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NOTES

Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act

Some criminals will not mend their ways.[1] Authorities find that these "career criminals"[2] commit *most* of the serious crime in the United States.[3] In recent years, the criminal justice system has responded specifically to the problems posed by incorrigible felons. Law enforcement agencies have developed and implemented special pro-

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1. For an illustration, see Leo, *A Criminal Lack of Common Sense*, U.S. NEWS & WORLD REPORT, Aug. 21, 1989, at 56 (recounting the 32-year criminal career of an incorrigible, violent sex offender and the repeated failures of the California criminal justice system to stop him).

2. Lawmakers and judges use a variety of labels, largely synonymous, to describe this group of offenders: career criminals, career offenders, habitual offenders, repeat offenders, recidivists. *See, e.g.*, United States v. Belton, 890 F.2d 9, 10 (7th Cir. 1989) (interchangeable use of terms "career offender" and "career criminal"); *see also Armed Career Criminal Act: Hearings on H.R. 1627 and S.52 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 10, 17-18, 31, 64 (1984) [hereinafter *Hearings*] (interchangeable use of various labels during hearings on career criminal legislation).

Generally, career criminals are people who repeatedly commit serious crimes and fail to respond to treatment. *See, e.g., Belton*, 890 F.2d at 10 (Judge Posner's definition: "A career criminal is incorrigible, undeterrable, recidivating, unresponsive to the 'specific deterrence' of having been previously convicted . . . ."). Some criminologists have ventured a typology within the broader class of career criminals. Skilled professional criminals who make their living at crime are labeled "intensives," or "heavies." Others are "intermittents," or "losers," who tend to be opportunistic and often "oblivious to the risks and consequences of their criminal acts." *See* J. PETERSILIA, P. GREENWOOD & M. LAVIN, CRIMINAL CAREERS OF HABITUAL FELONS x-xi, 152-55 (1978) [hereinafter J. PETERSILIA]. The patterns of individual criminals' careers, however, tend to be random and unpredictable, often defying any neat typology. *See* S. MILLER, S. DINITZ & J. CONRAD, CAREERS OF THE VIOLENT 215-16 (1982).

3. The landmark study is M. WOLFGANG, R. FIGLIO & T. SELLIN, DELINQUENCY IN A BIRTH COHORT (1972) [hereinafter M. WOLFGANG]. Having studied the criminal records of 10,000 young males born in Philadelphia in 1945, the authors found that those "chronic offenders" who committed five or more offenses (627 or 18% of all delinquents) had committed a total of 5,305 offenses — 51.9% of all crimes committed by the cohort's delinquents. *Id.* at 88; *see also* R. CLARK, CRIME IN AMERICA 215 (1970) (80% of all felonies committed by repeaters); M. PETERSON, H. BRAIKER & S. POLICH, WHO COMMITS CRIMES 186-88 (1981) (reporting that 25% of the sampled offenders committed 58% of offenders' armed robberies, 46% of their assaults, and 65% of their burglaries); K. WILLIAMS, THE SCOPE AND PREDICTION OF RECIDIVISM 5-6 (1979) (30% of defendants in study accounted for 56% of total arrests). Conviction data, however, do not sufficiently describe the extent of the harm career criminals cause. Many commit scores of crimes in addition to those for which they are caught and punished. *See* J. PETERSILIA, *supra* note 2, at vii (previously convicted inmates in confidential study self-reported commission of over 20 crimes per year of "street time"); *see also* M. MALTZ, RECIDIVISM 12 (1984) (same). Congress has heard and acted on this data. *See generally Hearings, supra* note 2, at 12 (Remarks of Senator Arlen Specter: "It need not be repeated, the tremendous problem caused by the career criminals, where some 6 percent of the criminals in this country account for some 70 percent of the crime . . . ."); *id.* at 37 (Remarks of Congressman Wyden: "[S]tudies show that less than 10 percent of the criminal population commits more than two thirds of all violent crime in America.").

grams aimed at career criminals,[4] and nearly all states have enacted habitual-offender laws that increase prison terms for recidivists.[5] In the past decade, the federal government has entered the fray.

The Armed Career Criminal Act of 1984[6] (ACCA) enables the federal government to help state authorities more effectively prosecute "career criminals."[7] The ACCA imposes a mandatory sentence of at least fifteen years, and up to life imprisonment, for illegal possession of

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4. *See* W. GAY & R. BOWERS, TARGETING LAW ENFORCEMENT RESOURCES 1-26 (1985) (reviewing existing career criminal programs and instructing police agencies on how to develop such programs); Crovitz, *In Detroit, a Prosecutor Makes Street Crime a Federal Case,* Wall St. J., Nov. 7, 1990, at A15, col. 3 (describing Detroit program coordinating state and federal police and prosecution efforts against the "fewer than 2,500 criminals . . . responsible for the overwhelming majority of violent crime and drug trafficking" in Detroit).

5. *See* L. SLEFFEL, THE LAW AND THE DANGEROUS CRIMINAL 1 (1977) (survey of state recidivist statutes; most states have one or more in effect); Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism,* 96 HARV. L. REV. 511, 511 n.2 (1982) (as of 1979, 44 states had recidivist statutes in effect).

6. The Armed Career Criminal Act (ACCA) was originally codified at 18 U.S.C. app. § 1202(a) (1982 & Supp. III 1985). The ACCA was amended and recodified at 18 U.S.C. § 924(e) by the Career Criminal Amendments Act of 1986, Pub. L. No. 99-308, 100 Stat. 459 (Supp. IV 1986) (expanding the range of predicate convictions from robbery and burglary in the 1984 version to include any "violent felony or serious drug offense"). The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 7056, 102 Stat. 4181, 4462 (1988) amended the original ACCA by adding language requiring that the predicate offenses be "committed on occasions different from one another."

Presently, the ACCA is codified at 18 U.S.C. § 924(e) (1988). It provides:

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

(2) As used in this subsection —

(A) the term "serious drug offense" means —

(i) an offense under the Controlled Substance Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.) or the first section or section 3 of Public Law 96-350 (21 U.S.C. 955a et seq.) for which a maximum term of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law; and

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that —

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

7. *See Hearings, supra* note 2, at 10.

a firearm[8] by anyone who has three prior convictions for violent felonies or serious drug offenses "committed on occasions different from one another."[9] The ACCA provides in part:

> In the case of a person who violates section 922(g) of this title [which criminalizes possession of firearms by felons] and has three previous convictions by any court . . . for a violent felony or serious drug offense, or both, committed on occasions different from one another, such person shall be . . . imprisoned not less than fifteen years and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person . . . and such person shall not be eligible for parole . . . .[10]

To apply the ACCA, judges must determine first whether the defendant's prior convictions meet the definitions of "violent felony or serious drug offense," and secondly whether the offenses were committed on different occasions so that they count separately toward armed career criminal status. This Note focuses on the latter analysis — conviction counting.

The ACCA implements a policy of "selective incapacitation."[11] That is, it singles out a special class of offenders for long periods of incarceration. To the extent that the criminal justice system identifies some criminals as unresponsive to rehabilitative treatment or deterrence, and expects them to offend again, the case for incapacitating them — denying them the opportunity to commit crimes by locking them up for long periods of time — is especially strong.[12] If the gov-

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8. Federal law prohibits convicted felons from possessing a firearm which has been shipped or transported in interstate or foreign commerce (which is tantamount to all firearms). 18 U.S.C. § 922(g) (1988) provides in part:

> (g) It shall be unlawful for any person —
>
> (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
>
> . . . .
>
> . . . to ship or transport . . . or possess in or affecting commerce, any firearm or ammunition . . . .

9. 18 U.S.C. § 924(e)(1) (1988).

10. 18 U.S.C. § 924(e)(1) (1988). For the full text of the ACCA, see *supra* note 6.

11. *See* M. GOTTFREDSON & T. HIRSCHI, A GENERAL THEORY OF CRIME 259-65 (1990); P. GREENWOOD & A. ABRAHAMSE, SELECTIVE INCAPACITATION (1982); Note, *supra* note 5.

12. On the crime-reduction rationale supporting selective incapacitation policy, see P. GREENWOOD & A. ABRAHAMSE, *supra* note 11, at 30-31; M. MALTZ, *supra* note 3, at 11-13; Note, *supra* note 5, at 512. Crime reduction is not the only justification for sentence enhancement for career criminals. *See, e.g.*, Spencer v. Texas, 385 U.S. 554, 571 (1967) (Warren, C.J., dissenting in part and concurring in part) (noting that recidivist statutes serve both incapacitation and retribution objectives); *cf.* SENTENCING 187-301 (H. Gross & A. von Hirsch eds. 1981) (exploring the relationship between sentencing policy and the goals of the criminal law); Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958). The purposes of the criminal law are complex and interrelated. Implicit in the concept of "career criminals" is the notion that since they are remorseless, and thus incapable of experiencing useful punishment, they are probably beyond hope of deterrence or rehabilitation. The remaining goals of the criminal law, such as "the disablement of offenders [incapacitation], the sharpening of the community's sense of right and wrong, and the satisfaction of the community's sense of just retribution," can still be served if career criminals serve long sentences. Hart, *supra*, at 401. In sentence enhancement legislation these goals are clearly paramount. *See* 28 U.S.C. § 994(h) (1988).

ernment cannot expect to change these criminals' behavior, it can at least isolate them and thereby protect society from their future crimes.[13] In recent years, Congress and state legislatures have attempted to accomplish precisely that. A number of federal sentencing laws enacted during the past decade impose enhanced sentences on repeat offenders.[14]

The ACCA identifies career criminals on the basis of their prior criminal records; it reaches those with the prescribed number and type of prior convictions. Other federal incapacitation statutes operate in similar ways. The Federal Sentencing Guidelines (Guidelines),[15]

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13. *See* Note, *supra* note 5, at 512 (explaining rationale for incapacitation policy). The ability to predict future criminality is a much debated subject. Several authorities deny the ability to predict future criminal conduct in individual cases without unacceptably high rates of error. *See generally* 3 AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE § 18-3.2, at 223 & n.8 (2d ed. 1986) [hereinafter ABA STANDARDS] (high rates of error common); S. KLEIN & M. CAGGIANO, THE PREVALENCE, PREDICTABILITY, AND POLICY IMPLICATIONS OF RECIDIVISM 37 (1986) (five recognized predictive models proved only 5 to 10% more accurate than mere chance in predicting postrelease crime commission); M. MALTZ, *supra* note 3, at 12 (predictions based on routinely collected criminal justice data showed over 50% misclassification error); Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions,* 23 J. LEGAL EDUC. 24, 46 (1971) (high rates of error common); von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons,* 21 BUFFALO L. REV. 717, 727 (1972) (same); Note, *supra* note 5, at 514-15 & n.21 (collecting studies showing error rates in predicting future violent crime between 54 and 99%). Others assert that recidivism is predictable with sufficient accuracy to justify its use in reaching policy decisions. *See, e.g.,* P. SCHMIDT & A. WHITE, AN ECONOMIC ANALYSIS OF CRIME AND JUSTICE 365-73 (1984) (overprediction error just 2.5%, a "marked improvement over most previous attempts to predict recidivism"); E. VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 251 (1975) (recidivism predictable with "a high degree of probability").

Importantly, most of these studies have not confined their samples to offenders previously convicted of three serious offenses. Error rates in analyses of first-time or second-time offenders do not necessarily undermine the validity of classifications made under the ACCA. Indeed, Wolfgang, Figlio, and Sellin found that the likelihood of recidivism increases as the number of prior convictions increases — the percentage of those with five prior offenses who commit a sixth crime is greater than the percentage of those with one prior offense who commit a second, and so on. M. WOLFGANG, *supra* note 3, at 65-70. Although Gottfredson and Hirschi argue against the selective incapacitation of youthful offenders early in their careers, they note that "[a]t some point, of course, almost any policy will suggest that multiple recidivists merit incarceration [for long terms]." M. GOTTFREDSON & T. HIRSCHI, *supra* note 11, at 264. The ACCA, of course, defines that point as three previous violent or serious drug offenses.

14. Especially in the past 15 years, Congress has passed a number of statutes toughening federal sentencing policy. The Federal Sentencing Guidelines, 18 U.S.C.A. § 3551 (Supp. 1991), completely redesign federal sentencing policy. *See infra* Parts III and IV; *see also* 18 U.S.C. § 3147 (1988) (enhanced sentence for offenses committed while released on bail); 21 U.S.C. § 841(b) (1988) (enhanced sentences for certain drug offenders). Since 1984, often to the chagrin of federal judges who believe these laws work terrible injustice in some cases, each election year has seen "mandatory minimum sentences . . . ratcheted upward in a drug-warring frenzy." *See* Taylor, *Ten Years for Two Ounces,* AM. LAW., Mar. 1990, at 68.

15. 18 U.S.C.A. app. 4 (West Supp. 1991). The Guidelines apply to 90% of all felony and Class A misdemeanor cases in federal court. 18 U.S.C.A. app. 4, Ch. 1, Pt. A.5 (West Supp. 1991) (Introduction and General Application Principles). This Note addresses the interaction between the Guidelines and the ACCA, so a basic explanation of the Guidelines is in order. In cases under the Guidelines, judges determine sentences based on two factors: the *offense level* and the *criminal history category.* 18 U.S.C.A. app. 4 § 1B1.1 (West Supp. 1991).

Chapter Two of the Guidelines contains a series of crime-specific sections that tell judges how to compute the offense level. 18 U.S.C.A app. 4 §§ 1B1.1(b), 2A1.1-2X5.1 (West Supp. 1991).

which control most federal sentencing decisions, contain a "career offender" provision which enhances the sentences of recidivists with qualifying conviction records.[16] As they do when applying the

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Each specific crime has a "base offense level" which applies generically, and additional instructions to raise or lower the offense level by a certain amount if certain aggravating or mitigating circumstances occurred ("specific offense characteristics"). 18 U.S.C.A app. 4 § 1B1.1(b) (West Supp. 1991). Thus, for the crime of kidnapping, § 2A4.1 specifies a base offense level of 24, and directs the judge to increase the offense level to 28 if the victim "sustained permanent injury," and by another two levels, to 30, if a "dangerous weapon" was used. 18 U.S.C.A app. 4 § 2A4.1 (West Supp. 1991).

Chapter Four of the Guidelines provides the rules for computing the second factor, the criminal history category. 18 U.S.C.A app. 4 §§ 1B1.1(f), 4A1.1-4B1.4 (West Supp. 1991). To simplify, the judge assesses the defendant a certain amount of "points" based on the number and length of the defendant's prior sentences, and whether the instant crime was committed while on parole or escape status or soon after release. 18 U.S.C.A app. 4 § 4A1.1 (West Supp. 1991). If, for example, the kidnapper above had four prior sentences of more than one year, he would be assessed three points for each of them, for a total of 12. And, if the kidnapping had been committed within two years of release from prison, the judge would add an additional two points, raising the total to 14. Different point scores translate to one of the six criminal history categories (I-VI); fourteen "points" translates to category VI, the highest one. *See* 18 U.S.C.A app. 4 § 4A1.1 & Ch. 5, Pt. A (West Supp. 1991) (Commentary and Sentencing Table).

The judge uses the offense level and criminal history category to determine the appropriate sentencing range, expressed in months, from the Sentencing Table. 18 U.S.C.A app. 4 § 1B1.1(g) & Ch. 5, Pt. A (West Supp. 1991). The table is reproduced in part below:

SENTENCING TABLE

Criminal History Category

Offense Level	I (0-1)	II (2-3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
			....			
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	**168-210**
31	108-135	121-151	135-168	151-188	168-210	188-265
			....			
37	210-262	235-293	262-327	292-365	324-405	360-life

At the intersection of each criminal history category (columns I-VI) and offense level (43 total rows), the table prescribes the permissible sentencing range. Thus, for a kidnapper with an offense level of 30 and a criminal history category of VI (14 points), the sentencing range is 168-210 months imprisonment (bold type). Judges may impose sentences outside the prescribed range only in limited, unusual circumstances. 18 U.S.C.A. app. 4 Ch. 1, Pt. A.2 (West Supp. 1991) (Introduction) (citing 18 U.S.C. § 3553(b) (1988)). By structuring the sentencing analysis in this way, the Guidelines seek to curtail the tremendous discretion that formerly marked federal sentencing decisions and resulted in wide disparities. 18 U.S.C.A. app. 4 ch. 1, pt. A.3 (West Supp. 1991). The foregoing explanation greatly simplifies the Guidelines in the interest of quickly explaining the interaction of the offense level and criminal history to produce the sentence. Those aspects bear directly on the Guidelines' treatment of career offenders and the interface between the Guidelines and the ACCA. *See infra* Parts III and IV.

16. 18 U.S.C.A. app. 4 § 4B1.3 (West Supp. 1991). The Career Offender provision enhances sentences by mandating the highest criminal history category (VI) and higher offense levels than those that would normally apply (*e.g.*, the offense level becomes 37 for all offenses with a statutory maximum penalty of life imprisonment, and becomes 32 where the instant offense carries a statutory maximum of 20 years). 18 U.S.C.A app. 4 § 4B1.1 (West Supp. 1991). The actual

ACCA, courts applying the Guidelines must determine whether prior convictions count separately toward sentence enhancement.[17] Similar issues therefore arise when courts count prior convictions under the ACCA and the Guidelines.[18]

To implement the ACCA, prosecutors and judges must apply the statute's criminal history standard to accurately distinguish career criminals from ordinary offenders.[19] The ACCA directs judges to enhance the sentence of ex-felons convicted of illegal possession of a firearm whenever the defendant has three previous convictions for violent felonies or serious drug offenses committed on occasions different from one another. This standard, when satisfied, triggers mandatory sentence enhancement — the ACCA does not allow parole, probation, or suspended sentences.[20] If courts interpret the standard too narrowly and fail to identify a large number of offenders who will in fact commit serious crimes again, the law will have little effect on crime.[21] On the other hand, if courts interpret the standard too broadly and capture offenders who probably would not commit serious crimes again — "false positives" who are not really career criminals[22] — then other problems will result. Judges will sentence misclassified offenders to unjustly harsh terms,[23] which will further stretch prison resources for no good reason.

Some commentators question whether an examination of prior conviction history alone should suffice to classify individuals as career criminals. Many think the judge should attempt a broader or more rigorous analysis of each offender before the court.[24] For example, judges could examine facts underlying the prior crimes: the degree of violence involved, the relationship of the offender to the victims, or similarities between offenses. The judge might also consider the per-

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sentence still comes from the sentencing table; the court simply applies the higher category and level to find it in the table.

17. *See infra* Parts III-IV.

18. *Id.*

19. *See* M. GOTTFREDSON & T. HIRSCHI, *supra* note 11, at 259. No test or standard will be completely accurate. *See supra* note 13.

20. 18 U.S.C. § 924(e)(1) (1988).

21. For example, an early version of the ACCA would have limited the predicate offenses to violations of federal law such as bank robbery. Congress ultimately rejected that version as underinclusive. Critics successfully argued that such a standard would emasculate the ACCA because the law would reach only a few criminals, *i.e.*, 10% of the total armed robbers and none of the burglars. *See Hearings, supra* note 2, at 38.

22. *See supra* note 13 and accompanying text.

23. Some federal judges protest that recently passed federal mandatory minimum sentencing laws enhancing the sentences of certain drug offenders force courts to impose absurdly long sentences on false positives. "Most are undoubtedly real criminals. But many are marginal players with no prior criminal records — lookouts, drivers, 'mules.'" *See* Taylor, *supra* note 14, at 68. Even though all ACCA defendants, by definition, have prior criminal records, fears of this sort are not completely allayed when the ACCA is applied. *See infra* Part II.

24. *See infra* note 50.

sonal characteristics of the offenders: whether the defendants made their living from crime, whether they demonstrate remorse, or the nature of their prior treatment. Other commentators, however, argue that the conviction history alone provides the better test.[25]

Another problem with the ACCA test appears with its practical application. In close cases, the phrase "occasions different from one another" proves ambiguous. It is unclear how Congress intended judges to count convictions for offenses occurring within a short time span — multiple burglaries on a single night, for example. The offenses could qualify as separate "occasions," each counting toward the requisite three, or they could be considered part of a single criminal occasion and thus count as a single conviction.[26] The text of the ACCA does not specify the elapsed time between offenses necessary to delineate separately countable "occasions." Similarly, the ACCA does not specify whether nontemporal factors such as a common criminal scheme or a common victim matter to the determination of separate occasions.

A problem thus arises because three-time offenders can differ dramatically in ways intuitively relevant to the determination whether or not they are "career" criminals. Some defendants, for example, have made round trips through the system — arrested, tried, convicted, and punished — on three or more successive occasions. They more strongly demonstrate resistance to treatment than those who have served a single jail sentence. Defendants with a history of offenses spanning several years more convincingly demonstrate a career of crime than do those with a history of only three crimes committed within a few weeks of one another.[27]

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25. *See infra* section I.B.

26. The word "occasion" is ambiguous here. One definition of "occasion" is "a situation or set of circumstances favorable to a particular purpose," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1560 (1986), which suggests same-night burglaries might be a single occasion. Alternately, "occasion" may be "a particular time at which something takes place," *id.*, suggesting successive burglaries happen on different occasions.

27. The problem is best illustrated by two hypothetical examples not too far removed from actual cases that have come before the courts. *Compare* United States v. Wicks, 833 F.2d 192 (9th Cir. 1987) (same-night burglaries), *cert. denied,* 488 U.S. 831 (1988) *with* United States v. Uzelac, 921 F.2d 204 (9th Cir. 1990) (conviction based on possession of hunting weapons) *and* United States v. Smeathers, 884 F.2d 363 (8th Cir. 1989) (same). Suppose Defendant One has a history that shows, in Year One, a robbery conviction and six months probation; in Year Three, a burglary conviction and six months in prison; and in Year Five, two convictions under one indictment for armed robberies committed one week apart, resulting in concurrent prison sentences of four years. In Year Nine, the defendant is convicted for an armed robbery, as well as for possession of a sawed-off shotgun and pistol found in the trunk of the car. Clearly, Congress intended for this offender to be sentenced to at least 15 years under the Armed Career Criminal Act. The test — three or more convictions for serious crimes on different occasions — does not give pause. This defendant is the stereotypical armed recidivist who has been through the "revolving door" of the criminal justice system. *See infra* note 50 and accompanying text.

Legal and moral problems arise when the ACCA defendant seems less threatening. *See supra* note 23. Suppose Defendant Two was convicted in Year One for burglary of a warehouse and immediately released on probation. Weeks later, a single indictment results in two convictions

Where defendants' conviction records leave serious doubt about whether they are in fact career criminals, some courts balk at sending them to jail for fifteen years. These courts have developed approaches to conviction counting that avoid application of the Act in all but the most egregious cases.[28] Critics find these approaches excessively lenient and underinclusive; they fail to capture criminals whom Congress fully intended to incapacitate.[29] Other courts enhance the sentence of virtually any defendant whose predicate offenses occurred at distinct times, even if only hours apart.[30] Critics argue that these courts employ overly mechanical definitions that lead to draconian sentences for criminals who are almost certainly outside the small class of "career criminals" which Congress targeted in the ACCA.[31] Between these two approaches, some courts attempt to group related crimes into criminal "episodes."[32] Since the statute does not define criminal episodes, these courts effectively reintroduce discretion into the application of a *mandatory* sentencing law — one designed fundamentally to limit judicial discretion.[33]

However troublesome the ACCA's language, Congress has articulated a prior-conviction-based test to identify career criminals and commanded the courts to apply it at sentencing. Courts should interpret and apply such a concept uniformly to achieve fairness.[34] As described above, courts sometimes fail to do so with respect to

for burglarizing adjacent apartments on the same night, and a jail term of several months. For the succeeding five years, his record shows not so much as a traffic citation. Then, in Year Six, defendant is arrested in a Bureau of Alcohol, Tobacco, and Firearms crackdown. Defendant is convicted for illegal possession of a hunting rifle, a gift from an employer. *See* Gonzalez, *Trafficker's High-Powered Guns Put ATF in Middle of Drug Fight*, Wash. Times, Dec. 20, 1989, at B5, col. 1. Fifteen years without parole — the mandatory minimum sentence if defendant is sentenced under the ACCA and its conviction counting test is literally applied — seems very harsh in such a case.

28. *See, e.g.*, United States v. Balascsak, 873 F.2d 673 (3d Cir. 1989) (requiring intervening convictions between offenses; *see infra* section II.B.3).

29. *See, e.g.*, 873 F.2d at 685-88 (Greenberg, J., dissenting).

30. *See, e.g.*, *Wicks*, 833 F.2d at 192 (relying on the distinction in time to count same-night burglaries separately; *see infra* section II.B.1).

31. *See, e.g.*, 833 F.2d at 194-95 (Pregerson, J. dissenting).

32. *See, e.g.*, United States v. Towne, 870 F.2d 880 (2d Cir. 1989), (considering selected facts underlying the crimes to group them into separate "episodes"; *see infra* section II.B), *cert. denied*, 490 U.S. 1101 (1989).

33. ABA STANDARDS, *supra* note 13, § 18-4.4, at 285 (mandatory sentencing laws represent legislature's attempts to curtail judicial discretion); *see also infra* note 156 and section II.B.2, discussing the discretion that arises in the criminal episodes approach.

34. *See* 18 U.S.C.A. app. 4, Ch. 4, Pt. A.3 (West Supp. 1991) (Introduction to Guidelines); *see also* Taylor v. United States, 110 S. Ct. 2143, 2154-55 (1990). Ambiguous terms in criminal statutes should be interpreted consistently to ensure uniform results in factually similar cases. The problem has surfaced in parts of the ACCA other than the conviction counting problem. The ambiguity of the term "burglary" in the ACCA — whether "breaking and entering" counts as a "burglary," for example — also created disagreement between the circuits until resolved in *Taylor*.

conviction counting under the ACCA.[35] The various approaches to conviction counting should be reconciled: (1) to conform judicial application of the law to probable congressional intent; (2) to improve the uniformity of results between the federal circuits in factually similar cases; and (3) to bring the ACCA in accord with other federal sentencing law, especially the more recent U.S. Sentencing Guidelines.[36]

This Note suggests an interpretation of the ACCA which achieves these goals. Part I examines the legislative history of the Armed Career Criminal Act relevant to the conviction counting problem. Part II explores the different approaches courts take in counting prior convictions under the ACCA. Part III analyzes the "career offender" concept and the conviction counting method recently articulated in the Federal Sentencing Guidelines, a much more comprehensive expression of federal sentencing policy than the Armed Career Criminal Act. Part IV proposes that courts draw heavily on the Guidelines' conviction counting principles when applying the ACCA.

I. Legislative History

The history of the ACCA supports some limited conclusions as to how Congress intended the courts to count convictions. Part I examines these conclusions in detail. First, interpretations should not narrow the reach of the ACCA so much as to sacrifice prosecutorial leverage. Second, interpretations should not require individualized factfinding, nor should they involve unfettered judicial discretion. Finally, the history supports the conclusion that Congress did not necessarily intend that a conviction history must demonstrate repeated rehabilitative failures for the convictions to be counted separately.

The Armed Career Criminal Act was enacted in 1984 and amended in 1986 and 1988.[37] Courts searching for the precise meaning of the phrase "committed on occasions different from one another" find no clear answer in the Act's legislative history.[38] Still, the legislative evidence of the Act's purposes and intended operation provides some helpful clues.

A. *The Leveraging Principle*

Congress intended the ACCA to add the power of the Federal Government to the efforts of local prosecutors in dealing with habitual criminals. The principal sponsors believed the ACCA would bolster

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35. *See infra* Part II.

36. 18 U.S.C. § 3553 (1988).

37. *See supra* note 6.

38. *See infra* Part II.

local prosecution efforts through the principle of "leveraging":[39]

> The primary benefit of this legislation will *not* be the federal prosecution of criminals, but the leverage that the *threat* of federal prosecution will give *state* prosecutions. The threat by the state prosecutor to move a repeat offender's case to the federal level — where trials are conducted on the average four times faster than in crowded state courts and where the defendant would face a mandatory 15 year sentence — would significantly cut down on the growing tendency of defendants [in state court] to file one delaying motion after another and otherwise attempt to circumvent the state judicial process [such as by judge-shopping].[40]

Ideally, prosecutors would exercise their discretion to seek enhanced sentencing in federal court for only a few of their cases.[41] The *threat* of prosecution under the ACCA, however, would inspire all *potential* ACCA defendants to agree to guilty pleas with stiffer sentences.[42]

The leverage concept bears on the conviction counting problem because it mitigates against narrowing the reach of the ACCA. Congress expected prosecutorial discretion to limit significantly the number of cases actually prosecuted under the ACCA.[43] Congress envisioned only the more egregious cases as proper federal fodder.[44] Congress intended, however, that courts interpret the ACCA in such a way that it *could* be used as a threat against a much greater number of repeat offenders than those actually prosecuted. Interpretations narrowing the reach of the ACCA diminish the credibility of this threat. For example, to require incarceration between convictions would remove

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39. *Hearings, supra* note 2, at 10.

40. *Id.* at 19 (remarks of Sen. Specter).

41. *Id.* at 15.

42. *Id.* at 13.

43. The chief Senate sponsor, Senator Arlen Specter, explained the anticipated effect of the legislation in terms of his experience as a Philadelphia prosecutor:

> [The ACCA] could be a centerpiece [of a federal effort to fight crime] by providing leverage for state prosecutors.
>
> . . . [As a district attorney] I had some 500 career criminals on the docket . . . . Witnesses would disappear, or memories would dim, or . . . they could work a plea bargain and, notwithstanding a record of 5, 6, 7 armed robberies, 7, 8, 9, 10 burglaries, walk out of court with probation . . . again, and again, and again over my strenuous protests . . . because the judge shopping and moves for continuance were simply beyond the power of that judicial system to control.
>
> . . . [If prosecution under the ACCA] happened to a few of Philadelphia's career criminals, there would be a mass rush for guilty pleas in the State courts, and . . . it is not [overly] optimistic to predict that 300 or 400 of the balance of those 500 cases would result in guilty pleas, and not with sentences of 15 years to life but with sentences of 10 years, or 12 years, much more than is being obtained at the present time. It is that *leveraging* which we really seek to accomplish through the career criminal bill.

Id. at 13 (emphasis added); *see also id.* at 37 (remarks of the principal House sponsor, Rep. Ron Wyden) ("Perhaps most important, this bill will give local prosecutors leverage.").

44. Prosecutors, who have wide discretion whether or not to prosecute recidivists under sentence enhancement laws, would determine which cases warranted ACCA prosecution. *See id.* at 13; ABA STANDARDS, *supra* note 13, § 18-4.4, at 285 n.35. In the states' experience, mandatory sentencing laws have been characterized as merely transferring discretion from judges (who formerly sentenced as they saw fit) to prosecutors (who continue to charge as they see fit). *See id.*, § 18-4.4, at 285; M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 1-13 (1973).

from consideration any prior offenses that resulted in probation or suspended terms. Fortuitous prior treatment would operate as a license to offend again with confidence that the ACCA could not apply. The leverage concept mitigates against such a narrow reading of the conviction counting language.

Although the broadest possible interpretation of the ACCA[45] would maximize leverage, competing considerations recognized by Congress[46] — administrative efficiency, the appropriate role of judicial discretion, and avoiding arguably unjust sentences in anomalous cases, for example — lead to judicial interpretations that narrow the reach of the ACCA in varying degrees.[47] Any sound interpretation should permit justifiable results in close cases. At the same time, the ACCA should cause nearly all three-time offenders to worry — they should not be *certain* it cannot apply to them.

B. *Accuracy Versus Equity: The Proper Scope of the Inquiry*

Plainly, some judges think that the "mere" fact of three prior felonies, without more, does not a career criminal make. They hesitate,[48] or simply refuse,[49] to send someone to jail for fifteen years on that basis alone. They would examine a defendant's history in more depth than the text of the ACCA requires before identifying them as career criminals.[50]

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45. *See infra* section II.B.1.

46. *See, e.g., infra* note 75 and accompanying text.

47. *See infra* sections II.B.2 & 3.

48. *E.g.,* United States v. Balascsak, 873 F.2d 673, 684 (3d Cir. 1989) (Becker, J. concurring) ("[W]e must insist that the government prove convincingly that the crimes (and the episodes of which they were part) were truly separate."). The hesitation is understandable in part because mandatory fifteen-years-to-life sentences are so severe. Prior to enactment, the ABA warned that mandatory (ACCA) sentences far out of proportion to the crime might violate the constitutional prohibition against cruel and unusual punishment. *See Hearings, supra* note 2, at 79. So far, the U.S. Supreme Court has disagreed, upholding some very stiff mandatory sentences for recidivists. *See, e.g.,* Rummel v. Estelle, 445 U.S. 263 (1980) (Sentence of life imprisonment for three felony bad check offenses under the Texas state recidivist statute did not violate eighth amendment.); *see also* Note, *The Armed Career Criminal Act: Sentence Enhancement Statute or New Offense?,* 56 FORDHAM L. REV. 1085, 1094 nn.58-62 (1988).

49. *See, e.g., Balascsak,* 873 F.2d at 683-84 (rejecting the statutory test, "committed on occasions different from one another," and refusing to enhance the sentence unless the conviction history showed three rehabilitative failures in the form of intervening convictions).

50. Because courts have access to plenty of conflicting testimony, virtually any possible construction of the conviction counting language in the ACCA can find some support in the record. *See* Taylor v. United States, 110 S. Ct. 2143, 2160 (1990) (Scalia, J., dissenting) (describing the various contradictory views in the legislative record of the ACCA); *see also* United States v. Herbert, 860 F.2d 620, 622 (5th Cir. 1988) ("[T]he legislative history, like the statute itself, is ambiguous."), *cert. denied,* 490 U.S. 1070 (1989).

The committee testimony of the Assistant U.S. Attorney General of the Criminal Division, Department of Justice, Mr. Stephen S. Trott, supports several competing views on conviction counting. Trott described the class of offenders that he felt should be targeted for mandatory minimum sentences:

> 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

The legislative history, however, strongly supports the notion that judges applying the ACCA should confine their identification inquiry to the conviction record — that is, to the description of prior offenses, dates of conviction, and treatment.[51] Many criminologists studying recidivism attempt to predict future criminality.[52] They construct models that invariably examine several factors in addition to the number and type of prior offenses — age and socioeconomic status, for example — that tend to predict recidivism.[53] Error rates in these models can be quite substantial; even the better models achieve only seventy percent accuracy.[54] In stark contrast to the broad, multifactor analysis that marks academic efforts, the ACCA as written classifies career criminals based on a much *narrower* set of facts — number, type, and timing of prior convictions. While even the most rigorous scientific models misclassify significant numbers of offenders, Congress wrote the ACCA to consider even *less* information than do scientific

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> 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."

Hearings, supra note 2, at 64. Judge Pregerson, dissenting from the majority's straightforward reading of the ACCA in *Wicks*, quoted the above portion of the Trott testimony verbatim, and then concluded

> Thus, it is clear that [the ACCA] is aimed at recidivists, not at individuals who commit three acts that result in three convictions.
>
> I would . . . hold that something more than three convictions is required. . . . Here, where two of the three convictions stemmed from burglaries that occurred on the same night, I would hold that [the ACCA] was not intended to, and therefore does not, apply.

United States v. Wicks, 833 F.2d 192, 195 (9th Cir. 1987), *cert. denied*, 488 U.S. 831 (1988). The Trott quotation plausibly suggests that witness Trott envisioned three complete, successive cycles through the system. "[L]ocking them up and letting them go doesn't do any good. . . . [T]hey are back for a third time" seems to describe three successive cycles of offense, conviction, incarceration, and release. Perhaps that is the "something more" Judge Pregerson would require to count the convictions separately, since it would prove the defendant was, in his words, "resistant to society's efforts at rehabilitation." 833 F.2d at 195.

However, Trott's testimony, taken as a whole, hardly supports Judge Pregerson's reluctance to take the language at face value. In the *next sentence* after the passage quoted, Trott stated that he felt a mandatory *life sentence* should be imposed on armed repeat offenders with histories such as Wicks: "I have always believed for people who use firearms, who have demonstrated their proclivities by a *couple of convictions*, that they should go away *forever*." *Hearings, supra* note 2, at 64 (emphasis added).

51. In general, courts agree that the ACCA is designed to be easy for judges to apply. No elaborate factfinding is contemplated at the sentence enhancement stage. *See* Taylor v. United States, 110 S. Ct. 2143, 2160 (1990) ("We think the only plausible interpretation of [the ACCA] is that . . . it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense."); *see also* United States v. Balascsak, 873 F.2d 673, 683 (1989) ("The supporters of the legislation cannot have contemplated an interpretation of the statute which required for its application anything but a straightforward process. 'Ordinarily, the proof will be in the form of certified court records . . . .' ").

52. *See, e.g.*, S. KLEIN & M. CAGGIANO, *supra* note 13, at 37 (summarizing results of five predictive models).

53. *See, e.g.*, M. WOLFGANG, *supra* note 3, at 64 (examining residential and school moves, education levels, I.Q., race, and socioeconomic status).

54. *See* J. PETERSILIA & S. TURNER, GUIDELINE-BASED JUSTICE 26 (1985) (the most accurate and sophisticated models achieve no better than 70% accuracy).

models. The reasons for the narrower inquiry have as much to do with fairness as accuracy.

In 1984, Congress conducted hearings on the bills that would become the Armed Career Criminal Act of 1984.[55] The definition and scope of the career criminal problem, the leverage feature, resource allocation issues, and predicate offense issues dominated the hearings; methods for identifying career criminals did not figure prominently in the discussion.[56] The American Bar Association (ABA) witness, however, testified on the identification issue at some length. The ABA witness, generally opposed to the ACCA, stated that scientific attempts to predict commission of specific dangerous crimes pose high risks of false positives, but conceded that "recidivism in general is often predictable."[57] To identify proper subjects for sentence enhancement, the ABA recommended, courts should use a criminal history test rather than "clinical or diagnostic"[58] evaluations: "[T]he tendency toward overprediction in the clinical diagnosis of dangerousness makes past criminal conduct the best and *fairest* guide to the determination of whom to incapacitate for an extended period . . . ."[59]

The ABA did not here assert any superior predictive *accuracy* in a conviction history test, but argued rather that such a test was more *fair.*[60] The ACCA could have been written to direct judges to put all convicted felons — not just those with three prior offenses — through a battery of tests to "diagnose" the offender as a career criminal. To avoid increased incarceration, the offender would have had to satisfy the model designed by the diagnostician. The disadvantages of this approach are twofold. First, scientific studies find that factors outside the subjects' criminality — education, poverty, employment, and substance abuse, for example — correlate positively to recidivism.[61] Such factors introduce race and class bias into recidivism decisions.[62] Second, as noted above, models of this sort fail to predict recidivism with high accuracy. Broad clinical analysis makes sentence enhancement

55. *See Hearings, supra* note 2 (hearings on H.R. 1627 and S. 52, House and Senate versions of the ACCA).

56. *See generally id.*

57. *Id.* at 95 n.31.

58. *Id.* at 95.

59. *Id.* at 96 (emphasis added).

60. The ABA would also have increased the fairness of the ACCA by building in incremental increases in punishment proportional to the number or quality of prior offenses. *Id.* at 79, 85. The ACCA left the amount of any incremental increase above the minimum to the judge by specifying only a broad sentencing range of 15 years to life. By comparison, the Federal Sentencing Guidelines specify incremental increases for each prior offense. *See supra* note 15; *infra* Part III.

61. *See* J. PETERSILIA & S. TURNER, *supra* note 54, at 25-27; *see also* M. WOLFGANG, *supra* note 3, at 64.

62. *See* J. PETERSILIA & S. TURNER, *supra* note 54, at 25 (Considering factors such as education, employment, and substance abuse introduces race and class bias into recidivism decisions.).

turn not just on the defendant's behavior, but also on the diagnostician's mistakes and biases.

In contrast, the ACCA as written identifies career criminals based solely on their own behavior. To avoid increased incarceration, the offenders need only commit less than three felonies or not possess a firearm. The latter approach proves "self-effectuating,"[63] and thus more fair than the former. The ACCA does not turn on factors outside the defendant's volition.

The ABA's rationale for choosing a narrowly written criminal history test, unfortunately, is neither fully developed nor debated in the history. Indeed, the identification issue was largely ignored in the discussion. Congress may well have chosen the narrower approach simply because it is cheaper and more certain. Regarding accuracy, however, the equity rationale put to Congress by the ABA reasonably explains the choice to consider less, rather than more information.[64]

In sum, Congress was aware of the advantages and disadvantages of broad versus narrow inquiry. The ABA recommended confining the inquiry to the conviction record on grounds of equity. Broader inquiry permits factfinders to introduce undesirable biases into the identification process, gaining thereby only marginal improvements in accuracy. A test considering less, but more certain, information is also easier to administer than a more complex analysis. These reasons suggest conviction counting analysis should focus narrowly on the fact and timing of prior convictions for serious offenses, to the exclusion of other indicators of "career criminal" status. One such indicator, unmentioned in the ACCA but difficult for courts to ignore, is the extent to which the defendant has demonstrated that further rehabilitation would be useless. Section C examines this point in detail.

C. *The Sequence of Offenses and Convictions*

Early drafts of the ACCA contemplated that defendants would qualify for sentence enhancement only if they committed a third predicate offense, while armed, *after* having already been convicted of two offenses: "Those career criminals with two or more prior convictions for robbery or burglary who *then* carry a firearm while committing yet another robbery or burglary will be eligible for prosecution in Federal court [under the ACCA]."[65] State and local prosecutors balked at fed-

63. Concomitantly, the ABA would have limited the risks of inaccuracy by proportionately increasing the incapacitative sentence by some specific percentage for each additional prior conviction. *See supra* note 60.

64. *See supra* note 6 (text of ACCA limits consideration to the number, type, and timing of prior offenses).

65. S. REP. NO. 190, 98th Cong., 1st Sess. 2 (1983) (emphasis added) (earlier draft of ACCA, S. 52); *see also* S. 1688, 97th Cong., 1st Sess. (1981), *reprinted in* 127 CONG. REC. 26,449 (1981) (defining career criminals as those who commit robbery or burglary "after having been twice convicted of [a robbery or burglary felony]").

eral prosecution of the traditionally local crimes of robbery and burglary.[66] The ACCA as it eventually emerged alleviated that concern, since, under the enacted version, only the federal offense of illegal possession of a firearm is tried in federal court.[67] The total number of predicate felonies remained at three, the same as in earlier versions.

The version of the ACCA finally enacted does not specify, as earlier drafts had, that at least two of the prior convictions must precede commission of the third predicate offense.[68] Under earlier versions of the bill, the Third Circuit has noted, "three burglaries on the same night could not possibly subject a defendant to the fifteen-year mandatory minimum."[69] Earlier versions thus required *intervening* convictions[70] between countable offenses:

> Given the narrow focus of the bill [on career criminals], the most reasonable interpretation would be to require the same relationship [as in the earlier drafts of the bill]. That is, the *first conviction* must have been rendered *before the second crime was committed.* The bill was aimed at a small number of hard-core offenders, and was explicitly motivated by concerns that some state courts operated as a "revolving door."[71]

This interpretation reasonably construes the earlier draft. The enacted version, however, does not imply that each offense must follow a prior conviction. The ACCA simply requires that three prior convictions precede the firearm possession offense.[72] Moreover, given the most recent amendment to the ACCA, interpreting the ACCA to require intervening convictions seems plainly wrong.

In 1988, Congress amended the ACCA to add the proviso that the three predicate offenses must have been "committed on occasions different from one another."[73] The amendment appears to have been

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66. H.R. REP. No. 1073, 98th Cong., 2d Sess. 4-5, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3661, 3664-65 (1984); *see also* United States v. Balascsak, 873 F.2d 673, 679-81 (3d Cir. 1989) (discussing federalism concerns attending early drafts of ACCA).

67. Originally codified alongside the ACCA at 18 U.S.C. app. § 1202(a) (Supp. 1985), the federal law prohibiting felons from possessing firearms is now codified at 18 U.S.C. § 922(g) (1988). See text of § 922(g), *supra* note 8.

68. *See Balascsak,* 873 F.2d at 681 (pointing to the discrepancy).

69. 873 F.2d at 681 (citing S.1688, 97th Cong., 1st Sess., *reprinted in* 127 CONG. REC. 26,449 (1981)).

70. *See infra* section II.B.3 (discussing the Third Circuit's "intervening convictions" approach in *United States v. Balascsak*).

71. *Balascsak,* 873 F.2d at 682 (quoting S. REP. No. 190, 98th Cong., 1st Sess., at 6).

72. 18 U.S.C. § 924(e) (1988). It is not clear from the record that Congress changed the earlier language for conviction counting purposes. The relevant text was probably redrafted only to alleviate federalism concerns. *See supra* notes 66-67 and accompanying text. The enacted version added a federal crime, felony firearm possession, *supra* note 8, so that traditionally local crimes (*e.g.*, burglary) would not be tried in federal court; that idea had troubled state prosecutors. The ACCA kept the total number of substantive prior offenses the same (three) as in earlier versions. The enacted version, *supra* note 6, simply requires all three prior convictions to have been committed before the federal firearm offense.

73. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7056, 102 Stat. 4181, 4402 (1988) (amending the ACCA).

drafted in direct response to *United States v. Petty*,[74] where the court counted separately six convictions stemming from the simultaneous robbery of six restaurant patrons. Explaining the change intended by the amendment, the Senate Judiciary Committee Chairman, Senator Joseph Biden, explained:

> Under the amendment, the three previous convictions would have to be for offenses "committed [on] occasions different from one another." Thus, *a single multicount 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 appropriate to clarify the statute . . . to insure that its rigorous sentencing provisions apply only as intended in cases meriting such strict punishment.[75]

As a practical matter, the government routinely prosecutes defendants charged with multiple offenses under multiple-count indictments.[76] Senator Biden's remarks recognize this practice and explain that the ACCA requires a difference in time between *crimes,* but not sequential prosecutions. By comparison, under an intervening convictions approach, offenses treated in a multicount indictment could not possibly qualify since the convictions are all returned at the same time. If, as Senator Biden explains, multicount convictions *can* still qualify, then it follows that the ACCA may be applied to defendants who commit three serious crimes over some period of time, with or without intervening efforts at rehabilitation.[77]

Although the Biden remarks largely discount the "intervening convictions" interpretation of the ACCA, they fail to specify how much time *is* required to separate sequential offenses into distinct, countable "occasions." Courts diverge in their approach to that question.[78]

To summarize, the legislative history of the ACCA has been used to support vastly different results.[79] On balance, the history of the Act seems most valuable at telling us how it should *not* be construed.

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74. 798 F.2d 1157 (8th Cir. 1986), *vacated,* 481 U.S. 1034, *revd.,* 828 F.2d 2 (8th Cir. 1987); *see infra* section II.A.

75. 134 CONG. REC. S17,370 (daily ed. Nov. 10, 1988) (remarks of Sen. Biden) (emphasis added).

76. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 993 (1990).

77. *Accord* United States v. Balascsak, 873 F.2d 673, 687-88 (3d Cir. 1988) (Greenberg, J., dissenting).

78. *See infra* section II.B.

79. *Compare United States v. Wicks,* 833 F.2d 192 (9th Cir. 1987) (different times of commission sufficient), *cert. denied,* 488 U.S. 831 (1988), *with Balascsak,* 873 F.2d at 678-81 (intervening convictions required) *and* United States v. Towne, 870 F.2d 880 (2d Cir. 1989) (continuity of conduct and number of victims relevant), *cert. denied,* 490 U.S. 1101 (1989).

First, courts should narrow the reach of the ACCA as little as possible, since the fundamental principle upon which the Act is based — affording state and local prosecutors leverage in the form of a swift, certain, and severe federal sentencing alternative — would be undermined if courts interpret the Act in such a way that many criminals know it cannot reach them. Second, Congress rejected extensive, individualized fact-finding as a means of improving accuracy and thus minimizing the risk of false positives. The ACCA contemplates an examination of the conviction record, and little else. The idea of broader diagnostic analysis was put before Congress, as were the fairness and proportionality advantages of a criminal history focus; it chose the latter approach. Finally, convictions returned under multiple-count indictments can be counted separately provided the offenses were committed on different "occasions." Thus, the statute cannot logically require intervening efforts at rehabilitation.

The legislative history does not address satisfactorily how much time between offenses, if any, is required to count the convictions separately. "Committed on different occasions" means at least "nonsimultaneous,"[80] but how far beyond remains unclear. One offense may be viewed as happening on an "occasion" different from that of another committed five minutes later.[81] Five minutes seems like too short a career to warrant the consequences of career criminal sentence enhancement. The rule of lenity dictates that courts should construe criminal statutes, including sentencing provisions, in favor of the accused.[82] At the same time, application of the rule of lenity "cannot dictate an implausible interpretation of a statute, nor one at odds with the generally accepted contemporary meaning of a term."[83] The questions are whether courts should draw a bright line at all, and if not, what the standard should be.

II. Judicial Approaches to Conviction Counting

Courts applying the ACCA count convictions in a number of ways. Multiple simultaneous offenses count as a single conviction for sentence enhancement purposes.[84] Where offenses have occurred over time, however, courts differ in their approaches. Some courts count each offense as a different occasion regardless of the time span, so long as the crimes were temporally distinct.[85] Others attempt to group the

80. *See infra* section II.A.

81. *See supra* note 26.

82. Taylor v. United States, 110 S. Ct. 2143, 2157 (1990) (discussing the appropriate construction of the term "burglary" as used in the ACCA and citing Bifulco v. United States, 447 U.S. 381 (1980), for the rule of lenity in construction of criminal statutes).

83. *Taylor,* 110 S. Ct. at 2157 (citing Perrin v. United States, 444 U.S. 37, 49 n.13).

84. *See infra* section II.A.

85. *See infra* section II.B.1.

underlying offenses into factually related criminal episodes and count these episodes separately.[86] Still others count only offenses separated by sequentially corresponding intervening convictions.[87] In all cases the courts struggle to avoid under- and overinclusive interpretations.

The problem arises most often in situations where the defendant has three or more prior convictions, but committed some or all of the crimes either simultaneously or nearly so. Courts must sometimes classify defendants who committed some of their offenses over a period of hours or days — multiple burglaries in a single night, for example.[88] Here, reasonable observers may doubt that the defendant makes his living from crime, or cannot be rehabilitated, or both.[89] Representative cases illustrate the divergent approaches to the problem.

A. *Simultaneous Offenses*

In *United States v. Petty*,[90] the defendant had been convicted previously of one count of armed robbery in Missouri, and later, of six counts of armed robbery under a single indictment in New York.[91] The New York convictions were for the simultaneous robberies of six persons in a restaurant.[92] Upon his subsequent conviction in federal court for drug trafficking and felony gun possession violations, the trial judge enhanced Petty's sentence pursuant to the ACCA.[93] On appeal, Petty contended that his New York prior convictions should count as only one conviction for ACCA purposes since he was charged under a single indictment and served the six sentences concurrently.[94]

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86. *See infra* section II.B.2.

87. *See infra* section II.B.3.

88. *See e.g.*, United States v. Wicks, 833 F.2d 192 (9th Cir. 1987), (two burglaries committed a short time apart on the same night), *cert. denied*, 488 U.S. 83 (1988); United States v. Petty, 798 F.2d 1157 (8th Cir. 1986) (simultaneous robberies of six restaurant patrons), *vacated*, 481 U.S. 1034, *revd.*, 828 F.2d 2 (8th Cir. 1987); United States v. Greene, 810 F.2d 999 (11th Cir. 1986) (four burglaries of four separate buildings within a four day period), *cert. denied*, 110 S. Ct. 1322 (1990).

89. For instance, the defendant's criminal activity might be the product of some unusual, but temporary, lapse. In the extreme, the well-worn hypothetical of the parent stealing a loaf of bread for the children comes to mind. A more realistic example might be the single drunken or drugged night of crime — resulting in three or more convictions for multiple distinct offenses. Of course, prosecutorial discretion may filter out many of the most dramatic cases. Whether such discretion is a sufficient safeguard against overinclusive application of sentence enhancement laws lies outside the scope of this Note. For a comprehensive treatment of the general subject of prosecutorial discretion, see B. ATKINS & M. POGREBIN, THE INVISIBLE JUSTICE SYSTEM: DISCRETION AND THE LAW (2d ed. 1982).

90. United States v. Petty, 798 F.2d 1157 (8th Cir. 1986), *vacated*, 481 U.S. 1034, *on remand* 828 F.2d 2 (8th Cir. 1987), *cert. denied*, 486 U.S. 1057 (1988).

91. 798 F.2d at 1159.

92. 798 F.2d at 1159-60. While the court describes Petty's robberies of restaurant patrons as "simultaneous," it is unclear whether he robbed the victims all at the same time, or one after the other.

93. 798 F.2d at 1159.

94. 798 F.2d at 1160.

Unpersuaded, the Eighth Circuit upheld the enhanced sentence, reasoning that statutorily mandated indictment and concurrent sentencing procedures had no bearing on the essential fact that the New York robberies resulted in loss to six different victims and therefore constituted six different offenses.[95]

The Supreme Court granted certiorari on the question of whether the six New York convictions had been counted properly.[96] The Court vacated the judgment and remanded to the Eighth Circuit for reconsideration in view of the position asserted by the Solicitor General.[97] In his brief, the Solicitor General urged that offenses should be counted separately only if they occurred at different times, and that the statute, properly interpreted, bases the career criminal classification on a history of "multiple criminal episodes" rather than multiple convictions arising from a single "episode."[98] On remand, the Eighth Circuit accepted the argument of the Solicitor General, holding that Petty's simultaneous robberies constituted one criminal episode: "[T]he 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."[99]

The *Petty* case stands for the general proposition that criminal acts, irrespective of quantity or quality, must occur over time to justify enhanced sentencing of the convict as a career criminal.[100] With *Petty* in mind, Congress in 1988 amended the ACCA to require that the predicate convictions be committed on different occasions.[101] In the

95. 798 F.2d at 1160.

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

97. 481 U.S. at 1034-35.

98. *See* United States v. Petty, 828 F.2d 2, 3 (8th Cir. 1987).

99. 828 F.2d at 3. The court vacated the original 22-year enhanced sentence and remanded to the trial court for resentencing on the applicable count. 828 F.2d at 3.

100. *See* 828 F.2d at 3. The opinion is narrowly written, and avoids discussion of what the difference in time between offenses must be in order to properly count the offenses separately. It seems wrong that Petty would be any more the "career criminal" had he, for example, stationed himself in the restaurant lobby and robbed six patrons sequentially, at distinct times, as they happened into the restaurant. However, the opinion, as well as the amendment this case inspired, *supra* note 101, taken literally, may allow just such a result.

101. *See supra* note 6. Commenting on the 1988 amendment to the ACCA, Senator Biden retold the *Petty* case history and remarked:

> The proposed amendment clarifies the armed career criminal statute to reflect the Solicitor General's construction and to bring the statute in conformity with the other [federal] enhanced penalty provisions . . . . Under the amendment, the three previous convictions would have to be for offenses "committed [on] occasions different from one another." Thus, a single multicount 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.*

134 CONG. REC. S17,370 (daily ed. Nov. 10, 1988) (remarks of Sen. Biden) (emphasis added). Two readings of this commentary are possible. One could infer from Senator Biden's explicit

rare situation of truly simultaneous offenses, this principle is easy to apply and draws no quarrel.[102]

B. *Nonsimultaneous Offenses*

Judges disagree on how to apply the ACCA where the predicate offenses are committed at different times within a short period. The statute remains ambiguous under these circumstances.[103] The amending proviso, requiring that the offenses be committed on "occasions different from one another," may allow even minor differences in time between offenses to trigger the ACCA.[104] In contrast, the standard urged by the Solicitor General in the *Petty* case, requiring three or more "multiple criminal *episodes,*"[105] plausibly suggests that a spree of criminal activity, in which several offenses are committed over a period of time, but are in some sense connected, should *not* trigger the ACCA.[106] Not surprisingly, in cases involving connected offenses, courts resolve the ambiguity with inconsistent results. Some courts rely on the distinction in time and enhance the sentence. Others, however, consider nontemporal linkages between offenses or require intervening convictions before enhancing the sentence.[107]

1. *Distinct in Time*

In *United States v. Wicks,*[108] the defendant had three prior burglary convictions, two of them for burglaries committed on the same night.[109] Wicks was convicted for the two same-night burglaries under a single indictment and served concurrent sentences.[110] The

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reference to *Petty* that any measurable difference in time between offenses, that is, any *nonsimultaneous* offenses, should count toward career criminal status. On the other hand, Senator Biden's statement that single multicount convictions "*could* still qualify" when the offenses are committed "on different occasions," "over the course of time," could mean that such a pattern of convictions *may, but does not necessarily* have to be counted, as in circumstances where the defendant appears not to be a "career criminal." *Id.* (emphasis added).

102. The 1988 amendment clearly means that simultaneous offenses, as illustrated by *Petty,* count as a single conviction for ACCA purposes. As might be expected, the much more common situation is that in which the offenses are distinct, but close in time. As shown *infra* in section II.B.1, the correct approach in these cases is not clear. *Petty* nonetheless bears on the "nonsimultaneous" conviction counting problem because, among other things, it acknowledges the difficulty of articulating a standard to capture "that concept of what is meant by 'career criminal.' " 134 CONG. REC. S17,370 (daily ed. Nov. 10, 1988) (remarks of Sen. Biden).

103. *See supra* note 26 ("occasions" susceptible to different interpretations).

104. *Id.* This construction supports the approach taken by the court in United States v. Wicks, 833 F.2d 192 (9th Cir. 1987), *cert. denied,* 488 U.S. 831 (1988), discussed *infra* at section II.B.1.

105. *See supra* note 99 and accompanying text.

106. This is essentially the approach taken by the court in United States v. Towne, 870 F.2d 880 (2d Cir. 1989), discussed *infra* at section II.B.2.

107. *See infra* sections II.B.2 and II.B.3.

108. 833 F.2d 192 (9th Cir. 1987), *cert. denied,* 488 U.S. 831 (1988).

109. 833 F.2d at 193.

110. 833 F.2d at 193.

trial court counted the convictions separately. The Ninth Circuit affirmed, reasoning that, although close in time, the two burglaries were committed at "two different places at two different times."[111] The Court of Appeals distinguished *Petty* on the ground that, in *Petty*, the convictions were for "simultaneous" rather than "distinct in time" offenses.[112] *Wicks'* mechanical ruling suggests that any difference in time between crimes, even a few hours, meets the "multiple criminal episodes . . . distinct in time" requirement adopted in *Petty*.[113] The *Wicks* majority relied on this temporal distinction for its result, but also noted the differences in location and victims between offenses.[114]

The majority explicitly rejected Wicks' argument that the statute should not be applied because he had only been punished, in effect, twice, and therefore did not demonstrate the resistance to rehabilitation that the statute aimed to treat.[115] In a dissent, however, Judge Pregerson agreed with Wicks. He argued that the court should not construe the statute literally in view of the evidence of a legislative intent to target "individuals who are resistant to society's efforts at rehabilitation."[116] Judge Pregerson would have required something more than mere evidence of three convictions to find offenses distinct in time.[117]

The majority's "distinct in time" approach essentially interprets language such as "different occasions" and "multiple episodes" to mean simply "nonsimultaneous." This approach can impose harsh sentences even in cases where all three prior offenses were committed within hours of one another.[118] As evidence of "career criminal" status, such a fact pattern differs dramatically from the case where the offenses occur over a long period of time and more convincingly demonstrate a criminal career.[119] Where the defendant's prior conviction history consists of only three offenses in the same night,[120] a rigid

111. 833 F.2d at 194.

112. *See* 833 F.2d at 194 (arguing that distinctions in time alone can satisfy the criminal episodes test).

113. 833 F.2d at 194.

114. 833 F.2d at 194.

115. 833 F.2d at 193.

116. 833 F.2d at 195 (Pregerson, J. dissenting); *see infra* section II.B.3. (discussing the Third Circuit's intervening-convictions approach).

117. 833 F.2d at 194-95; *see also supra* note 50 (discussing Judge Pregerson's use of the legislative history).

118. *See* 833 F.2d at 194. Under the court's reasoning, Wicks would just as properly have received an enhanced sentence had all three of his burglaries been committed minutes apart in adjacent buildings. It is doubtful that Congress intended such a brief period of criminal activity to result in armed career criminal treatment. *See* 833 F.2d at 195 (Pregerson, J., dissenting).

119. *See* 833 F.2d at 195 (Pregerson, J. dissenting) ("The title of the Act indicates that it was aimed at career criminals, rather than those who merely commit three punishable acts. . . . More was required.").

120. *See* United States v. Balascsak, 873 F.2d 673, 683 (3d Cir. 1989) ("We could hardly attribute to Congress the intention of branding someone a career criminal offender who, for

"distinct in time" approach is overinclusive. This concern, however, diminishes where only a portion of the prior offenses appear related. For example, two burglaries in one night, followed by two more several months later, fairly undercut the notion of an isolated spree.

2. *Multiple Criminal Episodes*

In *United States v. Towne,*[121] the Second Circuit rejected the mechanical approach of the *Wicks* majority and attempted to group offenses into "criminal episodes." In 1976, Towne was convicted on two felony counts of kidnapping, and later sexually assaulting, a single victim.[122] Then, in 1983, in exchange for the dropping of an outstanding 1979 New Hampshire rape charge, Towne pled guilty in Vermont to two counts of sexual assault and kidnapping, again committed upon a single victim.[123] In 1986, Towne was the prime suspect in the disappearance of a fifteen-year-old girl; the investigation of that crime led to his arrest and conviction on felony firearms charges.[124] The trial court enhanced Towne's sentence under the ACCA, counting the sexual assaults and kidnappings as four separate convictions.[125]

On appeal, the government argued that the lower court had counted Towne's four convictions properly because kidnapping and rape "have very different elements, protect discrete interests, [and] do not inevitably occur together."[126] The Second Circuit rejected this argument, holding:

> [U]nder the circumstances of this case, in each instance the kidnapping and rape offenses *were* part of a continuous course of conduct which was directed against a single victim. . . . [U]nlike other cases cited by the appellee, where a convicted defendant had committed separate crimes against separate victims in separate locations [*Wicks* and *Greene* cited] we consider each of these two attacks to be a single criminal episode.[127]

Having determined that only two criminal episodes existed in these facts, the court vacated the portion of the lower court's ruling enhancing Towne's sentence under the ACCA.[128]

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example, committed several separate felonies during a single drunken spree, with no time to sober up and reconsider between the separate incidents.").

121. 870 F.2d 880 (2d Cir.), *cert. denied,* 490 U.S. 1101 (1989).

122. 870 F.2d at 889.

123. 870 F.2d at 882.

124. 870 F.2d at 882-83.

125. 870 F.2d at 888-89.

126. 870 F.2d at 891 (quoting the U.S. Attorney for the District of Vermont).

127. 870 F.2d at 891.

128. 870 F.2d at 891. Much of the difficulty with this decision lies in the language used to explain the result. Hypothetically, Towne might have, on one of the occasions, in the same period of time, kidnapped not one, but two women (at the same time) and later sexually assaulted them both. There would be two victims then, as opposed to a "single victim," but it is not clear what light that sheds on Towne's status as a "career criminal." Similarly, suppose the abductee escaped before Towne could assault her, but he returned several hours, or days, or weeks later,

By comparison, the *Wicks* opinion suggests enhancement would have been appropriate, since Towne committed his offenses at different times and locations.[129] Further, although *Wicks* presents overinclusion risks by looking only to the fact of nonsimultaneous convictions, the *Towne* court's refusal to enhance the sentence for multiple offenses against a single victim presents underinclusion problems.[130] The *Towne* approach looks beyond the fact and timing *of* convictions to the facts *underlying* the convictions, deciding on its own their relevance to whether the defendant is a career criminal.[131]

In effect, *Towne* reintroduces discretion into the sentencing decision by leaving the boundaries and rules of the "episode" inquiry to the judge. The court can circumvent Congress' standard by choosing

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and then assaulted her. Such circumstances change the "single prolonged attack" characterization, but would hardly show Towne to be any more of a "career criminal" than he was in his actual attacks.

129. *Compare* United States v. Wicks, 833 F.2d 192, 193-94 (9th Cir. 1987), *cert. denied*, 488 U.S. 831 (1988) *with Towne*, 870 F.2d at 891. Because Towne, like Wicks, committed two different offenses (kidnapping and sexual assault) at two different places (the site of the abduction versus the site of the sexual assault) at two different times (kidnapping, then later sexually assaulting his victims), under the *Wicks* analysis he would qualify for enhanced sentencing. However, the *Towne* court distinguished *Wicks* on the ground that Wicks "had committed separate crimes against *separate victims* in separate locations." *Towne*, 870 F.2d at 891 (emphasis added). The distinction hardly seems dispositive.

130. The *Towne* opinion suggests that the court would not enhance a sentence where the "offenses were part of a continuous course of conduct which was directed against a single victim." *Towne*, 870 F.2d at 891 (emphasis omitted). This portion of the court's reasoning seems too narrow, since it is quite plausible that a criminal could make a "career" (or at least part of one) out of repeated offenses against a single victim. For example, a burglar might steal from the same warehouse night after night, or a bully might beat the same victim time after time. While those situations may differ from *Towne* in the elapsed time between offenses, it is hardly clear from the *Towne* decision that Towne would have qualified for enhanced sentencing had the interval between the kidnappings and the subsequent sexual assaults been separated by a similar length of time. Perhaps the rationale behind the *Towne* opinion is that since there was no discernible break in the defendant's criminal activity between the time of the kidnappings and the sexual assaults the offenses blend together in time. This undifferentiated continuity of criminal activity might distinguish *Towne* from *Wicks*. *See supra* section II.B.1 (Wicks' burglaries were separated by a discernible, if brief, break in time between offenses.). Also, the fact Towne's offenses occurred with no break in criminal activity may mean Towne lacked the requisite "time to sober up and reconsider between the separate incidents" suggested in United States v. Balascsak, 873 F.2d 673, 683 (3d Cir. 1989). On the other hand, he undoubtedly could have abandoned his prolonged attack at some time during its course.

131. Once factors other than the number, type, and timing of the prior offenses enter the analysis, judicial discretion figures prominently in the analysis. Since the statute doesn't specify any additional factors for consideration, the court decides them on its own. The sentencing decision begins to resemble the traditional discretionary approach. *See* M. FRANKEL, *supra* note 44, at 21-25. The *Towne* court looked at the number of victims and the "prolonged" character of the attacks, and declined to enhance Towne's sentence. It might just as easily have considered the repetitive nature of Towne's offenses (similar violent sexual assaults), the fact he had failed in an intensive rehabilitation program specifically aimed at sex offenders, and the fact his initial crime in each offense (kidnapping) preceded the subsequent sexual assaults by enough time to force the victims to drive to secluded locations, affording Towne a reasonable opportunity to desist. Discretion applied along the latter lines thus might reverse the results in *Towne* and *Wicks*. Compare this discretion with the discretionary departure provisions in the federal sentencing guidelines, *infra* Part III.

as it wishes from the plausible reasons for finding, or not finding, a single criminal episode. Without statutory guidance, the "episode" idea is just as ambiguous as the "occasion" and "career criminal" concepts.

The *Towne* court approvingly cited the dissent in *Wicks*, which noted that "the title of the Act itself indicates that it was aimed at punishing 'career' criminals, 'individuals who are resistant to society's efforts at rehabilitation.' "[132] The *Wicks* dissenter thus hints that courts should not restrict their inquiry to the number, substance, and timing of convictions, but also should assess how many unsuccessful "efforts at rehabilitation" the prospective career criminal defendant has been afforded. This idea is central to the third approach to counting convictions.

3. *Intervening Convictions*

In *United States v. Balascsak*,[133] the defendant was tried and convicted of illegally purchasing a gun as an ex-felon. In May of 1981, Balascsak had been convicted of burglary.[134] Months later, in November of 1981, he was convicted of two more crimes: burglaries of two different houses one block apart on the same night.[135] The pattern of offenses closely resembles that in *Wicks*.[136] Acting consistently with the *Wicks* "distinct in time" approach, the trial court enhanced the sentence.[137]

On appeal, the Third Circuit declined to follow the approaches taken by other circuits and virtually disregarded the 1988 amendment.

> "Distinct in time," "criminal episodes," and "committed on occasions different from one another" [phrases taken from *Petty*, *Wicks*, *Towne*, and the language of the 1988 amendment to the ACCA] are malleable standards. . . . We 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.[138]

132. *Towne*, 870 F.2d at 891 (quoting *Wicks*, 833 F.2d at 195 (Pregerson, J., dissenting)).

133. 873 F.2d 673 (3d Cir. 1989).

134. 873 F.2d at 675.

135. 873 F.2d at 675.

136. *See* United States v. Wicks, 833 F.2d 192 (9th Cir. 1987), *cert. denied*, 488 U.S. 831 (1988).

137. *Balascsak*, 873 F.2d at 676. Balascsak was convicted under the earlier version of the ACCA, 18 U.S.C. app. § 1202 (1982 & Supp. II 1984). That version did not contain the "committed on occasions different from one another" language added by the 1988 amendment to the current version of the ACCA. *See* discussion of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7056, 102 Stat. 4181, 4402 (codified as amended at 21 U.S.C. §§ 1501-09 (1988) (amending the Armed Career Criminal Act). However, the *Balascsak* court was aware of the added language at the time it considered the Act's application to the instant case. *See Balascsak*, 873 F.2d at 688 (Greenberg, J., dissenting).

138. *Balascsak*, 873 F.2d at 683. The *Balascsak* court vociferously criticized the *Wicks* ma-

The court examined the legislative history at length and decided that Congress meant to target a small number of high-rate offenders *incapable of rehabilitation.*[139] The court adopted the conviction counting method used in most state habitual-offender statutes. Most state schemes require that each successive felony must be committed after the previous felony conviction in order to count toward habitual-offender status.[140] The *Balascsak* majority held that the ACCA requires that each counted offense occur after a preceding conviction.[141] Balascsak's offense/conviction pattern, arrayed chronologically, was: Offense 1, Conviction 1, Offense 2, Offense 3, Conviction 2, Conviction 3. Thus, offenses 2 and 3, the burglaries committed on the same night, only counted as one occasion.[142]

This approach may often prove underinclusive. Courts taking this view will not enhance sentences even if the string of offenses spans days, weeks, or months unless it is broken by intervening convictions.[143] Absent intervening convictions, the offenses — no matter how indicative of a criminal career — do not count separately.[144] This

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jority's reliance on the distinction in time between offenses as sufficient reason to trigger the ACCA:

> The *Wicks* majority held that two burglaries committed on the same night in two different locations are "distinct in time" and therefore may be counted as multiple convictions. Thus the *Wicks* court would rely on small temporal distinctions without considering the underlying purpose of the statute; precisely the interpretation the Solicitor General suggested was improper.

873 F.2d at 683. The *Balascak* majority went on to state that a "criminal episode" test (precisely the interpretation the Solicitor General suggested *was* proper) or a "committed on occasions different from one another" standard (precisely the language of the 1988 amendment) are "hardly more satisfactory" than the *Wicks* temporal test. 873 F.2d at 683. The court opined that these tests would all require an "evidentiary hearing" to "give factual content to the phrase." 873 F.2d at 683. Further, in view of the fact that the legislative history suggests that proof of the underlying convictions would "[o]rdinarily . . . be in the form of certified court records," the court concluded that the drafters "cannot have contemplated an interpretation of the statute which required for its application anything but a straightforward process." 873 F.2d at 683 (quoting S. REP. No. 585, 97th Cong., 2d Sess. 3, at 78 (1982)). Accordingly, the court rejected any test which would require it to "evaluat[e] the precise temporal, spatial, or jurisprudential relationship between two crimes." 873 F.2d at 684.

139. *Balascsak,* 873 F.2d at 679-82. Evidence of such purpose was to be found in metaphors such as "revolving door" and "three-time loser" used in the legislative record. "The sort of 'three-time loser' which the supporters of the bill had in mind is one who is convicted of one crime, then commits a second, and then commits a third." 873 F.2d at 682 (citing S. REP. No. 190, 98th Cong., 1st Sess. 1, at 6 (1983)).

140. 873 F.2d at 682 ("[T]he rule followed in the majority of jurisdictions is that each successive felony must be committed after the previous felony conviction in order to count toward habitual criminal status.") (quoting State v. Carlson, 560 P.2d 26, 29 (Alaska 1977)).

141. *Balascsak,* 873 F.2d at 683-84.

142. *Balascsak,* 873 F.2d at 684.

143. In essence, the *Balascak* approach captures career criminals who are apprehended and convicted more frequently, and passes over those who are brought to justice less frequently — but who are logically as much "career criminals" as the former group. *See* United States v. Herbert, 860 F.2d 620, 622 (5th Cir. 1988) ("Logically, a person who is convicted in a single trial for multiple felonies committed on separate occasions could be classified as an 'habitual offender' or 'career criminal.' "), *cert. denied,* 490 U.S. 1070 (1989).

144. The concurring judge in *Balascsak* pointed out that several offenses without intervening

approach might pass over bona fide career criminals who are successful in avoiding convictions for long periods of time. Many of the most dangerous career criminals — mob bosses, drug kingpins, and master thieves, for example — whose long patterns of crime often come to light only after lengthy investigations which culminate in multicount indictments, would escape enhanced sentencing, while their clumsier, more exposed, more easily caught underlings would not.[145]

Even more problematically, the *Balascsak* approach all but rewrites the present version of the statute. Congress could easily have included an intervening convictions scheme modeled on state habitual-offender laws in the ACCA had it wished to do so. Yet the text of the statute requires simply that the offenses be committed on different occasions, and suggests that Congress wanted a much more inclusive rule than state schemes provide.[146]

The concurring and dissenting opinions in *Balascsak* amplify the differences between the majority's intervening convictions standard, the multiple episodes approach, and the distinct in time approach. Judge Becker's concurring opinion urges the multiple criminal episodes approach. He argues that the "intervening convictions" approach goes too far, but that the "criminal episode requirement must be read rigorously and that we must insist that the government prove convincingly that the crimes (and the episodes of which they were part) were truly separate." [147] Judge Becker recognized, however, the

convictions could demonstrate career criminal status sufficient to trigger the Act. 873 F.2d at 684-85 (Becker, J., concurring); *see also* 873 F.2d at 687 & n.4 (Greenberg, J., dissenting) (pointing out that labels such as "career criminal" and "repeat offender" apply equally "to those who commit three crimes without any intervening convictions as to those who go through the judicial and penal systems between crimes," and that the majority's "reconstruction" of the ACCA would have the wrong effect of allowing felons who are repeatedly arrested, but whose prosecutions are delayed, to avoid enhanced sentencing).

145. This possibility is similar to that mentioned by Judge Greenberg in his dissent — the repeated arrest, delayed prosecution anomaly. *Balascsak*, 873 F.2d at 687 & n.4 (Greenberg, J., dissenting).

146. *See supra* section I.A. The intent for the ACCA to operate in part as a tough federal "lever" that could be used to expedite the plea process in state courts implies that the defendant should find his options under state law relatively attractive when compared with the federal alternative. State schemes, moreover, are often criticized as ineffective, in part because they tend to capture the less serious, more easily caught offenders whose offense/conviction patterns more quickly ripen into the requisite sequence of three pairs. *See* ABA STANDARDS, § 18-4.4, at 280-81. Reliance on analogies to state habitual offender statutes to interpret the ACCA proves unpersuasive. If Congress "drew on" the state habitual-offender statutes, it could have attached a similar counting scheme to the ACCA, particularly in its response to the conviction counting problem in the 1988 post-*Wicks* amendment. Had Congress wanted an intervening convictions method applied, it could have simply drafted or amended the Act plainly to require intervening convictions. More plausibly, Congress wanted a much tougher, more inclusive rule than state habitual-offender laws. Indeed, had Congress thought state laws worked well enough, there would be no need to offer a federal response to the recidivist problem at all. *See supra* section I.A.

147. 873 F.2d at 684 (Becker, J., concurring).

difficulty in deciding how much time should be required to count Balascsak's burglaries as separate episodes:

> I concede my inability to establish a bright line, e.g., as to whether two days' or two weeks' hiatus is enough. But developing the law on a case-by-case basis and drawing lines depending on the facts is the stuff of judging and I would leave the development of the law to that process.[148]

On the facts of *Balascsak*, Judge Becker would not have counted the two burglaries separately, since it was "more than possible that the two burglaries were committed within minutes of each other."[149] Judge Becker correctly implied that some measure of discretion ("the stuff of judging") must operate in close cases to avoid over- and underinclusive results. He left unanswered the question of appropriate boundaries for that discretion in the ACCA's mandatory sentencing scheme.

Judge Greenberg's dissenting opinion essentially argued for a distinct-in-time interpretation. He noted that the labels quoted by the majority, "career criminal" and "three time loser," apply equally well to those who commit multiple crimes without intervening convictions as to those who go through the judicial and penal systems between offenses, and suggested that Congress was concerned with *both* types of offenders.[150] Judge Greenberg correctly pointed to the 1988 amendment, which added the words "committed on different occasions," as evidence that Congress intended the ACCA to apply to those criminals involved in repeated criminal episodes, with or without intervening efforts at rehabilitation.[151] In keeping with the *Wicks* rationale, Judge Greenberg would have counted the two burglaries as separate convictions since "the burglaries at issue were sufficiently distinct in time and place as to satisfy the applicable standard."[152]

In summary, the conviction counting approaches taken by the courts result in different outcomes when the predicate offenses occur closely in time. The mechanical *Wicks* approach almost certainly leads to sentence enhancement and risks overinclusion. The equally mechanical *Balacscak* approach reads so much into the ACCA that it proves underinclusive. Between the two, the "multiple episodes" concept articulates at best a hazy standard for grouping or distinguishing separately countable convictions, risking inconsistent outcomes and reintroducing a large measure of judicial discretion into the sentencing process.

The same conviction counting issues and problems presented by the ACCA have surfaced in the development and implementation of

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148. 873 F.2d at 685 (Becker, J., concurring).

149. 873 F.2d at 684-85 (Becker, J., concurring).

150. 873 F.2d at 687 (Greenberg, J., dissenting).

151. 873 F.2d at 688 (Greenberg, J., dissenting).

152. 873 F.2d at 688 (Greenberg, J., dissenting).

the Federal Sentencing Guidelines' "career offender" sentence enhancement provisions. The Guidelines may offer useful insights for interpreting the ACCA.

III. COUNTING CONVICTIONS UNDER THE "CAREER OFFENDER" PROVISIONS OF THE FEDERAL SENTENCING GUIDELINES

This Part examines the treatment of "career offenders" under the Federal Sentencing Guidelines. It briefly examines the basic operation of the Guidelines and the Guidelines' career offender provision. It then analyzes the Guidelines' conviction counting method and the application of the method by the federal courts. This Part concludes that conviction counting under the Guidelines improves upon each of the various approaches taken under the ACCA.

A. *The Federal Sentencing Guidelines*

The ACCA represents only one of a number of major federal criminal law reforms enacted in 1984. The Comprehensive Crime Control Act of 1984,[153] of which the ACCA was a part, also contained the Sentencing Reform Act of 1984,[154] which established the United States Sentencing Commission (Sentencing Commission). The Sentencing Commission develops the Guidelines and policy statements, both of which are binding in federal courts.[155] The Guidelines replace the former discretion-based federal sentencing scheme[156] with a system of prescribed sentencing ranges based on specified "offense behavior" and "offender characteristics."[157] Briefly, the Guidelines employ a "sentencing table," a matrix of incremental sentencing ranges which increase in proportion to the combined weight of the "offense level" of

153. Pub. L. No. 98-473, 98 Stat. 1837, 1976 (1984).

154. Pub. L. 98-473, 98 Stat. 1837, 1988, 2017 (1984) (codified at 18 U.S.C. §§ 3551-59 (1988); 28 U.S.C. §§ 994-98 (1988)).

155. 28 U.S.C. § 994(a) (1988); 18 U.S.C. § 3553(b) (1988); *see* Guidelines, 18 U.S.C.A. app. 4 (West Supp. 1991), discussed *supra* note 15.

156. *See, e.g.*, M. FRANKEL, *supra* note 44, at 5-6, 118-119 (criticizing the extreme disparity in sentencing attributable to judicial discretion and proposing guidelines developed by a sentencing commission as a remedy); Note, *Sentence Enhancement Based on Unconstitutional Prior Convictions*, 64 N.Y.U. L. REV. 1373 (1989) (distinguishing discretionary from mandatory sentencing schemes). Congress expressly found that the then-existing sentencing scheme often did not "accurately reflect the seriousness of the offense," and implicitly that it often did not produce appropriate sentences for violent offenders. *See* 28 U.S.C. § 994(j), (m) (1988). The tension between the judiciary and the legislature on the issue of sentencing discretion is an old and recurring theme in the criminal law. *See* United States v. Pinto, 875 F.2d 143 (7th Cir. 1989) (explaining the move to Guideline-based sentencing as a "pendulum swing" away from the former discretion-based model, a recurrent theme in criminal law reform).

157. *See* 28 U.S.C. § 994 (c), (d) (1988); *see also* Guidelines, 18 U.S.C.A. app. 4 § 1A (West Supp. 1991) (introductory commentary explaining the need for the Guidelines and how they generally operate); Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988) (explaining the background, promulgation, and operation of the Guidelines).

the crime and "criminal history category" of the defendant.[158] The sentencing judge may depart from the guideline range in very few cases; the Guidelines thus greatly curtail judicial discretion from earlier practice.[159] Furthermore, the sentence ordered is the sentence served because the Guidelines also abolish parole.[160]

Congress directed the Sentencing Commission to develop guidelines that would ensure certain repeat offenders receive prison terms "at or near the maximum term."[161] Accordingly, the Guidelines contain a "career offender" provision which greatly increases the offense level and criminal history category — and thus greatly increases the sentence — of defendants who meet the definition prescribed by Congress. Guideline section 4B1.1 provides that

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (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.[162]

The application notes for section 4B1.1 refer the reader to section 4B1.2 for definitions of the terms "crime of violence," "controlled substance offense," and "two prior convictions."[163] For defendants quali-

158. *See* Guidelines, 18 U.S.C.A. app. 4 § 5A (West Supp. 1991) ("Sentencing Table"). For the basic mechanics of how the Guidelines work, see *supra* note 15. By specifying the incremental increases in sentence for each additional prior crime, the Guidelines thus contain the proportionality limitations on sentence enhancement voiced by the ABA during the earlier debate on the ACCA. *See supra* note 60.

159. 18 U.S.C. § 3553(b) (1988); *see supra* note 15.

160. Guidelines, 18 U.S.C.A. app. 4 § 1A3 (West Supp. 1991). The ACCA also eliminates parole. 18 U.S.C. § 924(e) (1988). For the text of this provision, see *supra* note 6.

161. 28 U.S.C. § 994(h) (1988). Incapacitation of likely recidivists is one of the "basic purposes of criminal punishment" recognized by Congress in the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976 (1984), the parent legislation of both the ACCA and the Guidelines. *See* Guidelines, 18 U.S.C.A. app. 4 § 1A2 (West Supp. 1991) ("the basic purposes of criminal punishment [are d]eterrence, incapacitation, just punishment, and rehabilitation").

162. Guidelines, 18 U.S.C.A. app. 4 § 4B1.1 (West Supp. 1991) (emphasis added).

163. Guidelines, 18 U.S.C.A. app. 4 § 4B1.1, application note 1 (West Supp. 1991). The text of § 4B1.2 reads in part as follows:

> (1) The term "crime of violence" means any offense . . . punishable by imprisonment for a term exceeding one year that —
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.
>
> (2) The term "controlled substance offense" means an offense [under a law] prohibiting the manufacture . . . or distribution [or possession with intent toward distribution] of a controlled substance . . . .
>
> (3) The term "two prior felony convictions" means (A) the defendant committed the instant offense subsequent to sustaining at least two felony convictions [of either a qualifying violent or drug offense, or both], and (B) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of Part A [of Chapter 4].

18 U.S.C.A. app. 4 § 4B1.2 (West Supp. 1991); *cf.* ACCA, 18 U.S.C. § 924(e)(2) (1988) (The Guidelines' definition of "crime of violence" nearly mirrors the ACCA definition of "violent felony;" The definition of "controlled substance offense," although it does not refer to specific

fying as career offenders, judges must adjust the offense level and criminal history category above normal levels, thus greatly increasing the applicable sentencing range in the sentencing table.[164]

B. *Conviction Counting Under the Guidelines*

This section examines conviction counting in the Guidelines career offender provisions, including the basic test and its application by the courts. It then examines the Guidelines' concept of criminal "occasions" and its treatment by the courts. Conviction counting issues identical to those presented under the ACCA arise under the Guidelines.

1. *The Basic Test*

To compute the number of prior felony convictions under the career offender guideline, section 4B1.1, the judge must use the method described at section 4A1.2.[165] This section provides in part: "Prior sentences imposed in *unrelated* cases are to be *counted separately.* Prior sentences imposed in *related* cases are to be treated as *one sentence* for purposes of the criminal history."[166] The application notes to section 4A1.2 define the term "related," but caution that the method may not work in all cases.

> Related Cases. Cases are considered related if they (1) occurred on a *single occasion,* (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing. The court should be aware that there may be instances in which this definition is overly broad and will . . . underrepresent[] the seriousness of the defendant's criminal history and the danger that he presents to the public. For example, *if the defendant commits a number of offenses on independent occasions separated by arrests,* and the resulting criminal cases are consolidated . . . [counting the convictions as a single conviction per the general rule] will not adequately reflect either the seriousness of the defendant's criminal history or the frequency with which he commits crimes. In such circumstances, *the court should consider whether departure is warranted.* See

anti-drug statutes as does the ACCA, is also quite similar.). Subsection (3), defining "two prior felony convictions" refers the reader to the conviction counting provisions applicable to criminal history computation in general. *See* 18 U.S.C.A. app. 4 §§ 4A1.2, 4A1.3 (West Supp. 1991); *infra* notes 165-67 and accompanying text. By comparison, the only conviction counting guidance appearing in the ACCA is that the three prior convictions be for offenses "committed on different occasions" as discussed *supra* Part II.

164. Because the career offender provision increases the offense level and criminal history category, the sentencing range from the sentencing table increases. *See supra* note 15 (explaining mechanics of the Guidelines); *see also infra* notes 216-19 and accompanying text (explaining how the career offender provision applies in ACCA cases).

165. Section 4B1.2 of the Guidelines, in defining "two prior felony convictions," directs the sentencing court to section 4A1.2 for guidance in determining whether to count prior convictions separately. *See* 18 U.S.C.A. app. 4 § 4B1.2(3) & application note 4 (West Supp. 1991) ("The provisions of § 4A1.2 . . . are applicable to the counting of convictions under § 4B1.1.").

166. 18 U.S.C.A. app. 4 § 4A1.2(a)(2) (West Supp. 1991) (emphasis added).

§ 4A1.3.[167]

By implication, if offenses occurred on multiple occasions, they should normally count separately. The statutory language of the ACCA resembles this aspect of the Guidelines.[168]

Further, the Guidelines state the general rule that cases "consolidated for sentencing" are considered related and thus counted as a single prior conviction. Assuming that "consolidated for sentencing" means sentencing for multiple counts in a single proceeding, and that no "departure is warranted," many of the conviction patterns in the ACCA cases examined in Part II (those featuring concurrent sentencing on prior offenses) would not be counted separately under the Guidelines method.[169] In practice, however, courts have rarely followed the general "relatedness" rule where the underlying offenses are serious and factually distinct; upward departure from the Guidelines is common in such cases.[170]

To summarize, the Guidelines presumptively count offenses separately only if they are unrelated — committed on independent occasions, arising from separate criminal plans, and not consolidated for trial or sentencing. Courts may depart from this general rule, however, where the defendant's history shows enough dangerousness or proclivity to crime to convince the court that sentence enhancement is appropriate. The Guidelines suggest courts clearly should depart from this rule, for example, where the defendant's offenses are separated by intervening arrests. The Guidelines do not mention intervening convictions.

2. *Applications*

Courts counting convictions for purposes of the career offender provision have interpreted the Guidelines in ways that make it difficult to count defendants' multiple convictions as related. To avoid consolidation, courts either find the section 4A1.2 application note nonbinding or invoke the upward departure provisions applicable to the Guidelines generally. The following examples illustrate these approaches.

a. *Rejecting strict adherence.* At least one court has rejected outright the Guidelines' presumption that convictions for distinct offenses

167. 18 U.S.C.A. app. 4 § 4A1.2 application note 3 (West Supp. 1991) (emphasis added).

168. *See* 18 U.S.C. § 924(e)(1) (1988) (offenses "committed on occasions different from one another" count separately toward sentence enhancement).

169. *Compare* United States v. Wicks, 833 F.2d 192, 193 (9th Cir. 1987) (two same-night burglaries prosecuted and sentenced together but counted separately under ACCA), *cert. denied,* 488 U.S. 831 (1988) *with* United States v. Balascsak, 873 F.2d 673, 675 (3d Cir. 1989) (burglaries on consecutive days sentenced together but not counted separately since no intervening conviction between offenses).

170. *See infra* note 188 and accompanying text.

are related simply because the cases were consolidated for sentencing. In *United States v. Gross,*[171] the defendant had been sentenced in a single proceeding for two forgeries and for cashing a nonsufficient funds check on the same day. Although he stipulated that the three offenses were "factually unrelated criminal actions,"[172] the defendant alleged error in counting the sentences separately for computing his criminal history, since the cases were sentenced in a single proceeding and thus "consolidated for sentencing."

On appeal, the Ninth Circuit "reject[ed] that part of Application Note 3 that suggests that cases consolidated for sentencing are to be deemed related," finding the application notes to be merely nonbinding "advisory commentary."[173] The court noted that counting convictions for "multiple unrelated offenses" as a single related case, merely because they were sentenced together, would produce results dramatically different from those for identical defendants who were sentenced in separate proceedings.[174] Such a result, the court ruled, would be both inequitable and contrary to the Guidelines' policy of providing "honesty, uniformity, and proportionality in sentencing."[175] Much as it had done in the ACCA context in *United States v. Wicks,*[176] the Ninth Circuit counted convictions separately for sentence enhancement, even for offenses committed in a single day.[177]

b. *Authorized departures.* Even if courts do not reject the "consolidation for sentencing" language outright, they may be able to impose an enhanced sentence departing from the Guidelines' range. Guideline section 4A1.3 provides: "If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the de-

171. 897 F.2d 414 (9th Cir. 1990). *Gross* was not a "career offender" case; the conviction counting rules in § 4A1.2, however, apply to the normal criminal history calculation required by the Guidelines in all federal sentencing proceedings as well as the specific career offender provision.

172. 897 F.2d at 416.

173. 897 F.2d at 416; *see also* United States v. Metcalf, 898 F.2d 43 (5th Cir. 1990) (sentences issued on same day for separate burglaries not "consolidated" since offenses proceeded under separate docket numbers without any order of consolidation and were "not factually tied in any way"). *But see* United States v. Flores, 875 F.2d 1110, 1113 (5th Cir. 1989) (adhering to consolidated sentencing aspect of Application Note 3 and counting such convictions as one); United States v. White, 893 F.2d 276, 279 (10th Cir. 1990) (same).

174. 897 F.2d at 417.

175. 897 F.2d at 417 (citing Guidelines, 18 U.S.C.A. app. 4 § 1A3 (West Supp. 1991)). This rationale accords with the fairness justification for the narrow reading of the criminal history test in the ACCA. *See supra* section I.B.

176. 833 F.2d 192 (9th Cir. 1987), *cert. denied,* 488 U.S. 831 (1988).

177. *See also* United States v. Wildes, 910 F.2d 1484, 1487 (7th Cir. 1990) (In computing convictions for career offender status, the court stated that "[t]here is something of a mismatch between 'relatedness' and whether two cases count as 'two . . . convictions' for purposes of § 4B1.1(3)." The court did not have to decide whether to follow *Gross,* since two distinct sentencing proceedings were available.).

fendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range."[178] "Reliable information" may include information about "prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions."[179] For example, the Guidelines suggest that a consolidated sentence for a series of serious assaults would warrant departure.[180] In effect, this departure provision infuses the conviction counting and sentence enhancement process with a measured amount of judicial discretion — at least in the upward direction — since the judge may, but need not, decide the actual sentence based on facts in the defendant's criminal record other than the number, type, and timing of prior offenses.

As the Guidelines suggest, the judge has discretion to consider, for example, the fact that a defendant repeatedly committed similar violent offenses, or has continued to offend despite lengthy prior incarceration. Thus, while permitting discretion in some cases, the Guidelines nonetheless limit the inquiry to "reliable" facts in the criminal history. Broad, unguided speculation about the defendant's innocuousness or dangerousness is not allowed. A representative case illustrates the sorts of facts judges examine to decide close cases under the Guidelines.

In *United States v. Dorsey,*[181] the trial court imposed a sentence in the range prescribed for career offenders even though all the defendant's prior convictions were consolidated for sentencing. In 1982, an indictment charged Dorsey with seven bank robberies in two different states; he pled guilty to four of the robberies and agreed to sentencing in a single proceeding.[182] While serving his sentence, he escaped and proceeded to rob four more banks in three different states in two months. When he was caught, he pled guilty to these four offenses, again consenting to disposition of the cases in a single proceeding. The last four robberies formed the "instant offenses" in this case.[183]

On appeal, the Eleventh Circuit upheld the trial court's sentencing of Dorsey as a career offender to 262 months in prison, even though the Guidelines generally would characterize the offenses as related because all his prior convictions were "consolidated for sentencing."[184] Technically Dorsey did not qualify as a career offender under section 4B.1. The trial court found, however, the case warranted upward de-

178. 18 U.S.C.A. app. 4 § 4A1.3 (West Supp. 1991).

179. 18 U.S.C.A. app. 4 § 4A1.3(b) (West Supp. 1991).

180. 18 U.S.C.A. app. 4 § 4A1.3 commentary (West Supp. 1991).

181. 888 F.2d 79 (11th Cir. 1989), *cert. denied,* 110 S. Ct. 756 (1990).

182. 888 F.2d at 80-81. Dorsey's prior convictions had been pled and sentenced simultaneously under FED. R. CRIM. P. 20(a).

183. 888 F.2d at 80.

184. 888 F.2d at 80.

parture under section 4A1.3 on the basis of reliable facts: the seriousness of Dorsey's crimes and the circumstances of his single-proceeding sentencing.[185] The court of appeals affirmed:

> We do not believe . . . someone with a history such as Dorsey's should be treated as having only *one* prior conviction, solely because he is *permitted* to take advantage of Rule 20(a)'s procedural device. . . .
>
> This is not a case where a defendant committed multiple bank robberies over a short period of time in a single jurisdiction and was tried and sentenced simultaneously for all the offenses.[186]

The court noted that, without the procedural consolidation device, Dorsey would clearly have met the definition of "career offender" under section 4B1.1.[187] The court suggested that upward departure might not have been warranted had the offenses been committed within a short time span, a principal problem under the ACCA. *Dorsey* illustrates that, sparingly applied, discretion risks little in the way of fairness or accuracy.

Dorsey provides one example of a judge's discretionary power to impose enhanced sentences — even as severe as the career offender range — via the departure provision in Guidelines section 4A1.3, even though the "career offender" definition technically fails.[188] By comparison, under ACCA conviction counting approaches, Dorsey's convictions would be counted separately under the "distinct in time" and

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185. *See supra* notes 169-70 and accompanying text.

186. 888 F.2d at 81.

187. 888 F.2d at 81.

188. Several cases demonstrate the range of circumstances in which the sentencing judge may properly depart upward to enhance the sentence of defendants with "under-representative" criminal histories. *See, e.g.*, United States v. Armstrong, 901 F.2d 988, 989 (11th Cir. 1990) (like *Dorsey*, upward departure justified where career offender status would have obtained but for fact multiple bank robbery convictions resulting from interstate crime spree were "consolidated" for sentencing under rule 20(a)); United States v. Medved, 905 F.2d 935, 942 (6th Cir. 1990) (seriousness and timing of crimes justified departure; prior conviction related to three separate bank robberies committed over eight month period), *cert. denied*, 111 S. Ct. 997 (1991); United States v. Campbell, 888 F.2d 76, 78-79 (11th Cir. 1989) (upward departure to 120 months justified where crimes of record "substantial in number and serious in character" even though § 4B1.1 definitions of qualifying offenses for career offender status not precisely met), *cert. denied*, 110 S. Ct. 1484 (1990); United States v. Jordan, 890 F.2d 968, 971, 977 (7th Cir. 1989) (same). In all cases these courts' exercise of discretion is justified by facts readily apparent from the defendant's record.

Courts disagree over the circumstances in which judges may exercise discretion to depart downward — and apply a sentence more lenient than called for by the Guidelines — when the defendant clearly meets the career offender test, but the judge believes the criminal history *over*-represents the defendant's dangerousness and potential for recidivism. *Compare* United States v. Smith, 909 F.2d 1164, 1169-70 (8th Cir. 1990) (downward departure upheld as within judge's discretion where judge determined qualifying burglary and drug offenses to have been "somewhat small-time," and committed at early age and within two-month period), *cert. denied*, 111 S. Ct. 691 (1991) *with* United States v. Gonzalez-Lopez, 911 F.2d 542, 549-51 (11th Cir. 1990) (neither judge's assessment of underlying robbery and burglary offenses as lacking in "the requisite element of violence" nor his opinion that career offender sentencing was excessively harsh justified downward departure from applicable career offender range), *cert. denied*, 111 S. Ct. 2056 (1991).

"multiple episodes" approaches since he robbed the banks over a lengthy time (months), and in different states. The "intervening convictions" approach would reach a different result. Dorsey's first four robberies resulted in a single multicount conviction, and all of his postescape robberies preceded his second conviction. Given that sequence, the intervening convictions approach would assess Dorsey with just two prior offenses for sentence enhancement purposes. The prolific interstate bank robber and prison escapee would not receive an enhanced sentence. Surely the Guidelines' result is preferable.

c. *The Elusive "Single Occasion."* Both the Guidelines and ACCA use the concept of a criminal "occasion."[189] Neither the Guidelines nor the cases applying them define the term directly. Under the Guidelines, some cases recognize that close-in-time offenses may amount to a single occasion. In practice, however, factually distinct offenses often count separately, even where they occurred closely in time. The *Dorsey* court, without deciding the issue, noted that sentence enhancement might not have been warranted had he committed his offenses within a very short time span,[190] bank robberies on the same day, for example. This situation, of course, presents the most difficulty under the ACCA. The Guidelines presume cases to be "related," and thus count them as a single offense, if they "occurred on a single occasion."[191] The presumption, the cases show, presents no great obstacle to enhancing the sentence in most cases.

In *United States v. Jones,*[192] the defendant argued that two prior convictions, one for bank robbery and another for an attempted bank robbery ninety minutes later, involved offenses which occurred on a "single occasion," and therefore the convictions should properly have been counted as only a single related case. On appeal, the Eleventh Circuit upheld the trial court's determination that the offenses did *not* occur on a single occasion since they were "temporally distinct and involved two different . . . victims."[193] This narrow reading of the term "occasions" — finding two similar crimes committed minutes apart to be different, separately countable occasions — mirrors the Ninth Circuit's "distinct in time" approach under the ACCA.[194] Similarly, in *United States v. Gross*[195] three convictions for offenses com-

189. *See supra* note 167 and accompanying text; *supra* note 6.

190. 888 F.2d at 81.

191. 18 U.S.C.A. app. 4 § 4A1.2 application note 3 (West Supp. 1991). The ACCA implies the same rule, but the term "occasions" is no less ambiguous here than in the ACCA. *See supra* note 26 and accompanying text.

192. 899 F.2d 1097 (11th Cir.), *cert. denied,* 111 S. Ct. 275 (1990).

193. 899 F.2d at 1101.

194. *See* United States v. Wicks, 833 F.2d 192, 194 (9th Cir. 1987), *cert. denied,* 488 U.S. 831 (1988).

195. 897 F.2d 414, 415-417 (9th Cir. 1990). Gross appealed the trial court's separate counting based on consolidated sentencing and lost. Apparently, Gross did not make the "single occa-

mitted on the same day were, in the final analysis, counted separately.

In these cases, as in *Wicks,* the term "occasions" simply means distinct events occurring at different times, regardless how slight the interval between events may be. The decisions do not give much weight to the fact that such brief intervals between offenses might suggest behavior resulting from a one-time impulse rather than recidivist tendencies. It is unclear whether these defendants would have succeeded had they argued their offenses were related components of a "single common scheme or plan."[196] Under the Guidelines, where factually distinct offenses are neither committed simultaneously nor consolidated for sentencing, a "common scheme" argument may convince the court that the offenses constitute a single related case.[197] No reported cases address the point.

IV. A Consistent Approach to Federal Conviction Counting

This Part first examines the relationship between "career criminal" status under the Armed Career Criminal Act and "career offender" status under the Guidelines. Next, it suggests that the rationale for examining conviction history under the ACCA and the Federal Sentencing Guidelines is the same, and summarizes the ways in which conviction counting under the Guidelines nonetheless differs from the various approaches to conviction counting under the ACCA. Finally, it suggests how and why courts should interpret the ACCA to permit conviction counting by the same principles they use to apply the Guidelines. The recommended Guidelines-based approach is consistent with the text and purpose of the ACCA.

A. *Relationship Between Career Offender Provision and the ACCA*

Until quite recently, no specific Federal Sentencing Guideline existed for violations of the Armed Career Criminal Act.[198] Prior to the

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sion" argument, perhaps because he had already conceded that the same-day offenses were "factually unrelated." 897 F.2d at 416. Prospects for success, had he advanced the argument, may have been dim in view of the "distinct in time" approach to ACCA conviction counting taken by the Ninth Circuit in *Wicks,* 833 F.2d at 194.

196. Guidelines, 18 U.S.C.A. app. 4 § 4A1.2 application note 3 (West Supp. 1991).

197. *See supra* notes 167-68 and accompanying text.

198. The Sentencing Commission regularly drafts new guidelines and amendments to the existing Guidelines and submits these to Congress by May 1 of each year. Absent modification or rejection by Congress, the amendments become effective by operation of law on the date specified by the Commission, which must be at least six months after submission to Congress. *See* 28 U.S.C. §§ 994(o), (p) (1988); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7109, 102 Stat. 4181, 4419 (1988).

In 1990, the Congress adopted a new Guideline to cover violations of the ACCA. 18 U.S.C.A. app. 4 § 4B1.4 (West Supp. 1991) ("Armed Career Criminal"); *see* 55 Fed. Reg. 19,205 (1990). The text of § 4B1.4 follows:

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adoption of the new "Armed Career Criminal" Guideline in November of 1990, persons sentenced under the ACCA were not sentenced under the Guidelines[199] unless the defendant *also* qualified for career offender treatment under section 4B1.1.[200] Under the new Guideline, armed career criminals are subject to various sentencing ranges, including potential treatment under section 4B1.1 as a career offender.[201] Just as before the adoption of the Armed Career Criminal Guideline, if an armed career criminal qualifies as a career offender, the Guidelines increase the mandatory minimum sentence from fifteen years, the ACCA minimum, to thirty years, which is the bottom of the range for career offenders when the instant offense of conviction car-

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(a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. 924(e) is an armed career criminal.

(b) The offense level for an armed career criminal is the greatest of:

(1) The offense level applicable from Chapters two and three; or

(2) The offense level from section 4B1.1 (Career Offender) if applicable; or

(3)(A) 34, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in section 4B1.2(1), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. 5845(a)*; or

(B) 33, otherwise

*If section 3E1.1 (Acceptance of Responsibility) applies, reduce by 2 levels.

(c) The criminal history category for an armed career criminal is the greatest of:

(1) The criminal history category from chapter four, part A (Criminal History), or section 4B1.1 (Career Offender) if applicable; or

(2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in section 4B1.2(1), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. 5845(a); or

(3) Category IV.

18 U.S.C.A. app. 4 § 4B1.4 (West Supp. 1991).

The firearms "of a type described in 26 U.S.C. 5845(a)" consist of a class of weapons particularly useful to armed career criminals as opposed to sporting use: "sawed-off" and "cut-down" shotguns and rifles, machine guns, silencers, and weapons "capable of being concealed on the person" are clearly covered by the section. Antiques and rifled pistols and shoulder-fired arms (hunting weapons, for example) are excepted from the definition. *See* 26 U.S.C. § 5845(a), (e) (1988).

The text of the guideline suggests that the offense level for any armed career criminal will be at least 33. 18 U.S.C.A. app. 4 § 4B1.4(b)(3) (West Supp. 1991). The criminal history category will be at least Category IV. 18 U.S.C.A. app. 4 § 4B1.4(c)(3) & commentary (West Supp. 1991). That translates to a minimum sentencing range of 188-235 months, a range just inside the 15 years to life range mandated by the ACCA. The Career Offender Guideline, section 4B1.1, may apply in a proper case. 18 U.S.C.A. app. 4 §§ 4B1.4(b)(2), (c)(1) (West Supp. 1991). The Career Offender provision imposes a mandatory offense level of 37 (where the statutory maximum penalty is life, as with the ACCA) and a minimum history category of VI. 18 U.S.C.A. app. 4 § 4B1.1, (West Supp. 1991). The applicable sentencing range in that case — where the ACCA *and* Career Offender provisions apply — translates to *30* years to life. 18 U.S.C.A. app. 4 § 5A (West Supp. 1991) ("Sentencing Table").

199. *See* United States v. Jackson, 835 F.2d 1195, 1198 (7th Cir. 1987) (discussing the absence of a guideline for ACCA violations and calling for the Sentencing Commission to develop one), *cert. denied,* 485 U.S. 969 (1988). Sentencing under the ACCA, simply was not addressed by the Guidelines. Judges attempting to apply the Guidelines to the ACCA defendant had no Guideline to apply.

200. *See, e.g.,* Jackson, 835 F.2d at 1197. ACCA defendants can also qualify as career offenders in some cases. *See infra* notes 210-15 and accompanying text.

201. 18 U.S.C.A. app. 4 § 4B1.4 (West Supp. 1991).

ries a statutory maximum penalty of life imprisonment.[202]

Courts freely and frequently mix the terms "career offender" and "career criminal" in recidivist cases.[203] Intuitively, the two concepts seem interchangeable, which suggests any "career offender" possessing a firearm is an "armed career criminal." However indistinguishable the semantics may be, under the mechanics of current sentencing law, the two concepts must be understood as distinct. No "armed career criminal" wants to be determined a "career offender" as well because such a finding brings an extra fifteen years imprisonment.[204] Similarly, few "career offenders" convicted of possessing a weapon would want to be determined an "armed career criminal" because such a finding could raise their offense level by several orders.[205]

The actual offense before the court at the time of conviction distinguishes the "armed career criminal" from the "career offender." Only the offense of firearm possession by a felon[206] raises the possibility of armed career criminal status.[207] In contrast, under the Guidelines, the instant offense of conviction must meet the "crime of violence" or "controlled substance offense" definitions[208] to qualify the defendant for career offender treatment.[209]

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202. *See* 18 U.S.C.A. app. 4, §§ 4B1.1, 5A (West Supp. 1991); *see also* United States v. Alvarez, 914 F.2d 915 (7th Cir. 1990), *cert. denied,* 111 S. Ct. 2057 (1991) (applying Career Offender guideline and thus increasing ACCA minimum sentence to 360 months); United States v. O'Neal, 910 F.2d 663, 666-67 (9th Cir. 1990) (same); United States v. Williams, 892 F.2d 296, 304-05 (3d Cir. 1989), *cert. denied,* 110 S. Ct. 3221 (1990) (same).

203. *See, e.g.,* United States v. Belton, 890 F.2d 9 (7th Cir. 1989), in which Judge Posner used the terms interchangeably to describe the defendant:

> Nothing in the guideline's definition of a *career offender* requires, however,that every act constitutive of the offense underlying his current conviction have been committed after the prior conviction .... A *career criminal* is incorrigible, undeterrable, recidivating, unresponsive to the "specific deterrence" of having been previously convicted — and that is a good description of a man who continues trafficking in narcotics after having been arrested and convicted of a similar crime.

890 F.2d at 10 (emphasis added); *see also* United States v. Davenport, 884 F.2d 121, 123 (4th Cir. 1989) (Career Offender definition met, therefore defendant was a "career criminal"); United States v. Campbell, 888 F.2d 76, 77 (11th Cir. 1989) (discussing Career Offender provision as a "career criminal adjustment"), *cert. denied,* 110 S. Ct. 1984 (1990); United States v. Jordan, 890 F.2d 968, 970-71 (7th Cir. 1989) (same).

204. *See supra* note 198.

205. Career offenders' sentences will be less than if they were also ACCA violators where the instant offense of conviction has a statutory maximum penalty less than the life imprisonment maximum for violations of the ACCA. *See* Guidelines, 18 U.S.C.A. app. 4 § 4B1.1 (West Supp. 1991); *cf.* United States v. Jackson, 835 F.2d 1195, 1197-98 (7th Cir. 1987) (discussing the increase in sentence resulting from ACCA status), *cert. denied,* 485 U.S 969 (1988).

206. *See* 18 U.S.C. § 922(g) (1988) (criminalizing possession of a firearm by convicted felons).

207. 18 U.S.C. § 924(e)(1) (1988) (ACCA applies only to violators of 18 U.S.C. § 922(g) (1988) with the requisite prior convictions).

208. *See* 18 U.S.C.A. app. 4 § 4B1.2 (West Supp. 1991) (definitions of instant offenses required for career offender classification).

209. *See* 18 U.S.C.A. app. 4 § 4B1.1(2) (West Supp. 1991) (instant offense of conviction must be crime of violence or controlled substance offense to treat defendant as career offender).

A defendant can qualify as *both* an armed career criminal and a career offender under two possible scenarios. First, some defendants convicted on firearms charges with histories reached by the ACCA[210] are *also* convicted in the same proceeding for a violent or drug offense.[211] The latter crime supplies the instant offense required for career offender treatment. Of course this scenario assumes at least two of the prior convictions count separately under the Guidelines.[212]

Second, if the "felon in possession of a firearm" offense, which triggers the ACCA, also qualifies as a "crime of violence" under the Guidelines, then the firearm offense can operate as the instant offense for career offender classification.[213] This scenario requires at least three prior convictions counted separately under the ACCA, and at least two under Guidelines section 4B1.1. Courts disagree on whether mere "possession" of a firearm by a felon meets the definition of "crime of violence," but several have concluded that possession may qualify under certain circumstances.[214] In those cases where the possession offense amounts to a "crime of violence," the career criminal will qualify for a minimum thirty-year sentence as a career offender. Once again, this assumes at least two prior convictions count separately under the Guidelines.[215]

Where the career offender provision applies to defendants who also qualify for ACCA sentence enhancement, the mandatory minimum sentence increases from fifteen years, the minimum under the ACCA, to thirty years. The increase arises from the fact that the ACCA has a statutory *maximum* penalty of life.[216] The career offender provision

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210. 18 U.S.C. § 924(e) (1988).

211. *See, e.g.*, United States v. Jackson, 835 F.2d 1195, 1196-97 (7th Cir. 1987) (defendant convicted of violating ACCA in connection with bank robbery; bank robbery provided instant violent felony offense for career offender classification under Guidelines § 4B1.1), *cert. denied*, 485 U.S. 969 (1988).

212. *Cf. Jackson*, 835 F.2d at 1196 (defendant's five prior armed robbery convictions were separately countable under both ACCA and Career Offender provision of Guidelines, § 4B1.1). Staleness prevents crimes from being counted under the Guidelines, but not under the ACCA. *Compare* United States v. Jackson, 903 F.2d 1313, 1317 (10th Cir.) (Guidelines § 4A1.2(e) prohibits counting convictions more than 15 years old for career offender purposes), *vacated on other grounds*, 921 F.2d 985 (10th Cir. 1990) *with* United States v. Preston, 910 F.2d 81, 89 (3d Cir. 1990) (ACCA places no restriction on how recent prior convictions must be to be considered for sentence enhancement), *cert. denied*, 111 S. Ct. 1002 (1991) *and* United States v. Greene, 810 F.2d 999, 1000 (11th Cir. 1986) (four burglary convictions from 1962 used to enhance sentence under ACCA in 1985).

213. *See, e.g.*, United States v. O'Neal, 910 F.2d 663, 667 (9th Cir. 1990).

214. *Compare O'Neal*, 910 F.2d at 667 (possession of firearm by convicted felon under any circumstances is categorically a "crime of violence" within the definition in Guidelines § 4B1.2) *with* United States v. Alvarez, 914 F.2d 915, 917-19 (7th Cir. 1990) (possession of gun where defendant used force in struggle with arresting officer is crime of violence, but possession in absence of force may not be), *cert. denied*, 111 S. Ct. 2057 (1991) *and* United States v. Williams, 892 F.2d 296, 304 (3d Cir. 1989) ("possessing a gun while firing it . . . is a crime of violence; possession without firing the weapon is not"), *cert. denied*, 110 S. Ct. 3221 (1990).

215. *See, e.g.*, *O'Neal*, 910 F.2d at 663, 668.

216. *See supra* note 6.

prescribes an offense level of thirty-seven for offenses with statutory life maximums.[217] Combined with the prescribed criminal history category of VI which applies to all career offenders,[218] this translates to a sentencing range of *360 months* to life.[219] Thus the Guidelines increase the ACCA defendant's minimum sentence by fifteen years when the career offender provision also applies.

The table below compares the ACCA and the Career Offender provision of the Guidelines.

	Federal Sentencing	
	ACCA	Guidelines
Statutory Basis*	18 U.S.C. 924(e)	Career Offender Guideline 4B1.1
Instant Offense	18 U.S.C. 922(g) (possession of firearm by felon)	"crime of violence" or "controlled substance offense" as defined in Guideline § 4B1.2
Prior Offenses		
Number:	3 or more	2 or more
Type:**	"violent felony or serious drug offense"	Same type as instant offense
Relationship Between Convictions:	"committed on different occasions"***	"Unrelated" or departure warranted
Staleness:	No staleness limit	None older than 15 years may be counted

*Both ACCA and Guidelines trace their lineage to the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).
**The statutory definitions for violent and drug offenses under the ACCA and under the Guidelines are, for purposes of this Note, identical. Compare 18 U.S.C. § 924(e)(2) and Guidelines, § 4B1.2.
***The phrase is construed and applied by the courts in significantly different ways, as described in Part II.

B. *Common Purposes and Divergences*

The Armed Career Criminal Act and the Guidelines count convictions for the same purpose. Both laws are designed to enhance sentences for offenders whose criminal history suggests they deserve harsher treatment.[220] Under both, courts count convictions to deter-

217. Guidelines, 18 U.S.C.A. app. 4 § 4B1.1 (West Supp. 1991).

218. 18 U.S.C.A. app. 4 § 4B1.1 (West Supp. 1991).

219. 18 U.S.C.A. app. 4 § 5A (West Supp. 1991).

220. *See* Taylor v. United States, 110 S. Ct. 2143, 2149 (1990) (characterizing ACCA as a "sentence-enhancement provision"); *see also* Note, *supra* note 156, at 1380 (explaining that Federal Sentencing Guidelines effect sentence enhancement for all but first time offenders). Sentence enhancement for recidivists — "career" criminal offenders — is commonly justified on grounds of incapacitation, retribution, and deterrence. *See* Spencer v. Texas, 385 U.S. 554, 571 (1967) (Warren, C.J., dissenting in part and concurring in part); *see also* SENTENCING, *supra* note 12, at 187-301; Note, *supra* note 156, at 1373-74.

mine whether and to what degree to enhance the defendant's sentence.[221] Thus, conviction counting, whether under the ACCA or the Guidelines, serves to distinguish defendants who properly warrant an enhanced sentence.

Although their ultimate purposes are virtually identical, the conviction counting schemes employed under the ACCA and the Guidelines diverge in practice, leading to different results. The ACCA requires that offenses be committed on different "occasions" to count toward sentence enhancement.[222] Under the ACCA, several courts have counted offenses separately where there was only a small distinction in time between them, such as burglaries committed on the same night or on successive days.[223] Other courts have placed little emphasis on the temporal distinction, looking instead to the underlying factual relationship between the offenses to determine if they amount to a single "criminal episode."[224] Still another court has refused to count offenses separately unless they are separated by intervening convictions, regardless of the temporal relationship between offenses.[225]

The Guidelines take a similar occasion-based approach, but develop it differently. As a general rule, the Guidelines count offenses together if they occurred on a "single occasion," or were "consolidated" for trial or sentencing.[226] The Guidelines, however, give judges the discretionary power to impose an enhanced sentence where the defendant's criminal record, if assessed in strict compliance with the general rule, "underrepresents" the defendant's actual dangerousness or likelihood of recidivism.[227] The few reported cases suggest that a close relationship in time between offenses does not *compel* the conclusion that the offenses were committed on a "single occasion" if they are factually and temporally distinct crimes.[228] Further, as *Dorsey* demonstrates, the "consolidated for sentencing or trial" rule has little force; courts may impose sentences greater than the consolidation rule, if applied, would produce.[229]

No court applying the Guidelines has adopted any method similar to the "intervening convictions" approach taken by the Third Circuit in counting convictions under the ACCA.[230] The text of the Guide-

221. 18 U.S.C. § 924(e) (1988); 18 U.S.C.A. app. 4 §§ 4A1.2, 4B1.1 (West Supp. 1991). *See generally supra* Parts II and III.

222. *See* 18 U.S.C. § 924(e)(1) (1988); *see supra* section I.C.

223. *See supra* section II.B.1.

224. *See supra* section II.B.2.

225. *See supra* section II.B.3.

226. *See supra* note 167 and accompanying text.

227. *See supra* notes 181-88 and accompanying text.

228. *See supra* notes 192-95 and accompanying text.

229. *See* United States v. Dorsey, 888 F.2d 79, 79 (11th Cir. 1989), *cert denied,* 110 S. Ct. 756 (1990).

230. *See supra* section II.B.3.

lines clearly does not impose such a requirement.[231] Thus, courts applying the Guidelines to potential career offenders have repeatedly counted offenses separately without intervening convictions.[232]

Courts separately counting convictions for offenses committed within a short time span have justified their decisions by their authority to depart from the general counting rules in "underrepresentative" cases.[233] Thus, they retain the ability to count offenses arrayed closely in time as a "single occasion" — and thus, "related" — in cases where they do *not* believe the defendant is so dangerous or incorrigible as to warrant an enhanced sentence. By comparison, if judges applying the ACCA adhere strictly to the "distinct in time" approach taken in *United States v. Wicks,*[234] even when they do not believe the defendant is particularly dangerous or incorrigible, they must impose enhanced sentences under the ACCA. Such enhancement would not be required under the Guidelines.

C. *Toward Consistency*

Congress delegated to the U.S. Sentencing Commission broad authority to review and rationalize the federal sentencing process.[235] The Commission's ongoing effort produces the Federal Sentencing Guidelines.[236] With the enactment of the new Armed Career Criminal Guideline,[237] sentencing policy as represented by the Guidelines now reaches the ACCA. Given the preeminence of the Guidelines in the federal sentencing scheme, and the similar purpose "conviction counting" serves in both the Guidelines and the ACCA, there is a strong case for applying the ACCA as consistently as possible with the conviction counting method used under the Guidelines' criminal history and Career Offender analysis.

Courts take one of two general directions when applying the ACCA. The first attempts to read the statute according to its "plain meaning," interpreting the phrase "committed on different occasions from one another" to mean simply, and in all cases, "distinct in time." Such an approach poses significant problems: at the margins, it unnecessarily compromises the fundamental sentencing goals of proportionality (treating different cases differently) and uniformity (treating similar cases the same).[238] The paradigm "revolving door" criminal

231. *See, e.g., Dorsey,* 888 F.2d at 80-81.

232. *See supra* note 188 (collecting cases where Guidelines were applied without any intervening convictions requirement).

233. *See supra* note 188 (collecting upward departure cases).

234. 833 F.2d 192 (9th Cir. 1987), *cert. denied,* 488 U.S. 831 (1988).

235. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976 (1984) (relevant sections are codified at 28 U.S.C. §§ 991(b), 994(a) (1988)).

236. *See* 18 U.S.C.A. app. 4 § 1A1 (West Supp. 1991).

237. 18 U.S.C.A. app. 4 § 4B1.4 (West Supp. 1991).

238. *See* 18 U.S.C.A. app. 4 § 1A3 (West Supp. 1991).

differs in compelling ways from the offender who commits three offenses on a single drunken night.[239] Punishing the two offenders similarly compromises these goals, since the cases differ, but the treatment is the same.

The second route courts take when applying the ACCA recognizes the difficulty of the "mechanical" approach and searches for some alternative justified by legislative intent. The "criminal episodes" and "intervening convictions" approaches exemplify this effort.[240] These methods, most notably the intervening convictions approach, inevitably lead to differences between identifying career criminals/offenders under the ACCA and under the Guidelines, even in the same federal courtroom. This problem could surface often in the future since all ACCA cases are now covered by an applicable sentencing guideline.[241] The Guidelines' approach, by comparison, allows sufficient flexibility in these hard cases to achieve the best result. The Guidelines accomplish this using generally applicable counting rules augmented by provisions for departure in cases where the judge finds the defendant is especially dangerous or incorrigible, and thus deserves sentence enhancement.[242] The Guidelines implicitly recognize that the ultimate judgment in very difficult cases is best left to judges.[243]

Until Congress amends the ACCA to better explain the intended treatment of closely related crimes, courts facing difficult decisions in armed career criminal cases should look to the Guidelines' counting principles, including the discretionary departure provisions. Because Congress reviews and may modify or reject Guidelines amendments before they become law,[244] the Guidelines represent the clearest, most current, and most comprehensive expression of how Congress wants the sentencing process — including sentence enhancement for recidivists — to operate. The Guidelines originated in the same legislative effort as the ACCA, and their constant revision ensures their current vitality. Ambiguous terms, such as "occasions" and "episodes" are more likely to be given meaning in the revision of the Guidelines than in the ACCA. Importantly, now that a guideline has been specifically written for ACCA violations,[245] sentencing in ACCA cases may now

239. *See supra* note 120 and accompanying text.

240. *See supra* Part II. Of course, the intervening convictions approach operates just as mechanically as the distinct in time method, since it requires no discretion on the judge's part to determine whether each offense was preceded by a prior conviction. The adoption of such a standard, however, substitutes the court's standard for Congress' completely different one — the court's nonmalleable standard versus Congress' "malleable" one. United States v. Balascsak, 873 F.2d 673, 683-84 (3d Cir. 1989).

241. *See supra* section IV.A.

242. *See supra* note 188 and accompanying text.

243. See Judge Becker's similar views in *Balacscak*, 873 F.2d at 684-85 (Becker, J., concurring).

244. *See* 28 U.S.C. § 994(p) (1988).

245. 18 U.S.C.A. app. 4 § 4B1.4 (West Supp. 1991).

be viewed as a component part of the overall federal scheme, rather than as an anomaly.

The Guidelines also offer a rapidly growing body of federal case law that dwarfs that available under the ACCA. Conviction counting arises in some way in virtually all cases under the Guidelines, not only those involving Career Offenders. Thus, the Guidelines cases offer a rich source of facts, problems and solutions for consideration in ACCA cases. By drawing on the Guidelines principles, the discretion inherent in episodes-type approaches to the ACCA could be applied in ways reviewed and approved by Congress. Because Congress specifically indicates that it wishes to limit judicial discretion in sentencing by moving to mandatory sentencing laws and the Guidelines, it makes sense to conform to the best expression of those limits.

The Guidelines suggest several principles that would alleviate the confusion and divergence that currently mark conviction counting under the ACCA. First, courts should, in effect, *presume* that offenses constitute a single "occasion" under the ACCA when the offenses were (1) committed over a brief time span, (2) "consolidated for trial or sentencing," or (3) proved to have been part of a "common scheme or plan."[246] The majority of courts, those that apply the "criminal episodes" approach, have essentially already taken this view.[247] This presumption corresponds to the general rules for counting convictions provided under the Guidelines' relatedness principle.[248] Importantly, this rule must operate only as a presumption. If the rule were hard and fast, many criminals, for example those with several prior offenses that had been consolidated for sentencing, would know the ACCA could not reach them. Criminals cannot be so sure, however, if courts may depart from the presumption. The proposal thus does not sacrifice any significant degree of leverage:[249] only close cases present "occasion" questions, and even then the defendant faces the possibility of sentence enhancement.

Courts should override the above presumption in the same circumstances that warrant "departure" under the Guidelines — those situations where the defendant's conviction history demonstrates special incorrigibility or dangerousness. Criminal histories showing the fortuitous concurrent sentencing of multiple violent crimes or persistence in violent crime after treatment are not the cases that give pause.[250] Un-

246. *See* 18 U.S.C.A. app. 4 § 4A1.2 (West Supp. 1991). In future Guidelines revisions, "occasions" could be defined, for example, to mean some discreet period of time, *i.e.*, a day or so, affording plenty of time for the criminal to reflect and change his behavior. Defendants with several egregious offenses within 24 hours could still get enhanced sentences if the general rule underrepresented the seriousness of their history.

247. *See supra* section II.B.2 (criminal episodes approach).

248. *See supra* section I.A.; *supra* section III.A.

249. *See supra* section II.A.

250. *See supra* section II.B.2.

like the hypothetical three-houses-in-one-night burglar, these defendants do not present a strong chance that the offenses represent an isolated incident, anomalous to the defendant's character, and unlikely to be repeated.[251] Quite the contrary. Here courts should enhance the sentence, satisfying any doubts by keeping to the low end of the sentencing range. This suggestion is consistent with the Guidelines' provisions for defendants with "underrepresentative" criminal histories.[252] In practice, defendants such as Towne[253] — a violent, repeat sex offender and rehabilitative failure — could be incapacitated under the ACCA.

Finally, courts should not require intervening convictions in order to count offenses separately. Neither the text of the ACCA nor counting practice under the Guidelines remotely suggest Congress intended such a requirement as a prerequisite to sentence enhancement. As is common practice under the Guidelines,[254] defendants with egregious records, but fortuitously sentenced in a single proceeding, should receive enhanced sentences where their records contain reliable facts showing recidivism and dangerousness.

The suggested approach meets the criteria set forth in Part I by preserving leverage, keeping the scope of inquiry narrow, and not requiring repeated rehabilitative failure. The suggested approach preserves the leverage function in the ACCA.[255] Even where *all* of a defendant's prior offenses were, for example, committed within a short time span or sentenced concurrently, the offender could not be certain the ACCA could not reach him. The suggested approach threatens such offenders because it gives judges the same discretionary departure power they have under the Guidelines. Allowing departure improves upon the intervening convictions approach, which automatically excludes these defendants without regard to the severity of their prior offenses.[256] In intervening convictions jurisdictions, the ACCA poses no possible threat to, for example, concurrently sentenced defendants with three prior offenses, because such offenders know the court cannot count their prior offenses individually. The suggested approach, by comparison, provides the "threat of prosecution" Congress intended.[257]

The suggested approach also keeps the scope of the inquiry prop-

251. *See supra* note 120 and accompanying text.

252. *See supra* section III.B.

253. *See supra* section II.B.2.

254. *See supra* note 188 (collecting upward departure cases).

255. *See supra* section I.A (explaining the leverage concept envisioned by ACCA drafters).

256. *See supra* sections I.C and II.B.3 (explaining ACCA treatment of offense/conviction sequences versus the intervening convictions/rehabilitative failure approach).

257. *Hearings, supra* note 2, at 15 (discussing how the threat of prosecution under ACCA will have a beneficial leveraging effect).

erly narrow.[258] Courts can apply this standard based on information readily available in the "certified court records"[259] documenting the defendant's criminal history. Courts do not necessarily need to analyze the particular facts underlying prior offenses,[260] nor must they attempt any "clinical diagnosis" of individual defendants.[261] As *United States v. Dorsey*[262] illustrates, courts can base enhancement decisions on information from the conviction history alone. The narrow inquiry accords with the text of the ACCA, which speaks only of the number, type, and timing of prior offenses.[263]

The suggested approach does not require defendants to have failed at rehabilitation on three prior occasions before the ACCA can reach them.[264] Multiple-count convictions can still qualify where the defendant committed the offenses on different occasions.[265] Even if the offenses were consolidated for sentencing, and thus resulted in only one rehabilitative opportunity, the judge has the same ability as under the Guidelines to enhance the sentence.[266] The recommended approach thus permits courts to enhance the sentences of skilled or insulated criminals whose serious offenses tend to come to justice all at once.[267]

The suggested approach involves a significant degree of judicial discretion in sentencing, which mandatory sentencing laws in general, and the ACCA in particular, seek fundamentally to minimize.[268] Some degree of "discretion," however, is inevitable so long as courts are forced to apply phraseology as ambiguous as in the ACCA to the

258. *See supra* note 51 and accompanying text (ACCA contemplates narrow inquiry).

259. *Id.*

260. *See supra* section II.B.2 (criminal episode approach considers selected facts underlying particular crime).

261. *See supra* section I.B (unfairness and error of diagnostic-type inquiries put to Congress by ABA during ACCA hearings).

262. 888 F.2d 79 (11th Cir. 1989) (discussed *supra* section III.B), *cert. denied,* 110 S. Ct. 756 (1990).

263. 18 U.S.C. § 924(e) (1988).

264. *See supra* sections I.C and II.B.3 (Intervening convictions approach requires three failed rehabilitative opportunities, although 1988 ACCA amendment does not.).

265. *See supra* note 75 and accompanying text (Sen. Biden's explanation of intended application of the ACCA).

266. *See supra* notes 181-88 and accompanying text (upward departure under the Guidelines in under-representative cases).

267. *See supra* notes 143-45 and accompanying text (underinclusiveness of intervening convictions approach when applied to insulated criminals or those skilled in avoiding capture for long periods).

268. *See* ABA STANDARDS, *supra* note 13, at § 18-4.4 (mandatory sentencing laws represent legislatures' attempts to curtail judicial discretion); *see also* United States v. Pinto, 875 F.2d 143, 145 (7th Cir. 1989) (Judge Easterbrook explaining the absence of broad discretion in the career offender provision: "Criminals aren't entitled to sentences devised by judges rather than legislatures.").

diverse circumstances presented by the cases before them.[269] Further, the amount of discretion involved does not significantly increase that already at work under the prevailing "criminal episodes" approach. Rather, the suggested approach allows discretion to operate as consistently as possible in all federal sentence enhancement decisions. Facts that lead to sentence enhancement under the Guidelines will also lead to sentence enhancement under the ACCA. Judges can analyze prior offense patterns the same way, regardless of which specific sentence enhancement statute provides the authority. Finally, the degree of discretion suggested accords with the optimal level prescribed by Congress in the Guidelines. It is specious to believe that Congress intended "armed career criminals" to be identified and sentenced in significantly different ways from those used for "career offenders." If anything, Congress considers "career offenders" more dangerous; the minimum penalty under the ACCA *increases* if career offender status also obtains.[270] If Congress permits the career offender decision to be subject to some degree of judicial discretion, surely it approves of a similar amount in the ACCA context.

CONCLUSION

The Armed Career Criminal Act classifies offenders as career criminals if they have committed serious offenses on at least three different occasions. Congress has adopted a policy of incapacitation toward career criminals so identified; the ACCA commands courts to sentence career criminals to long terms. Courts struggle deciding how to differentiate criminal occasions for sentence enhancement under the ACCA because the term "occasions" proves vague in close cases. Compounding the difficulty, mandatory sentencing laws aim to minimize the judicial discretion required to interpret the term to avoid anomalous results in close cases.

Both minority interpretations of the ACCA remove judicial discretion from the analysis by relying on either distinctions in time between offenses or on the fact of intervening convictions between offenses. The former disserves incapacitation policy by its overinclusiveness; it wastes scarce resources and results in unjustly harsh sentences. The latter can frustrate incapacitation policy by its underinclusiveness; the law will not reach many career criminals, and thus fails to protect society from these offenders. Because many offenders could not possibly be reached, the leverage function of the ACCA loses much of its credibility and force.

The majority view attempts to differentiate occasions by grouping offenses into criminal episodes. This interpretation necessarily rein-

269. *Cf.* United States v. Balacscak, 873 F.2d 673, 684-85 (3d Cir. 1989) (Becker, J. concurring).

270. *See supra* section IV.A.

troduces discretion into the analysis, causing further struggle over where to properly draw the lines between episodes. Because courts applying the ACCA must exercise this discretion without the benefit of clear congressional intent, decisions rendered in close cases may prove either over- or underinclusive, and will almost surely produce quite different results between different jurisdictions.

The Federal Sentencing Guidelines offer a solution to the ACCA conviction counting problem. The Guidelines enhance the sentences of career offenders — fundamentally the same group of offenders termed career criminals under the ACCA. The Guidelines, like the ACCA, identify career offenders on the basis of the defendant's prior offenses. Unlike the ACCA, the Guidelines provide statutory principles for courts to use to differentiate offenses into separate occasions. The Guidelines recognize that, in some cases, strict adherence to these rules may fail to capture deserving offenders, such as when years of bank robbery offenses come to justice in a single proceeding. In these cases, the Guidelines allow the courts discretion to impose an enhanced sentence based on reliable facts demonstrating dangerousness or recidivism. This guidance focuses the exercise of discretion in a way that serves, rather than frustrates, the underlying incapacitation policy. Egregious defendants do not benefit from the fortuities of their prior arrests or sentencing.

Drawing on the Guidelines' methodology would alleviate much of the trouble with the ACCA. First, the Guidelines would eliminate the harsh, much criticized results that sometimes occur under minority approaches to the ACCA. To exaggerate the difference in standards, imagine a defendant convicted of three offenses committed within minutes of each other, and twenty years later found in possession of a hunting rifle. The mechanical, "distinct in time" approach leads to enhanced sentencing as an armed career criminal; the Guidelines-based approach will not.

Second, use of the Guidelines' methodology would improve the consistency of criminal history analysis in and between jurisdictions. The Guidelines' conviction counting methodology produces a large volume of case law to which courts applying the ACCA can turn for precedent and guidance. Furthermore, the Guidelines recently adopted an Armed Career Criminal Guideline which applies to those defendants determined career criminals *under the ACCA*. Depending on the instant offense, the Career Offender Guideline may *also* apply. Applying Guidelines methods in ACCA cases would avoid analyzing the defendant's history for the same basic purpose — classification as a career criminal/offender — but in different ways.

Finally, using Guidelines principles to apply the ACCA ensures that judges exercise discretion in a manner reviewed and approved by Congress. Since the subject of judges' analysis, prospective career

criminals' or offenders' histories, and the objective of the analysis, identification of proper subjects for incapacitation, is the same under the ACCA and the Guidelines, it follows that the analysis under the two laws should be conducted in similar ways. The Guidelines articulate the approved methodology in much greater detail than the ACCA. Moreover, the continual revision of the Guidelines promises further guidance as the case law evolves and the Sentencing Commission and Congress respond. In close cases, judicial discretion is a tool indispensable to the accurate identification of career offenders. The Guidelines offer the best instructions for its use.

— *James E. Hooper*