica, Cal.) ("The characteristics which identify high-rate burglars and robbers include obviously those who are convicted for robbery and burglary. Offenders convicted of other crimes against the person . . . on the average commit robberies and burglaries at a much lower rate than those convicted of those crimes.").

45. In applying ACCA, judges are instructed to look only at the record of prior convictions: the type of offenses and the occasions on which those offenses occurred. *See Taylor*, 595 U.S. at 602 ("We think the only plausible interpretation of [ACCA] is that . . . it generally requires the trial court to look only to the fact of conviction . . ."). *See also* James E. Hooper, Note, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 MICH. L. REV. 1951, 1962 (1991) (discussing how ACCA was designed to limit judicial discretion by relying on the record of conviction).

46. *CCLSA Hearings, supra* note 19, at 98.

47. *See* Hooper, *supra* note 45, at 1962-63. Hooper notes that attempts to predict future criminality consider "several factors in addition to the number and type of prior offenses—age and socioeconomic status, for example—that tend to predict recidivism." And even in these "broad, multifactor" analyses, "[e]rror rates . . . can be quite substantial; even the better models achieve only seventy percent accuracy." *Id.* (citing JOAN R. PETERSILIA AND SUSAN TURNER, *GUIDELINE-BASED JUSTICE: THE IMPLICATIONS FOR RACIAL MINORITIES* 26 (1985)). ACCA does not even attempt to incorporate multiple factors; instead the statute "classifies criminals based on a much narrower set of facts—number, type, and timing of prior convictions." *Id.*

48. *CCLSA Hearings, supra* note 19, at 98.

49. Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7056, 102 Stat. 4181, 4402 (amending the language of the Armed Career Criminal Act).

50. *United States v. Petty*, 798 F.2d 1157 (8th Cir. 1986) [hereinafter *Petty*]

was sentenced under ACCA based on a six-count robbery conviction resulting from the hold-up of six patrons of a single restaurant. On petition for a writ of certiorari in *Petty*, the Solicitor General, on behalf of the United States, admitted the government's erroneous application of the statute.⁵¹ The Solicitor General's brief acknowledged that, although ACCA lacked the descriptive language found in other recidivist statutes requiring that predicate convictions be for "offenses committed on occasions different from one another," the legislative history made clear that such an interpretation was intended.⁵² Based on a review of the legislative history, the brief concluded that the offenses underlying the prior convictions must be "multiple criminal episodes" that are "distinct in time."⁵³ The Supreme Court reversed *Petty* and remanded for consideration in light of the Solicitor General's brief.⁵⁴ On remand, the Eighth Circuit overturned *Petty*'s conviction, agreeing with the Solicitor General that the statute "was intended to reach multiple criminal episodes that were distinct in time, not multiple felony convictions arising out of a single criminal episode."⁵⁵

Congress responded by amending the statute to reflect the Solicitor General's interpretation. Senator Joseph Biden, former chairman of the Judiciary Committee, included a statement explaining the amendment:

[The amendment] clarifies the armed career criminal statute . . . by inserting language describing the requisite type of prior convictions that trigger the law's mandatory minimum sentencing provisions. . . . Under the amendment, the three previous convictions would have to be for offenses "committed occasions different from one another." Thus, a single multi-count conviction could still qualify where the counts related to crimes committed on different occasions, but a robbery of multiple victims *simultaneously* (as in *Petty*) would count as only one conviction. This interpretation plainly expresses that concept of what is meant by a "career criminal," that is, a person who *over the course of time* commits three or more of the enumerated kinds of felonies and is convicted therefor. It is

I].

51. *United States v. Petty*, 828 F.2d 2 (8th Cir. 1987) [hereinafter *Petty II*] (noting, on remand from the U.S. Supreme Court, that the Solicitor General admitted error in applying an ACCA enhancement to Mr. Petty).

52. *Id.* ("[The Solicitor General] noted that the legislative history strongly supports the conclusion that the statute was intended to reach multiple criminal episodes that were distinct in time, not multiple felony convictions arising out of a single criminal episode."). *See also McElyea*, 158 F.3d at 1020 (explaining the Solicitor General's position that neither Congress nor the United States Department of Justice intended the penalty provision of ACCA to apply more broadly than other federal recidivist statutes).

53. *Id.*

54. *Petty v. United States*, 481 U.S. 1034 (1987).

55. *Petty II*, 828 F.2d at 2.

appropriate to clarify the statute in this regard, both to avoid future litigation and to insure that its rigorous sentencing provisions apply only as intended in cases meriting such strict punishment.⁵⁶

Experience would prove that the 1988 *Petty* amendment clarified only that criminal acts occurring “simultaneously” (as in the *Petty* case itself) would no longer count as more than one predicate offense. The vague phrase “over the course of time” would be interpreted to include a period as short as half an hour, as long as one criminal act could be considered complete before the next one began.⁵⁷

B. Overinclusive Statutory Provisions

ACCA's reach has been expanded over the past two decades well beyond those serious repeat offenders initially targeted by Congress. Individuals sentenced under ACCA include those who have never served prison time and those with no violent criminal history.⁵⁸ Several factors account for ACCA's overly expansive application. In the first place, the conduct triggering its application is frequently neither a violent felony nor a serious drug offense, since the federal felon-in-possession statute is essentially a status offense.⁵⁹ Applying the penalty provision to mere firearm possession, ACCA strays from the original idea of targeting offenders who repeatedly use firearms during the commission of a robbery or burglary.⁶⁰

In addition, a wide range of offenses qualify as violent

56. 134 CONG. REC. S17, 360 (daily ed. Nov. 10, 1988) (statement of Sen. Joseph Biden) (emphasis added).

57. See *infra* Part III.B.

58. Zlotnick, *supra* note 9, at 53.

59. In many cases, years and even decades after committing offenses that qualify as ACCA predicates, mere gun possession triggers application of the statute. See, for example, *United States v. Jemison*, 292 F. App'x 863 (4th Cir. 2008), in which Mr. Jemison was convicted of illegally possessing a firearm that was found on the floorboard of his car after he crashed. Two successive cocaine distribution transactions over a twenty-four hour period nearly twenty years earlier counted toward his three predicate offenses. See also Zlotnick, *supra* note 9, at 52 (noting that “[m]any cases brought in federal court during the pre-Booker period under [ACCA] involved simple gun possession, meaning that the facts did not indicate that the defendant was engaged in any other criminal conduct at the time.”).

60. That simple possession can trigger a mandatory fifteen year sentence is particularly noteworthy given that an individual's right to bear arms is a constitutional right. *District of Columbia v. Heller*, 554 U.S. 570 (2008). The life-time ban on gun possession for people with virtually any prior felony convictions has been criticized as overly harsh and not so firmly rooted in American legal history. See C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695 (2009). However, challenges to the lifetime ban under *Heller* have failed. See, e.g., *United States v. White*, 593 F.3d 1199 (11th Cir. 2010); *United States v. Robinson*, No. 07-CR-202, 2008 U.S. Dist. LEXIS 60070 (E.D. Wis. July 23, 2008).

felonies;⁶¹ no prior conviction is too dated to qualify as a predicate;⁶² drug predicates need not be genuinely serious drug offenses;⁶³ and, finally, the focus of this Article: the different occasions provision has produced an artificially expanded definition of a criminal career.⁶⁴

Judicial interpretation of the different occasions provisions has been a particularly troublesome contributor to ACCA's broad scope largely because it can be satisfied by conduct charged in a single indictment.⁶⁵ Individuals who break into one building and rob three different businesses are eligible for the fifteen-year ACCA enhancement;⁶⁶ as are those who make three different drug

61. See, e.g., Zlotnick, *supra* note 9, at 52-53 ("[ACCA] makes simple burglary a 'crime of violence' . . . [and] [u]nder many state codes, an unarmed break-in of unoccupied dwellings constitutes burglary and therefore qualifies as a crime of violence for purposes of the ACCA.") (citation omitted).

62. See, e.g., *Jemison*, 292 F. App'x at 863 (concluding that two successive cocaine distribution transactions over a twenty-four hour period nearly twenty years earlier count as two prior offenses); *United States v. Hobbs*, 136 F.3d 384 (4th Cir. 1997) (holding that four prior robberies occurring over a few consecutive days nearly twenty years earlier count as ACCA predicates); *United States v. Pope*, 132 F.3d 684, 687 (11th Cir. 1998) (finding that two burglaries committed on the same day more than twenty years earlier count as ACCA predicates); *United States v. Green*, 904 F.2d 654 (holding that a conviction for burglary nearly forty years earlier counts as an ACCA predicate); *United States v. Gautier*, 590 F. Supp. 2d 214, 219 (D. Mass. 2008) (concluding that two prior armed robberies committed ten years earlier when defendant was sixteen years old count as ACCA predicates).

63. For purposes of ACCA, serious drug felonies are those offenses that carry a maximum term of ten years imprisonment. However, recidivist enhancements that increase the maximum term of imprisonment are fair game. For example, a drug offense that carries a maximum sentence of less than ten years but warrants a term of ten years or more when applied to a recidivist counts as an ACCA predicate. See Ethan Davis, Comment, *The Sentence Imposed Versus the Statutory Maximum: Repairing the Armed Career Criminal Act*, 118 YALE L.J. 369 (2008). In addition, many relatively minor state drug offenses include a maximum of at least ten years depending on the drug involved. See Zlotnick, *supra* note 9, at 53 ("[M]ost state drug statutes provide at least a ten-year maximum for the distribution or possession with intent to distribute of any amount of cocaine, heroin, or other serious drugs. Thus, petty offenders, especially drug addicts desperate for a 'fix,' could easily amass the requisite three convictions to qualify for the fifteen-year mandatory, simply by selling small amounts of drugs . . .") (citations omitted).

64. See, e.g., *Jemison*, 292 F. App'x at 863 (finding that two successive cocaine distribution transactions over a twenty-four hour period count as two prior convictions); *United States v. Washington*, 898 F.2d 439 (5th Cir. 1990) (finding that two robberies of the same store clerk committed a few hours apart are separate occasions under ACCA); *United States v. Letterlough*, 63 F.3d 332 (4th Cir. 1995) (finding that two sales of a single crack cocaine dose to the same police officer within ninety minutes are two separate convictions under ACCA).

65. See *infra* Part IV.

66. *Hudspeth*, 42 F.3d at 1015; *United States v. Tisdale*, 921 F.2d 1095 (10th Cir. 1990).

deals in one hour.⁶⁷ Compared with other habitual offender statutes, ACCA's different occasions provision is particularly broad. For example, the federal three-strikes statute, 18 U.S.C. § 3559(c), requires that "each [offense] used as a basis for sentencing . . . [be] committed after the defendant's conviction of the preceding [offense]."⁶⁸ Unlike ACCA, the federal three-strikes statute was carefully drafted to specify that each prior offense be separated by an intervening conviction. Similarly, many states whose codes include habitual offender provisions require an intervening conviction between each prior offense.⁶⁹ As a result of how prior convictions are counted under ACCA—and the relatively minor offenses that can qualify as ACCA predicates—some of the "career criminals" sentenced under the statute have never served time in prison for their prior offenses. David Zlotnick offers an example:

A troubled and alcoholic youth, [Jimmy Sluder] received probation for three unarmed burglaries early in his life. After completing his probation, he was arrested several years later for possession of an unlicensed firearm. Although the state court saw fit to give him only a thirty-day suspended sentence, the federal government prosecuted him under the ACCA, and he received a fifteen-year sentence in federal prison despite never having served any time in state prison.⁷⁰

C. "*Committed on Occasions Different*": Judicial Development of an Overinclusive and Arbitrary Standard

After the *Petty* amendment, there were several directions the courts could have taken to determine the occasions on which prior offenses occurred. They could have interpreted the amendment to include an intervening conviction requirement.⁷¹ They could have applied a case-by-case approach that considers the goals of the statute to target "hard core" repeat offenders. Or, they could have interpreted the amendment to exclude from ACCA's reach only those cases with a particular *Petty*-like factual scenario. In the absence of a clear intervening conviction requirement to guide them, appellate courts chose the latter course, adopting a rigid

67. See, e.g., *Letterlough*, 63 F.3d at 332, 337 (two drug deals over course of hour not continuous course of conduct).

68. 18 U.S.C. § 3559(c)(1)(A)-(B) (2006).

69. See, e.g., ARK. CODE ANN. §§ 5-4-501-504 (2009); ALA. CODE ANN. § 13A-5-9,-10 (2000); CAL. PEN. CODE § 667 (2010); COLO. REV. STAT. 18-1.3-801 (2004); DEL. CODE § 4214 (2011). But see, e.g., MO. REV. STAT. § 558.016(3) (1999) (defining a "persistent offender" as "one who has pleaded guilty to or has been found guilty of two or more felonies committed at different times") (emphasis added).

70. Zlotnick, *supra* note 9, at 53 n.178.

71. This approach was indeed advanced by the Third Circuit early on but has since been abandoned. See *infra* Part III.A.

standard that treats criminal acts as “different” from one another unless they occur virtually simultaneously.⁷² And because it is usually impossible to commit multiple offenses simultaneously,⁷³ the standard that has developed over the past twenty years is one to which *Petty*-like facts may present the only reliable exception.⁷⁴

As they have interpreted the statute, courts define different occasions as “separate and distinct criminal episodes”⁷⁵ that have a discernable beginning and end after which the defendant had an opportunity to refrain from committing the next offense.⁷⁶ Labored language is often used to articulate these separate criminal episodes. For example, the First Circuit describes separate criminal episodes as involving “a time interval during which the defendant successfully has completed his first crime, safely escaped, and which affords defendant a ‘breather,’ viz., a period (however brief) which is devoid of criminal activity and in which he may contemplate whether or not to commit a second crime.”⁷⁷ This is distinguished from “a time lapse which does not mark the endpoint of the first crime, but merely the natural consequence of

72. “Seemingly, the courts have allowed a defendant to be subject to the ACCA in every situation except where there is a true ‘simultaneous’ criminal episode.” *United States v. Brady*, 988 F.2d 664, 674 (6th Cir. 1993) (Jones, J., dissenting).

73. Unless, of course, a single act results in the violation of multiple statutes. The *Hudspeth* Court compared the *Petty*-like scenario, in which “the crime is completed with the single utterance of ‘stick ‘em up,’” with “an individual who violates multiple criminal statutes by a single act.” *Hudspeth*, 42 F.3d at 1021.

74. Indeed, as Judge Flaum noted in his *Hudspeth* dissent, “the import of the post-*Petty* amendment to the ACCA is that Congress has spoken clearly to a particular factual scenario (several robberies accomplished by the same ‘stick-em-up’).” *Id.* at 1026 (Flaum, J., dissenting).

75. *Hobbs*, 136 F.3d at 388.

76. See *Letterlough*, 63 F.3d at 334 (“[A] common sense definition tells us 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. James*, 337 F.3d 387, 391 (2003) (finding two prior burglaries were separate and distinct criminal episodes because “[t]he first burglary was completed before the second started”); *Pope*, 132 F.3d at 692 (“The successful completion of one crime plus a subsequent conscious decision to commit another crime makes that second crime distinct from the first for the purposes of the ACCA.”); *United States v. Hill*, 440 F.3d 292, 297 (6th Cir. 2006) (finding that Hill committed two separate burglaries in one night because, among other things, “it [was] possible to discern the point at which the first offense [was] completed, and the subsequent point at which the second offense [began].”).

77. *United States v. Stearns*, 387 F.3d 104, 108 (1st Cir. 2004). See also *Washington*, 898 F.2d at 442 (The defendant’s “two robberies were separate criminal episodes because he committed the first, completed it, and escaped; then, after a few hours of no criminal activity, Washington returned to commit the second crime.”).

a continuous course of extended criminal conduct.”⁷⁸ The Sixth Circuit has developed a similarly strained definition of a distinct episode: “an incident that is part of a series, but forms a separate unit within the whole. Although related to the entire course of events, an episode is a punctuated occurrence with a limited duration.”⁷⁹

Additional factors incorporated into the analysis of separate and distinct episodes include the geographic location, number of victims, nature of the offenses, method of completion, motive, and time interval between offenses.⁸⁰ None of these factors is necessarily determinative on its own, unless “any one of the factors has a strong presence,” in which case one or two factors “can dispositively segregate an extended criminal enterprise into a series of separate and distinct episodes.”⁸¹ Despite the relevance of time in the common understanding of an occasion, all circuits agree that the time interval between offenses is not dispositive. “Mere temporal proximity” does not “merge multiple offenses into a single criminal episode.”⁸² Even if “the pause between the two offenses [is] brief . . . crimes committed in rapid succession are still committed on different occasions when they ‘reflect distinct aggressions.’”⁸³ With no temporal requirement, criminal careers can begin and end in the space of less than an hour.⁸⁴ Often without giving much thought to the statute’s purpose, courts recite various combinations of the language above to conclude that prior offenses occurred on different occasions. As one judge has noted, “[t]he courts have become masterful in using phrases and concepts such as the acts committed by the defendant were distinct in time, the defendant had successfully completed the first crime and was

78. *Id.*

79. *United States v. Murphy*, 107 F.3d 1199, 1209 (1st Cir. 1997).

80. *See, e.g., Stearns*, 387 F.3d at 108 (“The ‘occasions’ inquiry conceivably may turn upon any combination of circumstances, including (but not limited to) the identity of the victim; the type of crime; the time interval between the crimes; the location of the crimes; the continuity *vel non* of the defendant’s conduct; and/or the apparent motive for the crimes.”); *United States v. Leeson*, 453 F.3d 631, 640-41 (applying the *Letterlough* factors); *Hudspeth*, 42 F.3d at 1023 (“Hudspeth committed three separate crimes, at three separate times, against three separate victims, in three separate locations.”); *United States v. Mucha*, 49 F. App’x 368, 371 (3rd Cir. 2002) (“Though three of the crimes occurred on the same night, they were each committed in different towns against different victims. As such, Mucha had opportunities to cease and desist from further criminal activity.”).

81. *Letterlough*, 63 F.3d at 336.

82. *United States v. Sneed*, 600 F.3d 1326, 1330 (11th Cir. 2010) (quoting *Pope*, 132 F.3d at 690).

83. *United States v. Davidson*, 527 F.3d 703, 707 (8th Cir. 2008).

84. *See, e.g., Hobbs*, 136 F.3d at 384 (holding that multiple prior convictions for offenses that occurred in less than one hour count as ACCA predicates); *Brady*, 988 F.2d at 669 (same); *Washington*, 898 F.2d at 439 (same); *United States v. Antonie*, 953 F.2d 496, 499 (9th Cir. 1991) (same).

free to leave . . . to explain why the case before them” does not represent simultaneous acts.⁸⁵

The rigid standard that has emerged not only turns one night into a career; it produces different outcomes in factually similar scenarios. The divergent outcomes in *McElyea* and *Hudspeth* discussed in the Introduction are only one example of ACCA’s inconsistency.

Compare *United States v. Murphy* with *United States v. Tisdale*. In *Tisdale*, another shopping mall case, the ACCA sentence was upheld where the defendant broke into a shopping mall and burglarized three different businesses. The court found that each burglary constituted a separate crime because “[a]fter the defendant ‘successfully completed’ burglarizing one business, he was free to leave. The fact that he chose, instead, to burglarize another business is evidence of his intent to engage in a separate criminal episode.”⁸⁶ The *Tisdale* court acknowledged that it is impossible to burglarize three separate businesses simultaneously, as the defendant tried to argue based on *Petty*. The fact that the burglaries took place in one “structure” did not persuade the court that these burglaries were committed at the same location.⁸⁷ Factual scenarios like *Hudspeth* and *Tisdale* are common.⁸⁸

In *Murphy*, however, the First Circuit refused to apply an ACCA enhancement where the defendant and an accomplice broke into an apartment complex and burgled two residences next door to one another. While *Murphy* remained in the first residence to prevent the occupant from calling the police, one of his accomplices kicked in the door of the adjacent apartment and robbed the second victim.⁸⁹ The First Circuit rejected an ACCA enhancement because “there exists no principled way of distinguishing between the end of the first burglary and the beginning of the second.”⁹⁰ “Because he never left the first location, he did not ‘successfully complete’ the first burglary until his accomplices completed the second.”⁹¹ *Murphy* could have faced an ACCA enhancement under the reasoning in *Hudspeth* and *Tisdale*, given that two separate

85. *Brady*, 988 F.2d at 674 (Jones, J., dissenting).

86. *Tisdale*, 921 F.2d at 1099.

87. *Id.*

88. See, e.g., *Antonie*, 953 F.2d at 498 (holding that two armed robberies of two different stores in less than an hour are separate predicate offenses); *Mucha*, 49 F. App’x at 371 (finding that three burglaries on the same night are separate ACCA predicates because “they were each committed in different towns against different victims.”); *United States v. Carr*, No. 2:06-CR-14-FL-1, 2008 U.S. Dist. LEXIS 83941 (E.D.N.C. 2008) (“breaking and entering multiple subunits at a single [storage unit] complex constitute separate occasions.”).

89. *Murphy*, 107 F.3d at 1208.

90. *Id.* at 1210.

91. *Id.*

residences and two separate victims were burgled and Murphy was legally responsible for both burglaries.⁹²

Consider also the following cases involving criminal conduct occurring during an escape. In *United States v. Schieman*, the Seventh Circuit upheld an ACCA enhancement where the defendant had completed one burglary and “safely escaped” from the premises at the time he assaulted a police officer who followed him down the street.⁹³ In *United States v. Graves*, when the defendant burgled a home and assaulted a police officer in the woods outside the home, the burglary and assault were held to be part of the same criminal episode because the defendant had not left the location of the first crime when he assaulted the officer.⁹⁴ In *Davidson*, the Eighth Circuit acknowledged the inconsistent results across circuits arising from the problem of “whether to treat as separate occasions . . . the commission of an offense designed to elude apprehension for an underlying offense . . . and . . . the commission of the underlying offense.”⁹⁵ While driving, Davidson assaulted his girlfriend who was a passenger in his car.⁹⁶ When stopped by a deputy sheriff who asked him to step out of the vehicle, Davidson sped away.⁹⁷ The court ultimately concluded that Davidson’s offenses of attempted domestic assault on his girlfriend and resisting arrest by fleeing were committed on different occasions.⁹⁸ The court reasoned that “when the deputy sheriff stopped Davidson’s vehicle . . . Davidson’s attempted assault on his girlfriend . . . had concluded, and the traffic stop represented a discernible pause in activity during which Davidson had an opportunity to cease and desist from further criminal activity.”⁹⁹ The court distinguished *Graves*, concluding that the traffic stop presented a “moment of relative calm” not present in

92. In a case similar to *Murphy*, the Fourth Circuit held that there was not enough information in the record to conclude that a defendant’s burglaries of two storage units occurred on separate occasions because it was unclear whether the defendant had entered both storage units himself sequentially or “simultaneously with the aid of his accomplice.” *United States v. Tucker*, 603 F.3d 260, 266-67 (4th Cir. 2010).

93. *United States v. Schieman*, 894 F.2d 909, 913 (7th Cir. 1990). In dissent, Judge Ripple argued that the defendant’s crimes were committed on the same occasion because “a burglary and the immediate escape” are “part of the same operation or episode” where one is the “continuation of the other.” *Id.* at 915 (Ripple, J., dissenting). Judge Ripple argued that the standard for determining separateness should be more “rigorous” than the majority had treated it. *Id.*

94. *United States v. Graves*, 60 F.3d 1183, 1187 (6th Cir. 1995).

95. *Davidson*, 527 F.3d at 708.

96. *Id.* at 707.

97. *Id.*

98. *Id.* at 710.

99. *Id.*

Graves.¹⁰⁰

Left with little guidance after *Petty*, the courts of appeal have developed a standard that reflects the most restrictive interpretation of Congress's attempt to clarify the statute. As the dissent in *Hudspeth* observed, resolution of the occasions inquiry involves less a case-by-case determination of separateness and more a rigid application of pre-determined factors:

The majority concludes that *Hudspeth* ought to receive the ACCA enhancement on the basis of his three distinct aggressions against three separate victims in three separate locations. This approach has the apparent virtue of drawing a bright-line (between simultaneous and sequential crimes) . . . though I believe its mechanical application would lead to just as many, if not more, arbitrary results as a case-by-case approach would produce.¹⁰¹

The dissent went on to illustrate the arbitrary nature of the court's analysis:

The majority appears to admit that the assailant who enters an apartment with an automatic weapon and shoots several people with one burst of his weapon is not subject to the provisions of this statute. On the other hand, if he takes several steps around the room divider and shoots several others, the statute becomes operative because, at least in some metaphysical sense, he had time to think about the second pull of the trigger. The crimes above no doubt deserve severe punishment. However, it is difficult to see, and Congress certainly did not intend, that one, but not the other, individual be treated as a recidivist.¹⁰²

All that remains clear after *Petty* is that an intervening conviction between offenses is not required, and the simultaneous robbery of six restaurant patrons is to be counted as a single occasion.¹⁰³

100. *Id.*

101. *Hudspeth*, 42 F.3d at 1026 (Flaum, J., dissenting).

102. *Id.* at 1037 (Ripple, J., dissenting).

103. *See Brady*, 988 F.2d at 674 (Jones, J., dissenting) ("Congress did not explicitly instruct the courts on how to deal with the large, undefined, murky middle ground that rests between *Balascsak* and *Petty* . . ."). In a concurring opinion rejecting an ACCA enhancement, Judge Clay of the Sixth Circuit suggested that the different occasions provision may make the statute unconstitutionally void for vagueness. *United States v. Thomas*, 211 F.3d 316, 323 (6th Cir. 2000) (Clay, J., concurring). In Judge Clay's view, "the case law fails to provide the requisite guidance to resolve the case and permit us to determine the outcome." *Id.* at 322. "In attempting to remove the ambiguity, case law interpreting the language 'committed on occasions different from one another' has led to inconsistent outcomes in our Court as well as other Circuits." *Id.* "[W]ere it not for the rule of lenity, it is possible that this thoroughly ambiguous statute could be declared unconstitutional on the ground that it is void for vagueness." *Id.* at 323.

III. EFFORTS TO LIMIT ACCA'S REACH

Almost as soon as it was enacted, ACCA was widely criticized for its overinclusive application, particularly relating to how prior convictions are counted as predicates.¹⁰⁴ Early attempts to consider the purpose of the statute rejected the notion that a one-night crime spree could amount to multiple criminal episodes. For example, finding that four prior convictions for kidnapping and assault committed on two separate days, "arose out of two, not three, distinct criminal episodes," the Second Circuit in *United States v. Towne*¹⁰⁵ noted: "It seems quite clear that [ACCA] was intended to target recidivists, i.e., those who have engaged in violent criminal activity on at least three separate occasions, and not individuals who happen to acquire three convictions as a result of a single criminal episode. . . ." In rejecting the ACCA enhancement in *McElyea*, the Ninth Circuit found that a defendant who "committed two identical crimes in basically the same location within a short time period . . . does not meet the profile of a career criminal envisioned by Congress."¹⁰⁶ A few years after *Petty* was decided, a panel of the Sixth Circuit rejected an ACCA enhancement, finding that "Congress sought to target career criminals with this statute, and we cannot agree with our sister circuits that a career logically comprises the events of a single evening."¹⁰⁷ The Sixth Circuit ultimately reversed this judgment in a rehearing en banc. The court upheld the ACCA enhancement after applying the familiar set of factors: "[The defendant] committed crimes against different victims at different places and at distinctly different times."¹⁰⁸ Despite these few early attempts, the courts of appeal have come to agree that the statute does not exclude individuals with one-night criminal careers.

Proposals to address the overbreadth of the different occasions inquiry generally fall into two categories: (1) use an

104. Critics have cited many issues with the ACCA's breadth, including: (1) mere possession as the triggering offense, e.g., Steven R. Sady, *The Armed Career Criminal Act – What's Wrong with "Three Strikes, You're Out?"*, 7 FED. SENT. R. 69 (1994); Zlotnick, *supra* note 9, at 52-54; (2) the broad definition of violent felony, e.g., Hillier, *supra* note 14, at 78; Levine, *supra* note 14, at 537; Zlotnick, *supra* note 9, at 1, 52-53; (3) the absence of any time limits on qualifying prior convictions, e.g., Sady, *supra* note 104, at 69; Levine, *supra* note 14, at 537; (4) the use of recidivist enhancements to count toward statutory maximum sentence requirements for prior qualifying drug crimes, e.g., Davis, *supra* note 63, at 369, 375; and (5) the confusion over how to define separate occasions, e.g., Hooper, *supra* note 45, at 1951, 1957; Derrick D. Crago, Note, *The Problem of Counting to Three Under the Armed Career Criminal Act*, 41 CASE W. RES. 1179 (1991).

105. *United States v. Towne*, 870 F.2d 880, 891 (2d Cir. 1989).

106. *McElyea*, 158 F.3d at 1021.

107. *United States v. Brady*, 960 F.2d 35, 40 (6th Cir. 1992).

108. *Brady*, 988 F.2d at 669.

intervening convictions approach; or (2) model ACCA on the career offender provision of the federal sentencing guidelines.

A. *The Intervening Convictions Approach*

In its 1989 en banc decision in *United States v. Balascsak*,¹⁰⁹ the Third Circuit interpreted the *Petty* Amendment to require an intervening conviction between prior qualifying offenses. The court reversed the ACCA application in a case in which two of the three predicate offenses involved two burglaries committed sometime between 10:45 PM on July 10, 1981, and 7:00 AM the next day. Judge Gibbons, writing for the majority, was concerned that “committed on occasions different from one another” was a “malleable standard[] . . . susceptible of applications inconsistent with the congressional purpose.”¹¹⁰ In searching for “small temporal distinctions,” courts would neglect to consider “the underlying purpose of the statute.”¹¹¹ The majority concluded that “[w]e could hardly attribute to Congress the intention of branding someone a career criminal offender who, for example, committed several separate felonies during a single drunken spree, with no time to sober up and reconsider between the separate incidents.”¹¹² Congress must have intended to require an intervening conviction between each previous offense, Judge Gibbons reasoned, because this is the only practical way to avoid the “cumbersome procedure [of] taking evidence and evaluating the precise temporal, spatial, or jurisprudential relationship between two crimes.”¹¹³ *Balascsak* was soon overruled, however, and the Third Circuit joined the remaining circuits in rejecting the intervening convictions approach.¹¹⁴

Supporters of the intervening convictions approach argue that this requirement best realizes Congress’s intent to target those who have had a chance to be rehabilitated in prison but have gone on to commit additional crimes after release.¹¹⁵ Such a

109. *United States v. Balascsak*, 873 F.2d 673 (3d Cir. 1989).

110. *Id.* at 683.

111. *Id.*

112. *Id.* at 683.

113. *Id.* at 684. Concurring, Judge Becker disagreed with the intervening conviction approach, but thought the government should be required to prove a degree of temporal separateness between criminal acts. *Id.* at 685 (Becker, J., concurring).

114. See *United States v. Schoolcraft*, 879 F.2d 64, 73-74 (1989) (overruling the intervening conviction approach endorsed by *Balascsak* because other courts of appeal “have held that the individual convictions may be counted for purposes of sentencing enhancement so long as the criminal episodes underlying the convictions were distinct in time” and because “the statute does not require that the three predicate offenses be separated by intervening convictions.”).

115. See *Balascsak*, 873 F.2d at 682 (citing Assistant Attorney General

requirement is incorporated in most state habitual offender statutes.¹¹⁶ However, settled consensus among the courts acknowledges that if Congress had intended ACCA predicates to be separated by intervening convictions, it would have drafted the statute accordingly, as it has done with other recidivist statutes.¹¹⁷ Moreover, the Supreme Court has clarified that in the absence of clear statutory language requiring an intervening conviction between offenses, a conviction need not include both an adjudication of guilt and a sentence.¹¹⁸ In *Deal v. United States*,¹¹⁹ the Court held that a conviction for purposes of stacking mandatory minimums under 18 U.S.C. § 924(c)(2) “refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final *judgment of conviction*.”¹²⁰ The Court’s approach to statutory construction in *Deal* supports a conclusion that a defendant who is convicted of three counts of burglary arising out of conduct in a single evening, and who receives a single sentence imposed on one day, has three separate convictions for purposes of ACCA.

B. *The Career Offender Sentencing Guidelines as a Model for ACCA*

Scholars have suggested that ACCA be modeled on the career offender provision of the Federal Sentencing Guidelines.¹²¹ Both

Trott’s statement at the Congressional hearings on ACCA, where he described career criminals as those “people who have demonstrated . . . that locking them up and letting them go doesn’t do any good.”); Crago, *supra* note 104, at 1194-95. Crago argues that because the original bill was a three strikes bill and the final bill was only meant to address federalism concerns by triggering the statute’s application with a violation of 922(g)(1), “at an absolute minimum, two convictions should be in place before commission of the crime underlying the third required conviction.” *Id.* at 1193. In other words, Thomas Hudspeth’s three convictions for burglarizing three stores in one half hour should count, at most, as two ACCA predicates. Jim Levine argues for an intervening arrest between predicate offenses. Levine, *supra* note 14, at 540.

116. See *supra* text accompanying note 69.

117. See 18 U.S.C. § 3559(c)(1)(A)-(B) (2006) (“[A] person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if the person has been convicted . . . of two or more serious violent felonies; or one or more serious violent felonies and one or more serious drug offenses; and *each [offense] used as a basis for sentencing under this subsection, other than the first, was committed after the defendant’s conviction of the preceding [offense].*”) (emphasis added).

118. *Deal v. United States*, 508 U.S. 129 (1993).

119. *Id.*

120. *Id.* at 132 (emphasis added).

121. See, e.g., Hooper, *supra* note 45, at 1986 (proposing that the Guidelines concept of a criminal occasion be applied to ACCA); Sady, *supra* note 104, at 69 (arguing that the Guidelines’ treatment of priors and the option to depart for mitigating circumstances offers a “more rational” approach than “ACCA’s blind rigor”); Levine, *supra* note 14 (proposing that ACCA be amended to be

ACCA and the career offender guideline target the same type of repeat offender and both were enacted in the same bill. The United States Sentencing Guidelines, which went into effect in 1987, include a provision for sentencing "career offenders." Under the Guidelines,

[a] defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.¹²²

Before 2007, the career offender guideline had a test similar to ACCA for counting predicate offenses. The guideline provided that "[p]rior sentences imposed in *related cases* are to be treated as one sentence" for purposes of assigning criminal history points.¹²³ The commentary to the Guidelines directed courts to treat cases as related "if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing."¹²⁴ Under the pre-2007 Guidelines, courts used factors similar to those used in ACCA cases to define whether offenses occurred on separate occasions.¹²⁵

The career offender guideline was amended in 2007 to address confusion in determining relatedness of prior sentences and whether to count them separately or together for purposes of the career offender enhancement.¹²⁶ The United States Sentencing

consistent with the Guidelines approach to calculating criminal history).

122. United States Sentencing Guidelines, 18 U.S.C.A. Appx. § 4B1.1 (West 2011).

123. See U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 89-90 (May 11, 2007), available at http://www.ussc.gov/Legal/Amendments/ReaderFriendly/20070501_RF_AmendAmend.pdf (referencing the pre-amendment Definitions and Instructions for Computing Criminal History, Section 4A1.2(a)(2)) (emphasis added).

124. See *id.* at 92 (referencing the pre-amendment commentary to Section 4A1.2, cmt. 3).

125. *United States v. Moreno-Arredondo*, 255 F.3d 198, 207 (5th Cir. 2001) ("Even though the two offenses were not committed simultaneously (but they almost were) and were not committed against the same victim (but the victims were closely related to each other and had a relationship with the defendant), they were the identical offense, were committed at the identical geographic location, and were barely separated in time literally by a matter of minutes.").

126. See Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28,558, 28,575 (May 21, 2007) ("The Commission has heard from a number of practitioners throughout the criminal justice system that the 'related cases' rules . . . are too complex and lead to confusion. Moreover, a significant amount of litigation has arisen concerning application of the rules, and circuit conflicts have developed over the meaning of terms in the commentary that define when prior sentences may be considered 'related.'").

Commission responded to input from federal judges, prosecutors, defense counsel, probation officers, and academics who were concerned with the instructions for determining prior related sentences.¹²⁷ The amended guideline states that convictions not separated by an intervening arrest are “counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day.”¹²⁸ To determine the applicability of the career offender guideline, courts are no longer faced with questions of whether prior sentences were related and occurred on the same occasion. They must simply determine whether prior sentences not separated by an intervening arrest were for offenses contained in the same charging instrument or were imposed on the same day.¹²⁹

Recognizing that this simplified approach to counting prior offenses may understate the seriousness of a particular offender’s criminal history, the Commission noted that courts may increase criminal history points for prior crimes of violence,¹³⁰ and they may depart upward from the guideline range.¹³¹ Courts may also

127. 72 Fed. Reg. 28,558.

128. 18 U.S.C.A. Appx. § 4A1.2(a)(2) (West 2011).

129. See Sentencing Guidelines for United States Courts, 72 Fed. Reg. at 28,576. “Under the amendment, the initial inquiry will be whether the prior sentences were for offenses that were separated by an intervening arrest (i.e., the defendant was arrested for the first offense prior to committing the second offense). If so, they are to be considered separate sentences, counted separately, and no further inquiry is required. If the prior sentences were for offenses that were not separated by an intervening arrest, the sentences are to be counted as separate sentences unless the sentences (1) were for offenses that were named in the same charging document, or (2) were imposed on the same day. In either of these situations they are treated as a single sentence.”). *Id.*

130. See *id.* at 28,558, 28,575 (“[I]f a defendant’s criminal history contains two robbery convictions for which the defendant received concurrent five-year sentences of imprisonment and the sentences are considered a single sentence because the offenses were not separated by an intervening arrest and were imposed on the same day, a total of 3 points would be added under § 4A1.1(a). An additional point would be added under § 4A1.1(f) because the second sentence was for a crime of violence . . .”).

131. See United States Sentencing Guidelines, 18 U.S.C.S. Appx. § 4A1.2, n.3 (West 2011).

Counting multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant’s criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were counted as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant’s criminal history or the frequency with which the defendant has committed crimes.

depart downward from the guideline range in consideration of sentencing goals laid out in 18 U.S.C. § 3553(a).¹³² A recent case in the Southern District of West Virginia illustrates an example of the court's discretion in avoiding the career offender guideline:

Both offenses involved the distribution of small, user amounts of drugs, and both offenses lack temporal proximity to either each other or the present offense. In fact, the two prior offenses are each over a decade old. . . . Mr. Moreland has not engaged in a "career" of crime and has not subsisted on a criminal livelihood. He is a 34 year-old man who has made both good and bad decisions in his life. He has not, however, demonstrated the pattern of recidivism or violence that would justify disposal to prison for a period of 30 years to life. One of the goals of sentencing remains the rehabilitation of convicts. I find that Mr. Moreland has an excellent chance of turning his life around after he completes his substantial sentence.¹³³

Scholars have suggested that this type of straightforward rule with built-in discretion mechanisms is necessary for a mandatory minimum sentencing provision like ACCA.¹³⁴ Like the career offender guideline, ACCA offers the same sentence range regardless of the severity of the crimes. However, as a mandatory sentencing provision, ACCA leaves courts without the flexibility that is built into the Guidelines.

Like the intervening conviction approach, the career offender guidelines approach would involve statutory amendment.

Id.

132. 18 U.S.C. § 3553(a) (2011). Section 3553(a) provides, in part: "Factors to be considered in imposing a sentence. . . . The court, in determining the particular sentence to be imposed, shall consider: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . ." *Id.*

133. *United States v. Moreland*, 568 F. Supp. 2d 674, 687 (S.D. W. Va. 2008). As the district court noted in *United States v. Carvajal*, "Punishment should not be more severe than that necessary to satisfy the goals of punishment." No. 04 Cr. 222 (AKH), 2005 U.S. Dist. LEXIS 3076, at *16 (S.D.N.Y. Feb. 17, 2005).

134. See, e.g., Hooper, *supra* note 45, at 1995-97 (arguing that some degree of discretion when applying ACCA will produce outcomes more consistent with the career offender guidelines and with congressional intent); Sady, *supra* note 104, at 71 (arguing that like the sentencing guidelines, ACCA should incorporate "the availability of departure for extraordinary mitigating factors [as] a safety valve for cases in which career offender treatment is irrationally harsh"); Levine, *supra* note 14, at 556 (proposing that ACCA be amended to incorporate the discretion for courts to consider "whether the offender had an opportunity to be rehabilitated or deterred after committing each of the felonies.").

Congress has made no changes to the statute since 1988, but with recent Supreme Court attention to ACCA's definition of violent felony—and Justice Scalia's call to declare ACCA constitutionally void—Congress may decide to intervene. Such an intervention would present an opportunity to address the different occasions provision as well the statute's residual clause.

IV. *SHEPARD* AND THE SCOPE OF THE PRIOR CONVICTION EXCEPTION

A more promising, if less direct, approach to limiting ACCA's reach is suggested by two Supreme Court decisions restricting the sources of information a sentencing court may consider in applying ACCA. One of the most heavily litigated elements of ACCA is whether a prior conviction meets the statute's definition of a violent felony.¹³⁵ In *Taylor v. United States*,¹³⁶ the Supreme Court specified the general categorical rule that a sentencing court may not examine the facts underlying a conviction for burglary to determine whether it was a violent felony.¹³⁷ However, in the limited cases where a state's statutory definition of burglary is broader than the definition of "generic burglary" under ACCA,¹³⁸ *Taylor* outlined a modified categorical approach that permits a sentencing court to consider the statutory elements, the charging documents, and the jury instructions to determine whether the prior conviction was for generic burglary.¹³⁹

Fifteen years later, the Supreme Court addressed the same issue in the plea context. In *Shepard*,¹⁴⁰ the defendant pled guilty to four prior burglary convictions, but nothing in the record indicated that the defendant had admitted to the generic element of burglary that qualifies as an ACCA predicate. The government attempted to introduce police reports to support the argument that the defendant's guilty plea constituted an admission to generic burglary.¹⁴¹ The Supreme Court rejected the use of police reports, holding that a sentencing court may not consider facts about a prior conviction unless those facts are based on judicial records of "conclusive significance."¹⁴² Such records include the plea colloquy

135. See *supra* note 13.

136. *Taylor v. United States*, 495 U.S. 575 (1990).

137. *Id.* at 600.

138. For example, a state burglary statute that includes burglary of boats or automobiles is broader than ACCA. See *Taylor*, 495 U.S. at 598-99 (interpreting the definition of burglary under ACCA to include the "generic, contemporary meaning of burglary . . . : an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.").

139. *Id.* at 602.

140. *Shepard*, 544 U.S. at 13.

141. *Id.* at 17-18.

142. *Id.* at 25.

between the defendant and the judge, a written plea agreement presented to the court, or a “record of comparable findings of fact adopted by the defendant upon entering the plea.”¹⁴³ Information in police reports lacks conclusive significance because such information is not necessarily charged in an indictment and admitted by a defendant, and it is usually information that is unnecessary for a jury to convict.¹⁴⁴ In both the plea and trial contexts, the modified categorical approach “permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record—including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms.”¹⁴⁵

Shepard's holding has constitutional dimension. The source restriction is meant, in part, to protect the Sixth Amendment right to a jury trial by limiting the extent to which the court can use prior convictions to increase the maximum penalty under 922(g).¹⁴⁶ In *Apprendi v. New Jersey*,¹⁴⁷ the Supreme Court held that under the Sixth Amendment, any fact that increases the maximum penalty prescribed by statute¹⁴⁸ must be submitted to a jury and proved beyond a reasonable doubt, or admitted by the defendant in a guilty plea.¹⁴⁹ The one exception preserved by *Apprendi* is “the fact of a prior conviction.”¹⁵⁰ A few years earlier in *Almendarez-Torres v. United States*,¹⁵¹ the Supreme Court upheld against a due process challenge the use of a prior conviction to enhance a sentence, finding that recidivism is a “traditional, if not the most traditional” basis for increasing a sentence. In applying the prior conviction exception to the Sixth Amendment, the *Apprendi* Court

143. *Id.* at 20.

144. *Id.* at 16.

145. *Johnson*, 130 S. Ct. at 1273.

146. *Shepard*, 544 U.S. at 24. The maximum penalty for possession of a firearm by a felon is ten years. 18 U.S.C. § 924(a)(2) (2006).

147. *Apprendi v. New Jersey*, 530 U.S. 466 (2001).

148. The statutory maximum is “the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant.” *Blakely v. Washington*, 542 U.S. 296, 303 (2004). Any facts supporting a sentence that exceeds the maximum authorized by the facts found by a jury or admitted by the defendant must be proved to a jury beyond a reasonable doubt. *United States v. Booker*, 543 U.S. 220, 244 (2005).

149. *Apprendi*, 530 U.S. at 490.

150. *Id.* (“[O]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”).

151. *Almendarez-Torres v. United States*, 523 U.S. 224, 243 (1998). The Court rejected *Almendarez-Torres'* due process argument holding that use of a prior conviction is a sentencing enhancement, not an element of an offense, and therefore need not be proven beyond a reasonable doubt. *Id.* at 244-47. *Apprendi* upheld the use of a prior conviction as an exception to the rule that such facts must be submitted to a jury. *Apprendi*, 530 U.S. at 490.

reasoned that “the certainty that procedural safeguards attach[] to any ‘fact’ of prior conviction . . . mitigate[s] the . . . Sixth Amendment concerns.”¹⁵²

In determining the scope of a sentencing court’s inquiry into a prior conviction, *Shepard* distinguished the fact of a prior conviction, which *Apprendi* said need not be proved, from facts *about* a prior conviction, which must be based on reliable judicial records.¹⁵³ Rejecting the use of unreliable sources like police reports, the Court reasoned that “allowing a broader evidentiary enquiry” into facts about a prior conviction implicated the judicial fact-finding proscribed by *Apprendi* by allowing the sentencing court to make a disputed finding of fact about the prior conviction that “is too far removed from the conclusive significance of a prior judicial record.”¹⁵⁴ In his *Shepard* concurrence, Justice Thomas took the argument a step further, concluding that expanding the evidentiary inquiry into facts about a prior conviction “would not give rise to constitutional doubt . . . [but] to constitutional error . . .”¹⁵⁵

A. *Shepard’s Application to the Different Occasions Inquiry*

Although *Shepard* addressed the definition of a violent felony under ACCA, most circuits have extended its reach to the different occasions inquiry.¹⁵⁶ Most recently, in 2010, the Eleventh Circuit

152. *Apprendi*, 544 U.S. at 488.

153. The *Shepard* Court stated:

[T]he Sixth and Fourteenth Amendments guarantee . . . a jury’s finding of any disputed fact essential to increase the ceiling of a potential sentence. While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute. The rule of reading statutes to avoid serious risks of unconstitutionality . . . counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea . . .

Shepard, 544 U.S. at 25-26.

At least one circuit has held that facts about an offense underlying a prior conviction must be alleged in the indictment leading to that conviction. *United States v. Washington*, 404 F.3d 834, 841-43 (4th Cir. 2005).

154. *Shepard*, 544 U.S. at 25. The Supreme Court has since questioned the *Almendarez-Torres* exception, but only Justice Thomas has explicitly called for overruling it. *Id.* at 27-28. Justice Thomas likewise questioned the constitutional “firmity” of *Shepard* and *Taylor*, finding that these cases “explain to lower courts how to conduct factfinding that is, according to the logic of this Court’s intervening precedents, unconstitutional in this very case.” *Id.* at 27 (Thomas, J., concurring).

155. *Id.* at 28. Justice Thomas further suggested that *Taylor’s* and *Shepard’s* decision to “explain to lower courts how to conduct factfinding” is unconstitutional in light of *Apprendi*.

156. *See, e.g., United States v. Thompson*, 421 F.3d 278 (4th Cir. 2005) (“ACCA’s use of the term ‘occasion’ requires recourse only to data normally

overruled its earlier decision in *United States v. Richardson*,¹⁵⁷ which held that a sentencing court could consider police reports to determine whether prior offenses occurred on separate occasions.¹⁵⁸ Noting the constitutional issues raised by the intervening *Apprendi* and *Shepard* decisions, the court held that “[b]ased on *Shepard*, there is simply no distinction left between the scope of permissible evidence that can be used to determine if the prior convictions are violent felonies or serious drug offenses or if they were committed on different occasions”¹⁵⁹

The result of *Shepard*'s application in many cases has been a rejection of an ACCA enhancement because the record of a prior conviction is incomplete or based on unreliable sources. In *Fuller*, for example, the Fifth Circuit reversed an ACCA enhancement based on an absence in the record of “*Shepard*-approved material that might resolve the question” of whether the prior burglaries occurred on different occasions.¹⁶⁰ The defendant, Troy Fuller, had been pulled over at a checkpoint and asked about his citizenship.¹⁶¹ He evaded questioning and refused consent to search his car. Eventually, Mr. Fuller's car was searched anyway and border patrol agents found a loaded pistol under the front passenger seat.¹⁶² It had been more than two decades since Mr.

found in conclusive judicial records, such as the date and location of an offense, upon which *Taylor* and *Shepard* say we may rely.”); *United States v. Thomas*, 572 F.3d 945, 950-51 (D.C. Cir. 2009) (recognizing that *Shepard* applies to the different occasions inquiry); *United States v. Williams*, 223 F. App'x 280, 282-83 (4th Cir. 2007) (applying *Shepard* to the different occasions inquiry); *United States v. Harris*, 447 F.3d 1300, 1305 (10th Cir. 2006) (same); *United States v. Fuller*, 453 F.3d 274, 278-79 (5th Cir. 2005) (same); *Sneed*, 600 F.3d at 1326 (applying *Shepard* and overruling its earlier decision holding that a sentencing court may look at police reports to determine whether prior offenses were separate). The Eighth Circuit appears to be the only circuit that does not apply the *Shepard* source restriction to the separate occasions inquiry. See *Davidson*, 527 F.3d at 707 (relying on *United States v. Boyles*, 235 F.3d 1057, 1057 (8th Cir. 2000), which held that *Taylor* “do[es] not limit the evidence a sentencing court may examine to decide whether earlier offenses were committed on different occasions.”). The First Circuit has not yet ruled on the issue. See *Gautier*, 590 F. Supp. 2d at 230.

157. *United States v. Richardson*, 230 F.3d 1297 (11th Cir. 2000).

158. *Sneed*, 600 F.3d at 1326. The Eleventh Circuit recently avoided the application of *Shepard*. See *United States v. Canty*, 570 F.3d 1251, 1257 (11th Cir. 2009). In *Canty*, the Eleventh Circuit rejected a sentencing enhancement under ACCA because the PSR did not include, and the government did not request, any findings about whether the defendant's prior crimes of escape and obstructing an officer were committed on different occasions. *Id.* at 1257. In doing so, the court avoided the application of *Shepard*, refusing to overrule *Richardson*. *Id.* at 1256.

159. *Sneed*, 600 F.3d at 1332-33.

160. *Fuller*, 453 F.3d at 279-80.

161. *Id.* at 275.

162. *Id.*

Fuller's convictions for two burglaries.¹⁶³ The Fifth Circuit found no evidence in the judicial record that the prior burglaries occurred "sequentially" rather than "simultaneously."¹⁶⁴ Other courts have reached a similar conclusion where the separateness of prior convictions could not be established by *Shepard*-approved facts.¹⁶⁵

B. Refining Shepard's Distinction Between the Fact of a Prior Conviction and Facts About a Prior Conviction

Shepard has left unresolved the murky distinction between the bare fact of a prior conviction and facts *about* a prior conviction. Some defendants facing ACCA enhancements have used *Shepard* to argue that the separate occasions inquiry itself violates their Sixth Amendment rights even when such determinations are made using so-called *Shepard*-approved sources. Specifically, they argue that the separate occasions inquiry involves facts *about* a prior conviction that must have been alleged in the indictment on which the prior conviction is based or pled and proved beyond a reasonable doubt.¹⁶⁶ This argument has failed to convince the appellate courts, some reasoning that the date and time on which offenses were committed are inherent in the fact of a conviction,¹⁶⁷ and some without engaging in much

163. *Id.* at 276.

164. *Id.* at 279-80.

165. *See, e.g.,* United States v. Bookman, 197 F. App'x 349, 350 (5th Cir. 2006) (rejecting an ACCA enhancement where the separateness of predicate offenses were not proven with *Shepard*-approved material); *Gautier*, 590 F. Supp. 2d at 232 (applying *Shepard* to the occasions inquiry and rejecting the ACCA enhancement because "the charging documents do not reveal the location of the crimes, the time interval between the offenses, or the continuity of the conduct.").

166. *See, e.g.,* United States v. Garcia, 329 F. App'x 528, 529 (5th Cir. 2009) ("Garcia argues that his enhanced sentence under § 924(e) is unconstitutional because his prior convictions and the dates of his prior convictions are elements of the offense that were not alleged in the indictment, proven beyond a reasonable doubt to a jury, or admitted by him."); United States v. Michel, 446 F.3d 1122 (10th Cir. 2006) ("[The defendant] claims that . . . whether his prior convictions were committed 'on occasions different from one another' is a factual question that must be determined by a jury beyond a reasonable doubt, not by the sentencing court.").

167. *See Thompson*, 421 F.3d at 282 (referring to the dates of prior convictions as "essential components" of those prior convictions and finding that "[a] conviction cannot . . . be reduced to nothing more than that the defendant was at some prior time convicted of some crime."); United States v. Morris, 293 F.3d 1010, 1012 (7th Cir. 2002) ("Morris presents no authority for parsing out the recidivism inquiry" to exclude the occasions on which the offenses occurred.); United States v. Santiago, 268 F.3d 151, 156 (2d Cir. 2001) ("[W]e are not persuaded by the defendant's contention that the separateness of the prior convictions can be distinguished from the mere fact of their existence . . .").

analysis.¹⁶⁸ There is at least one thoughtful discussion of this issue that deserves a closer look.

In *United States v. Thompson*,¹⁶⁹ the defendant had been convicted of numerous prior burglaries, none of which had been alleged in the instant indictment.¹⁷⁰ Thompson argued that because the indictment had not included any of these prior burglaries or the occasions on which they occurred, and because he had not admitted to them, an ACCA enhancement violated his Sixth Amendment rights. The Fourth Circuit concluded that whether the prior burglaries occurred on different occasions is a fact “so inherent in a conviction that [it] need not be found by a jury.”¹⁷¹ The court warned against applying an “artificially narrow reading of the ‘fact of a prior conviction’” that would “sever the prior conviction from its essential components.”¹⁷²

Thompson distinguished an earlier case, in which the Fourth Circuit had reversed an ACCA enhancement because the sentencing court relied on facts outside the indictment to determine whether the prior burglary was a crime of violence under ACCA. In *Washington*, the sentencing court relied on the government’s description of the building that the defendant burgled and its “likely contents” and “identity of any occupants” to conclude that the offense “involve[d] conduct that presents a serious potential risk of physical injury to another.”¹⁷³ This type of fact-finding, *Thompson* held, was clearly different from determining the occasion on which prior offenses occurred because unlike separateness, characteristics of the burgled building are not inherent in the fact of the prior conviction.¹⁷⁴

168. See, e.g., *United States v. Riggs*, 302 F. App’x at 808-09 (10th Cir. 2008) (summarily rejected the defendant’s argument that in light of *Shepard*, “a jury rather than a judge should have conducted the [different occasions] analysis”); *Garcia*, 329 F. App’x at 529 (stating simply that Garcia’s “argument is foreclosed by this court’s jurisprudence.”) (citing *Apprendi* and other cases); *Bookman*, 263 F. App’x at 401 (holding that *Almandarez-Torres* forecloses the argument that the occasions on which his prior offenses occurred must be plead and proven beyond a reasonable doubt); *United States v. Davis*, 487 F.3d 282, 287-88 (5th Cir. 2007) (rejecting the Sixth Amendment argument based on *Apprendi* without considering whether the occasions inquiry is or should be distinct from the fact of prior conviction); *United States v. Stotts*, 346 F. App’x 356 (10th Cir. 2009) (“Under our precedent, a district court may properly determine whether a defendant has three previous violent felony convictions which occurred on separate occasions for purposes of applying the ACCA.”).

169. *United States v. Thompson*, 421 F.3d 278, 280 (4th Cir. 2005).

170. Instead, Thompson’s criminal history was included in the Presentence Investigation Report. *Id.* at 280.

171. *Id.* at 282. “There is no occasion to persuade the jury, however, unless there is a disputed question of fact extraneous to Thompson’s prior convictions. No such question exists here.” *Id.* at 285.

172. *Id.*

173. *Washington*, 404 F.3d at 841.

174. *Thompson*, 421 F.3d at 285-86.

Judge Wilkins, dissenting, found nothing distinguishable about these two types of judicial fact-finding. According to Judge Wilkins, the court clearly violated Thompson's Sixth Amendment rights when it enhanced his sentence based on findings of fact—the dates on which the prior offenses were committed—that were not alleged in the indictment or admitted by the defendant.¹⁷⁵ To avoid running afoul of the Sixth Amendment, Judge Wilkins argued, the scope of the prior conviction exception should be limited to those facts necessary for a conviction.¹⁷⁶ As he noted: “Although a defendant is entitled to a jury trial on the question of whether he committed a particular crime, in few, if any cases is a jury required to find that the offense occurred on a particular date.”¹⁷⁷ Because the date on which a crime was committed is rarely an element of an offense, indictments are rarely required to state the correct date on which a crime was committed.¹⁷⁸

Echoing Justice Thomas's concurrence in *Shepard*, Judge Wilkins was not persuaded that reliable judicial documents would mitigate the Sixth Amendment significance. “[T]he fact that judicial records list a date on which a crime was committed does not mean that the defendant had the right to have that date found by a jury beyond a reasonable doubt”¹⁷⁹ This “is the critical

175. *Id.* at 287-89 (Wilkins, J., dissenting).

176. *Id.* at 289 (“Thompson’s admission to having three prior burglary convictions did not warrant a legal conclusion that the burglaries were committed on different occasions because separate burglaries are not necessarily committed on different occasions as a matter of law.”). Judge Ginsburg of the D.C. Circuit has expressed a similar concern. *See Thomas*, 572 F.3d at 952-53 (Ginsburg, J., concurring):

The question whether the sentencing judge may rely solely upon an indictment to determine the date of a prior offense without running afoul of the Sixth Amendment . . . is more difficult than the court lets on. . . . [A]s far as this record shows, neither Thomas’s plea to one offense nor the jury’s judgment of conviction on the other entailed a finding as to whether the offense occurred on the date charged.

177. *Thompson*, 421 F.3d at 292-93 n.8.

178. *See, e.g.*, VA. CODE § 19.2-226(6) (2010) (providing that no indictment “shall be . . . deemed invalid for omitting to state, or stating imperfectly, the time at which the offense was committed when time is not the essence of the offense.”); *See also* W. VA. CODE § 62-2-10 (2009) (“No indictment or other accusation shall be quashed or deemed invalid for omitting . . . the time at which the offense was committed.”). North Carolina even specifies that judgments are not invalid for stating the incorrect day on which the offense was committed. N.C. GEN. STAT. § 15-155 (2009) (providing that no judgment shall be reversed for “omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, *nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened.*”). The California Penal Code allows indictments to state that charged offenses occurred “on or about” a specific date. CAL. PEN. CODE § 951 (2010).

179. *Thompson*, 421 F.3d at 293 n.9.

point”¹⁸⁰ because the procedural safeguards that attach to the fact of conviction itself do not extend to the dates on which the conviction occurred.¹⁸¹ In short, for Judge Wilkins—and Justice Thomas—the test for whether certain facts are included in the fact of a prior conviction, and thus fall within the prior conviction exception, is whether those facts were originally admitted to or pled and proved beyond a reasonable doubt. It is not enough to conclude that certain facts are “inherent” in the fact of a prior conviction. And there is nothing “artificial” about reading the prior conviction exception narrowly to require the government to prove the date and time of the offenses on which it relied in seeking an ACCA enhancement.

V. MAKING ACCA CONSISTENT WITH THE SIXTH AMENDMENT AND THE STATUTE’S ORIGINAL PURPOSE

The problems with ACCA raised in this Article could be solved by amending the statute to require that each prior qualifying offense be separated by an intervening conviction or arrest. But if we are left with ACCA in its current form, courts must abandon the decades of case law that has accumulated around the different occasions inquiry to comply with *Apprendi*’s narrow prior conviction exception and the statute’s narrow purpose.

A. *Narrowing the Scope of the Prior Conviction Exception*

The prior conviction exception to *Apprendi* rests on shaky constitutional ground.¹⁸² These constitutional concerns are aggravated by an overly broad interpretation of a recidivist statute. Under ACCA, inquiry into the occasions on which prior offenses occurred to determine whether a defendant will be sentenced above the statutory maximum of a 922(g)(1) violation—at least five years above the maximum¹⁸³—implicates the concerns of this prior conviction exception. It is not merely the fact of three prior convictions that will subject a defendant to an ACCA enhancement; it is a broader evidentiary inquiry into whether the offenses underlying those prior convictions were committed on different occasions. There are two Sixth Amendment concerns

180. *Id.*

181. *Id.* at 293.

182. See *Shepard*, 544 U.S. at 27-28 (Thomas, J., concurring) (“*Almendarez-Torres* . . . has been eroded by this Court’s subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.”) (referring to the four dissenting Justices in *Almendarez-Torres* and himself); *Apprendi*, 530 U.S. at 489 (acknowledging that “it is arguable that *Almendarez-Torres* was incorrectly decided.”).

183. A person who violates 922(g)(1) “shall be . . . imprisoned not more than 10 years . . .” 18 U.S.C. § 924(a)(2) (2006).

raised by interpreting the different occasions requirement so broadly: (1) the date and time on which prior offenses occurred are not always alleged in an indictment or admitted by the defendant and such information is rarely necessary to convict; and (2) courts often extend the different occasions inquiry beyond the mere date and time on which the prior offenses occurred.

Because ACCA is a sentencing enhancement connected to a violation of 922(g)(1), the government is not required to separately charge it in an indictment,¹⁸⁴ although it sometimes does.¹⁸⁵ Often, it is at sentencing, after a plea or a finding of guilt, when the possibility of an ACCA enhancement first appears.¹⁸⁶ And in cases in which the government does allege in the indictment the prior convictions on which it will rely for a sentencing enhancement, the judicial record of those prior convictions may not include the date and time on which prior offenses occurred.¹⁸⁷ As a consequence, defendants are subject to sentences well beyond the maximum to which they would otherwise be exposed, based on facts the government has not proven, to which they have not admitted,¹⁸⁸ and of which they are not necessarily provided notice.

In determining whether prior offenses occurred on separate occasions, courts frequently examine more than simply the date and time when a prior offense occurred—information that, if alleged in an indictment, would more convincingly be included in the fact of a prior conviction. While sometimes insisting that an occasion can be reduced to the date and time,¹⁸⁹ courts nonetheless examine the conduct underlying the offenses to determine, for

184. Compare the notice provision for using prior convictions to enhance a sentence in the context of drug offenses. Under 21 U.S.C. § 851(a)(1), a person convicted of a drug offense may not be sentenced to an increased punishment based on a prior conviction unless the United States attorney files a notice before trial or entry of a guilty plea stating the previous convictions on which it will rely. *Id.*

185. At least one circuit has held that any facts about a prior conviction that are used to find that prior offenses were violent felonies must be alleged in the indictment leading to that conviction. *Washington*, 404 F.3d at 846-47.

186. *See, e.g., Harris*, 447 F.3d at 1302 (stating that “[p]rior to sentencing the probation office prepared a presentence report (PSR), concluding that Harris’s prior criminal history made him eligible for sentence enhancements as an armed career criminal.”).

187. *See Sneed*, 600 F.3d at 1328 (noting that in its sentencing memorandum, the government included the prior indictment that charged three drug convictions, but “[n]one of the counts contained dates, times or locations for the charged offenses.”).

188. A defendant pleading guilty “admits” to facts in several ways: facts in the indictment on which a plea is based; facts in a written plea agreement; facts admitted in the plea colloquy with the district court; and facts necessary to prove the offense charged in the indictment. *See Thompson*, 421 F.3d at 290 (Wilkins, J., dissenting).

189. *United States v. Burgin*, 388 F.3d 177, 186 (6th Cir. 2004); *Thompson*, 421 F.3d at 282.

example, whether the defendant had a “breather” before deciding to commit the next offense,¹⁹⁰ whether one offense ended before the next began,¹⁹¹ whether the offenses were “separate aggressions,”¹⁹² and whether the offenses were committed in different locations and against different victims.¹⁹³ The date and time is often only the beginning of a court’s inquiry, which frequently involves facts that are unlikely to have been admitted by the defendant—precisely the type of fact inquiry that implicates the Sixth Amendment.¹⁹⁴

By narrowing the scope of the prior conviction exception, the *Shepard* source restriction is an important safeguard of the Sixth Amendment. Yet, although most circuits purport to apply *Shepard* to the different occasions inquiry, not all agree on what constitutes a *Shepard*-approved source and some still reference police reports and other clearly inappropriate sources.¹⁹⁵ In light of the Sixth Amendment, it is not clear what constitutes an appropriate judicial record. A sentencing judge often relies on the information about prior convictions contained in the pre-sentence investigation report (PSR) prepared by the federal probation office. The PSR often includes information from police reports, complaints, and other extra-indictment information rejected by *Shepard*.¹⁹⁶ Even after *Shepard*, courts continue to consider PSRs if the defendant

190. *Stearns*, 387 F.3d at 108; *Washington*, 898 F.2d at 442.

191. *Schieman*, 894 F.2d at 913; *Tisdale*, 921 F.2d at 1095, 1098-99; *Washington*, 898 F.2d at 441.

192. *Davidson*, 527 F.3d at 707.

193. *Stearns*, 387 F.3d at 104; *Tisdale*, 921 F.2d at 1095.

194. Under the pre-2007 Sentencing Guidelines when sentences were counted as a single occasion if the underlying offenses were part of a common scheme or plan, the Seventh Circuit concluded that after *Shepard*, the inquiry more clearly implicated the Sixth Amendment because it could easily require determinations of facts about a prior conviction that were not based on sources of “conclusive significance.” *United States v. Tek Ngo*, 406 F.3d 839, 843 (7th Cir. 2005) (noting that in determining whether the defendant’s offenses were part of a common scheme or plan and thus whether the career offender guideline applied, the district court violated the defendant’s Sixth Amendment right when it “looked to the fact that the robberies were committed 10 days apart in deciding that they were not jointly planned,” and “conclude[ed] that the elapsed time between the crimes outweighed the fact that the crimes were ‘committed the same way.’”).

195. In one notable post-*Shepard* case, the Seventh Circuit permitted the sentencing court to consider “affidavits of complaints” filed for sentencing because they are “judicial documents, filed under oath and submitted in furtherance of formal prosecution.” *United States v. Jones*, 453 F.3d 777, 780 (6th Cir. 2006). Yet, *Shepard* explicitly prohibits the use of “complaint applications.” See also *United States v. Thomas*, 381 F. App’x 495, 505 (6th Cir. 2010) (referencing police reports to conclude when and how each robbery occurred in one night).

196. See *United States v. Taylor*, 413 F.3d 1146, 1157 (10th Cir. 2005) (finding that the PSR “appears to have relied upon both police reports and ‘court documents.’”).

fails to explicitly object to the facts contained within.¹⁹⁷ Indeed, judicial panels in the same circuit cannot agree on how closely to scrutinize the PSR.¹⁹⁸

Circuit courts are also in discord over how to treat a defendant's objection. When a defendant objects to information in the PSR, the government's burden to prove ACCA predicates increases.¹⁹⁹ Many courts require defendants to object to specific facts within the PSR rather than bringing a general *Shepard* challenge to a finding that their prior offenses were committed on separate occasions.²⁰⁰ Furthermore, when defendants challenge

197. See *Gautier*, 590 F. Supp. 2d at 222 (“[I]f the relevant facts contained in the PSR are uncontested, the court may consider these as further admissions by the defendant.”).

198. Compare *Harris*, 447 F.3d at 1302, 1304 (admitting the facts in the PSR because “[t]he time, place, and substance of the prior convictions can ordinarily be ascertained from court records associated with those convictions . . .”) with *Taylor*, 413 F.3d at 1157 (rejecting the use of the PSR because it “appears to have relied upon both police reports and ‘court documents’. . . . [and] [t]he record . . . does not tell us what these materials were and how they were documented.”).

199. See, e.g., *United States v. Brown*, 510 F.3d 57, 74-75 (1st Cir. 2007):

The Government's burden of proving a predicate conviction for sentencing purposes is admittedly a “modest” one that can be satisfied “in divers ways,” including by introducing a certified copy of the judgment, or by a statement in the PSR. However, when a defendant challenges a conviction laid out in the PSR, more is required. This case provides ample reason why. Brown was sentenced to five years and three months in prison. He was arrested and taken into custody on June 18, 2002, and has presumably served all or most of his five years and three months by now. The mandatory minimum under ACCA is fifteen years. The Government would have us keep Brown in prison for ten more years based on [limited information in the PSR]. . . . Indeed, as the PSR itself states, “No information was available regarding this offense.” In the face of this reality, the Government cannot be said to have met even its modest initial burden when it can produce nothing more. (citations omitted).

See also *Harris*, 447 F.3d at 1306 (“If Harris disputed the PSR's conclusion that he had committed three separate prior felonies, he could have objected to the PSR, and the court would have resolved the objection by further reference to the [charging documents, plea agreement, and judgment of conviction].”).

200. See *Thompson*, 421 F.3d at 285 (noting that although the defendant argued that the trial judge violated his Sixth Amendment rights when he used the PSR to find that his priors occurred on separate occasions, because the defendant did not object to any specific facts in the PSR, the trial judge's use of the PSR was permissible); *Riggs*, 302 F. App'x at 808 (“Riggs only objected to the legal conclusions in light of the PSR—namely that his conviction on two counts of first-degree robbery was a single occurrence and not two separate and distinct convictions. Riggs failed to object to the factual contents of the PSR . . . [t]herefore, the sentencing court here was entitled to use the undisputed facts within the PSR to perform the requisite analysis under the ACCA.”); *Harris*, 447 F.3d at 1302 (“Harris did not object to the factual assertions in the PSR” but argued instead that the different occasions inquiry was a question for the jury; however, this issue is “properly assessed by the

the sources of information in the PSR, some courts dismiss such objections on the grounds that the dates on which prior offenses occurred are “normally found in a *Shepard*-approved source.”²⁰¹

As long as questions remain about how to interpret *Apprendi*'s prior conviction exception, courts should be strict in applying *Shepard* to the different occasions inquiry. Specifically, they should exclude sources of information that contain facts that were not admitted by the defendant or were not necessary to convict. In determining whether the defendant admitted the date and time when prior offenses occurred or whether the prior convictions were necessarily based on the date and time of the offense, courts should scrutinize information in presentence reports given their propensity to include unreliable second-hand information. If *Shepard* had applied to the different occasions inquiry in 1994, Thomas Hudspeth would have been spared the mandatory fifteen-year ACCA sentence because the government's ACCA case rested on information in police reports that stated the approximate time when each prior burglary was committed.²⁰²

B. Standards for Making the Different Occasions Determination

Once the facts of a prior conviction are properly before a sentencing judge—whether the jury found those facts beyond a reasonable doubt or the defendant admitted to those facts—the court must determine whether the offenses underlying the prior convictions were committed on different occasions. In his concurring opinion in *Balascsak*, Judge Becker stopped short of

sentencing court.”). The Federal Rules of Criminal Procedure suggest that broader objections should suffice as appropriate challenges. See FED. R. CRIM. P. 32(f)(1) (“Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.”).

201. *United States v. Griffin*, 193 F. App'x 211, 216 (4th Cir.2006). In *Griffin*, the defendant challenged the use of the PSR to determine that his prior offenses were committed on separate occasions. Even though the PSR included information from “unspecified court records,” the court rejected the defendant's challenge both because the dates of commission are facts “normally found in a *Shepard*-approved source” and *Griffin* had not objected to the “accuracy” of the PSR. *Id.* Whatever is “normally” the case, the court ignored *Griffin*'s argument that in his case the PSR contained information from non-*Shepard* approved sources. See also *Harris*, 447 F.3d at 1304 (“[T]he separateness of prior crimes is inherent in the fact of conviction. The time, place, and substance of the prior convictions can ordinarily be ascertained from court records associated with those convictions . . .”).

202. See *Hudspeth*, 42 F.3d at 1018 n.3 (finding that the trial court's reliance on police reports was acceptable in this case because “[a]s a practical matter, a district court frequently must look beyond the charging papers and judgment of conviction, for these documents alone rarely provide the district court with the detailed information necessary (i.e., time, victim, location) to determine whether multiple offenses occurred on one or more ‘occasions.’”).

endorsing an intervening convictions requirement, but instead advocated that courts “insist that the government prove convincingly that the crimes (and the episodes of which they are part) were truly separate.”²⁰³ In *Balascsak*, if “all the government has proven” is that “two burglaries ‘occurred on the same night’ . . . it has not succeeded.”²⁰⁴ Judge Becker conceded the difficulty in “establish[ing] a bright line . . . as to whether two days’ or two weeks’ hiatus is enough,” but he concluded that this case-by-case line drawing is the “stuff of judging.”²⁰⁵

Unfortunately, the judicial line-drawing under ACCA has failed to consider the purpose of the statute. And since *Balascsak*, it has become clear that the government can usually succeed in securing an ACCA enhancement if they show that two prior burglaries occurred on the same night and even in the same hour. Until Congress requires an intervening conviction or arrest, courts must rethink the rigid application of a specific set of factors to the different occasions inquiry. As many courts have recognized, the inquiry has developed to make the *Petty* amendment essentially meaningless. In its place, courts should apply a test that considers the policy objectives of ACCA: to target the small core of habitual offenders who commit the vast majority of serious crime. An approach like this would prevent one-night crime sprees from triggering ACCA on their own.

In his en banc dissent in *United States v. Brady*,²⁰⁶ a Sixth Circuit case involving an ACCA enhancement based on two prior robberies occurring in less than one hour, Judge Jones proposed a simple test that would ask whether two or more acts can best be understood as “being one occasion of activity or different occasions of activity.” Instead of checking off a list of specific factors, Judge Jones’s test would consider “important concepts” such as “the defendant’s premeditation to commit several crimes at once and general continuity of the defendant’s actions.”²⁰⁷ Under this test, two convictions for burglarizing one store, leaving, and immediately thereafter burglarizing another store, would be considered continuous actions and would not count as two ACCA predicates. Instead of treating the period between the two burglaries as an opportunity to cease, Judge Jones describes these pauses in conduct as “lulls between commissions of crimes to allow the defendant an opportunity to do certain things like reload weapons or plot final strategies.”²⁰⁸ In other words, these pauses are not sharp distinctions separating different occasions of

203. *Balascsak*, 873 F.2d at 683.

204. *Id.* at 685.

205. *Id.* at 685.

206. *Brady*, 988 F.2d at 675 (Jones, J., dissenting).

207. *Id.*

208. *Id.* at 675 n.10.

activity. The “opportunity to cease” test is ultimately unsatisfying because such an opportunity always exists on some level where human behavior is concerned.

In an en banc dissent in *Hudspeth*, Judge Ripple advocated for a case-by-case approach with ACCA’s purpose in mind:

Until today, our decisions have reflected a thoughtful and measured approach to the task required by the statute—identifying those criminals whose repetitive behavior requires a special degree of isolation from society. . . . Here, the contiguous layout of the stores, the very short time involved in the execution of the entire plan, and the fact that the thieves treated the operation, both in its planning and in its execution, as a unitary matter make it, for purposes of fulfilling the Congressional intent, similar to the robbery of the six restaurant patrons in *Petty*. It stretches both the English language and the realities of the situation to conclude that this situation was anything other than a single occasion.²⁰⁹

In response to the concern that drawing principled distinctions on a case-by-case basis would be too difficult, Judge Ripple, dissenting again in *Schieman*, compared the requirements for the federal crime of RICO to suggest that courts can and should consider concepts more generally than rigid factors in assessing different occasions: “[t]he majority’s suggestion that no principled distinction is possible between a crime committed to elude detection within ten minutes of the original crime and one committed a day later ignores the fact that similar distinctions are made often in our criminal law.”²¹⁰ Under the case-by-case approach proposed in this Article, the court would consider the purpose of the statute in determining whether prior offenses represent continuous or separate actions. Although the outcomes produced by such a case-by-case analysis would not eliminate the inconsistencies characteristic of the current approach, on the whole, such outcomes would be more faithful to the statute’s purpose.

VI. CONCLUSION

The different occasions provision, as interpreted by the courts, exacerbates the Armed Career Criminal Act’s over-inclusive coverage and produces unduly harsh and inconsistent outcomes. The bill that eventually became ACCA initially called for a mandatory term of life imprisonment. The rationale for this extreme sentence rested on the very narrow application of the statute to the most repetitive and dangerous offenders who become

209. *Hudspeth*, 42 F.3d at 1035, 1037 (en banc) (Ripple, J., dissenting).

210. *Schieman*, 894 F.2d at 915 (Ripple, J., dissenting) (noting that for the federal crime of RICO, the government must prove “continuity plus relationship” to show a pattern of racketeering activity).

impossible to rehabilitate. As the bill went through several revisions before becoming law, this policy rationale remained.

The Supreme Court's ongoing interest in ACCA's residual clause may inspire congressional intervention. If it does, Congress should incorporate an intervening conviction requirement or an intervening arrest requirement similar to that in the career offender sentencing guidelines. Until then, to ensure that the statute applies to the small core of serious repeat offenders and to reduce its application to individuals like Thomas Hudspeth, courts should clarify the *Shepard* source restriction, apply it to the different occasions inquiry, and consider the purpose of the statute in determining whether offenses underlying prior convictions occurred on different occasions. As a matter of fairness, defendants faced with such a severe mandatory penalty should have an opportunity to challenge both the government's factual assertions and the conclusions the court reaches based on them. Such a proposal not only reflects a sense of fairness and accuracy; it also may be constitutionally compelled. If the government is intent on seeking an additional fifteen-year prison term for gun possession, it must make the case convincingly that such a lengthy sentence is warranted.

