The Problem of Counting to Three under the Armed Career Criminal Act

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THE PROBLEM OF COUNTING TO THREE UNDER THE ARMED CAREER CRIMINAL ACT

The Armed Career Criminal Act provides sentence enhancement for those who have been convicted of three felonies. Confusion has arisen as to the sequence in which these convictions must take place in relation to the acts that gave rise to the convictions. The author proposes that each of the three previous convictions be required to precede the commission of the next offense.

INTRODUCTION

EVEN THOUGH MOST people can define “conviction” and first grade children can count to three, the combination of these skills has persistently eluded learned federal appellate court judges when attempting to interpret the Armed Career Criminal Act of 1984 (“ACCA”).¹ The ACCA is a federal sentence en-

¹. Pub. L. No. 98-473, § 1802, 98 Stat. 2185. After being amended in 1986, the ACCA provided:
   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, 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
hancement statute that applies to any person who, having the requisite number of past felony convictions, is subsequently arrested and convicted of possessing a firearm. Under the ACCA, a

under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.


2. Courts consistently have ruled that the ACCA is a sentence enhancement statute because it increases the punishment of those convicted for other crimes rather than establishing elements of an independent federal offense. See, e.g., United States v. Rumney, 867 F.2d 714, 718 (1st Cir.), cert. dened, 491 U.S. 908 (1989); United States v. Affleck, 861 F.2d 97, 99 (5th Cir. 1988), cert. dened, 489 U.S. 1058 (1989); United States v. West, 826 F.2d 909, 911 (9th Cir. 1987); United States v. Jackson, 824 F.2d 21, 24 (D.C. Cir. 1987), cert. dened, 487 U.S. 1013 (1988); United States v. Hawkins, 811 F.2d 210, 220 (3d Cir.), cert. dened, 484 U.S. 833 (1987); see also Note, The Armed Career Criminal Act Amendment: A Federal Sentence Enhancement Provision, 12 Geo. Mason L. Rev. 99, 116 (1990) (arguing that the ACCA is a sentence enhancement statute). It is important to determine whether the ACCA is a sentence enhancement statute:

If the ACCA constitutes a separate offense and this offense has not been set forth in the indictment, the due process rights of the defendant have been violated. Furthermore, if the ACCA creates a separate federal offense, the government [would carry] the burden of proving each element of that offense, and failure to comply with this procedure [would] preclude[] use of the ACCA to impose the greater sentence.

If the [ACCA] is [a] penalty enhancement [statute], however, the defendant only need be tried for the present crime or crimes, and the jury need not decide whether requirements of the ACCA have been satisfied. [Also], if the ACCA is a sentence enhancement statute, the government is not required to prove the defendant's prior convictions beyond a reasonable doubt [and] issues of indictment and proof are not implicated.


3. Possession of a firearm by a convicted felon is a federal criminal offense. See 18 U.S.C. § 922(g) (1988). This section provides:

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;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien, is illegally or unlawfully in the United States;

(6) who has been discharged from the Armed Forces under dishonorable conditions; or

(7) who, having been a citizen of the United States, has renounced his citizenship;

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Id.
person convicted of firearm possession who has three previous convictions for violent felonies or serious drug felonies will be fined no more than $25,000 and imprisoned for a minimum of fifteen years.\(^4\) The fifteen-year sentence is a mandatory minimum\(^5\) with no possibility of parole.\(^6\) Furthermore, the presiding judge can neither suspend the sentence nor grant a probationary sentence in regard to the penalty imposed for the possession offense.\(^7\)

Thus, one who has three prior violent or serious drug felony convictions and then commits an armed robbery can be prosecuted for the robbery as well as for possession of a handgun by a convicted felon.\(^8\) In addition to the sentences on these two offenses, the government can request an enhanced sentence of at least fifteen years imprisonment for the firearm possession offense pursuant to the ACCA.\(^9\)

The ACCA has raised a number of legal issues, many of which are constitutional in nature.\(^10\) This note, however, focuses

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\(^5\) See id. However, the ACCA does not expressly provide a maximum sentence, leaving the matter to judicial discretion. Id.
\(^6\) See id.
\(^7\) See id.
\(^9\) See 18 U.S.C. § 924(e)(1) (1988). The ACCA also allows the imposition of a fine up to $25,000. Id.
\(^10\) This note does not examine the constitutional controversies surrounding the ACCA. In general, though, the ACCA has spawned the following constitutional issues and subsequent judicial determinations. First, courts have determined that the absence of a maximum imprisonment term is not unconstitutionally vague. See, e.g., United States v. Blannon, 836 F.2d 843, 844-45 (4th Cir.), cert. denied, 486 U.S. 1010 (1988); United States v. Davis, 801 F.2d 754, 756-57 (5th Cir. 1986) (rejecting argument that sentencing statutes are unconstitutionally vague for not setting a maximum sentence). Second, courts have ruled that the ACCA does not impose cruel and unusual punishment in violation of the eighth amendment. See, e.g., United States v. Pedigo, 879 F.2d 1315, 1320 (6th Cir. 1989); United States v. Rush, 840 F.2d 580, 582 (8th Cir.), cert. denied, 487 U.S. 1238 (1988); United States v. Gourley, 835 F.2d 249, 252-53 (10th Cir. 1987) (life sentence under the ACCA does not violate the eighth amendment when defendant has eleven prior felony convictions, more than half of which involve firearms), cert. denied, 486 U.S. 1010 (1988). Third, courts have held that the ACCA does not violate the equal protection clause of the fourteenth amendment, see United States v. Hawkins, 811 F.2d 210, 217 (3d Cir.) (the equal protection clause is not violated by the application of the ACCA), cert. denied, 484 U.S. 833 (1987), nor is it an ex post facto law. See United States v. Greens, 810 F.2d 999, 1000 (11th Cir. 1986), post-conviction proceeding, 880 F.2d 1299 (11th Cir.), reh'g denied, 888 F.2d 1398 (11th Cir. 1989), cert. denied, 110 S. Ct. 1322 (1990). A fourth issue is whether the ACCA violates the constitutional prohibition against double jeopardy. It has been consistently held, however, that punishing recidivism does not violate the double jeopardy provision. See, e.g., Gryger v. Burke, 334 U.S. 728, 732 (1948); United States v. Schell, 692 F.2d 672, 676 (10th Cir. 1982).
on the controversy surrounding the interpretation of the “three previous convictions” requirement.\(^\text{11}\) Part I of this note discusses how various courts have defined “three previous convictions” under the ACCA.\(^\text{12}\) The currently dominant approach, which this note labels the “criminal episodes approach,” requires only that the three previous convictions be based on “distinct” criminal episodes, regardless of intervening adjudication. In other words, a single previous trial that results in three convictions based on three separate occurrences of criminality is sufficient to trigger the ACCA.\(^\text{13}\)

Part II describes an alternative method of determining three previous convictions,\(^\text{14}\) the “intervening convictions approach,” introduced by the Third Circuit in \textit{United States v Balascak}\(^\text{15}\) following a 1988 congressional amendment to the ACCA.\(^\text{16}\) The intervening convictions approach holds that “each conviction must precede the commission of the next crime for which conviction can be considered.”\(^\text{17}\)

Part III argues that application of statutory construction rules and examination of the ACCA’s legislative history supports adoption of the intervening convictions approach.\(^\text{18}\) Part III further argues that policy considerations dictate that Congress amend the ACCA by codifying the intervening convictions approach articulated in \textit{Balascak}.\(^\text{19}\) Specifically, the intervening convictions approach protects congressional intent, provides increased accuracy in the identification of career criminals, and is

\begin{itemize}
\item \textit{See infra} text accompanying notes 20-40. Indeed, recently it has been argued that the three previous convictions requirement applies: to a person who is convicted of a violent felony, sentenced and incarcerated; who then is released from prison, commits a second violent felony and in a separate proceeding is again sentenced and incarcerated, presumably for a longer period of time; is released, and who then commits a third violent felony. United States v. Lane, No. 89CR0156, slip op. at 4 (N.D. Ohio Sept. 7, 1989).
\item \textit{See}, e.g., Rush, 840 F.2d at 581.
\item \textit{See infra} text accompanying notes 44-73.
\item 873 F.2d 673 (3d Cir. 1989) (en banc), aff'd, 902 F.2d 1558 (3d Cir.), cert. denied, 111 S. Ct. 173 (1990).
\item \textit{See infra} text accompanying notes 41-43.
\item \textit{Balascak}, 873 F.2d at 685 (Greenberg, J., dissenting). The \textit{Balascak} plurality described the intervening convictions approach less concisely: “[C]onvictions for the first two crimes must have been rendered before commission of the third crime [and] the first conviction must have been rendered before the second crime was committed.” \textit{Id.} at 681-82.
\item \textit{See infra} text accompanying notes 73-135.
\item \textit{See infra} text accompanying notes 136-178.
\end{itemize}
I. BACKGROUND

A. The Problems Encountered under the Three Previous Convictions Requirement

Originally, the ACCA provided no clear definition of "conviction." Consequently, courts that attempted to interpret the statute were faced with the question of whether:

"three previous convictions" should be construed literally to mean any three felony convictions, regardless of whether the three predicate felonies were committed simultaneously during a single spasm of criminal activity; or whether it should be construed as a reference to the number of prior occasions on which a defendant has engaged in, and been convicted of, violent criminal conduct.20

The original statutory language produced confusion and uncertainty. For example, would a kidnapping coupled with a rape constitute one conviction or two?21 Would multiple burglaries that occurred on different days, yet brought by the prosecutor in one judicial proceeding, constitute one conviction or multiple convictions?22

In United States v. Petty,23 the Eighth Circuit adopted a literal interpretation of "conviction." Petty was tried and convicted of several drug offenses, interstate transportation of ammunition by a convicted felon, and possession of a firearm by a convicted felon.24 The defendant was sentenced to twenty years imprisonment for the drug and interstate transportation charges and given a concurrent twenty-two year enhanced sentence for possession of a firearm by a convicted felon pursuant to the ACCA.25 To trigger application of the ACCA, the court relied on previous felony convictions of Petty in New York state. Specifically, he had six robbery convictions based on a single indictment for simultaneously

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20. United States v. Towne, 870 F.2d 880, 889 (2d Cir.), cert. denied, 490 U.S. 1101 (1989) (emphasis in original). Also, the three previous convictions requirement "fail[ed] to indicate whether the required previous convictions can result from a single judicial proceeding." United States v. Herbert, 860 F.2d 620, 622 (5th Cir. 1988).
21. See, e.g., Towne, 870 F.2d at 889-91.
22. See, e.g., Herbert, 860 F.2d at 621-22; United States v. Wicks, 833 F.2d 192, 193 (9th Cir. 1987); United States v. Greene, 810 F.2d 999, 1000 (11th Cir. 1986).
24. Id. at 1158-59.
25. Id. at 1159.
robbing six different people in a restaurant. Petty argued that these robberies constituted one conviction for purposes of sentence enhancement, but the Eighth Circuit disagreed and upheld the enhanced sentence.

On appeal to the Supreme Court of the United States, the Solicitor General filed a brief admitting that it was a mistake to have applied the ACCA to Petty. He stated that the ACCA is ambiguous and that "the legislative history strongly supports the conclusion that the statute was intended to reach multiple criminal episodes that were distinct in time, not multiple felony convictions arising out of a single criminal episode." The Supreme Court granted certiorari but remanded the case to the Eighth Circuit with instructions to consider the Solicitor General's brief. The Eighth Circuit subsequently vacated Petty's enhanced sentence, indicating that "convictions" under the ACCA must be felony convictions resulting from "criminal episodes" that were distinct in time.

Other circuits have likewise interpreted the three previous convictions requirement using the criminal episodes approach. In United States v Herbert, the Fifth Circuit addressed the issue of distinct criminal episodes tried in a single judicial proceeding. Herbert was convicted of possession of a firearm by a felon. He...

26. Id. at 1159-60.
27. Id. at 1160.
29. Id.
30. Id.
32. Petty, 828 F.2d at 3.
33. Id.
34. See, e.g., United States v. Gillies, 851 F.2d 492, 497 (1st Cir. 1988) (holding that convictions based on crimes committed in different places and at different times constitute separate felonies, though committed on the same evening); United States v. Rush, 840 F.2d 580, 581-82 (8th Cir.) ("it is the criminal episodes underlying the convictions, not the dates of conviction, that must be distinct to trigger the provisions of the ACCA"), cert. denied, 488 U.S. 857 (1988); United States v. Wicks, 833 F.2d 192, 194 (9th Cir. 1987) (felonies committed at different places and at different times were intended to be counted as separate felonies within the scope of the statute), cert. denied, 488 U.S. 831 (1988); United States v. Greene, 810 F.2d 999, 1000 (11th Cir. 1986) (convictions on four different burglaries at separate locations and at four separate times should be considered four separate felonies to satisfy the previous convictions requirement of the statute), cert. denied, 110 S. Ct. 1322 (1990).
35. 860 F.2d 620 (5th Cir. 1988).
had previously been convicted of an assault and two counts of burglary, on which the government attempted to base sentence enhancement under the ACCA. The assault conviction was unquestionably a separate conviction. However, the burglary convictions, which resulted from burglaries occurring several days apart, were returned in a single trial. The government contended that these two convictions constituted separate convictions under the ACCA.36

In determining whether the ACCA was applicable, the Fifth Circuit considered that, “[o]n its face, the term ‘three previous convictions’ does not appear to be ambiguous. The government, however, through the solicitor general, has previously conceded that [the] language in [the] statute was ambiguous.”37 The court then summarized the issue before it: “[I]n Petty [the ACCA] failed to indicate whether the required previous convictions could arise from a single transaction. [I]n this case [it] fails to indicate whether the required previous convictions can result from a single judicial proceeding. In both instances the statute is ambiguous.”38 Consequently, the Fifth Circuit considered the legislative history of the ACCA but found that it, “like the statute itself, is ambiguous.”39 The Fifth Circuit ultimately upheld Herbert’s sentence by concluding that when “a defendant is convicted in a single judicial proceeding for multiple counts arising from separate distinct criminal transactions that those convictions should be treated as multiple convictions under [the ACCA].”40

B. Congressional Clarification

On November 18, 1988, Congress, perhaps realizing the inherent ambiguity of the ACCA, attempted to clarify the predicate offense requirement.41 The amendment was included in a large piece of legislation entitled the Anti-Drug Abuse Act.42 It provides that the predicate convictions must be for felonies “committed on occasions different from one another.”43 Under this amendment, a kidnapping coupled with rape apparently would constitute

36. Id. at 621.
37. Id.
38. Id. at 621-22.
39. Id. at 622.
40. Id. (relying primarily on the reasoning of Petty).
42. Id.
43. Id.

one conviction for the purpose of sentence enhancement. Furthermore, two burglaries that occur on separate occasions but result in convictions during a single judicial proceeding will count as multiple convictions for the purpose of sentence enhancement. However, the three previous convictions requirement remains ambiguous despite congressional efforts because of the emergence of an alternative to the criminal episodes approach: This note identifies the alternative as the “intervening convictions approach.”

II. THE NEWEST WRINKLE: UNITED STATES V BALASCSAK

United States v Balascsak offered the first opportunity for a federal circuit court to interpret the three previous convictions requirement following the 1988 amendment to the ACCA. In Balascsak, the defendant pled guilty to a charge of possession of a firearm by a convicted felon. The government sought an enhanced sentence under the ACCA based on Balascsak's prior burglary convictions: Balascsak was convicted on May 21, 1981, of a burglary committed on November 30, 1980; he was then convicted on February 22, 1982, for two burglaries committed in July 1981.

In an en banc decision, the Third Circuit developed a new method of determining the existence of a previous conviction under the ACCA, the “intervening convictions approach.” Chief Judge Gibbons wrote a plurality opinion for six of the twelve judges sitting, while Judge Greenberg wrote for the five dissenters. Judge Becker wrote the single concurring opinion, in which he adopted the criminal episodes theory articulated by the dissenters but applied it in a way that produced the plurality's result. Thus, in actuality, the panel was evenly divided over which theory should apply to the three previous convictions requirement.

The majority opinion began by recognizing the vagueness of

45. Id. at 685 (Greenberg, J., dissenting).
46. See id. at 685 (Greenberg, J., dissenting). The specific date of these two burglaries was not mentioned by the Balascsak plurality. All that was noted was that Balascsak had committed two robberies some time between 10:45 P.M. on July 10 and 7:00 A.M. on July 11. Id. at 675.
47. See id. at 673.
48. See id. at 685 (Greenberg, J., dissenting).
49. See id. at 684 (Becker, J., concurring).
the three previous convictions requirement.\textsuperscript{50} It then looked to the legislative history of the ACCA for clarification,\textsuperscript{51} concluding that the congressional intention was to thwart career criminals.\textsuperscript{52} Therefore, the plurality reasoned, the defendant must have intervening convictions after each criminal offense to receive the ACCA sentence enhancement.\textsuperscript{53} In other words, "the first conviction must have been rendered before the second crime was committed."\textsuperscript{54} Likewise, the second conviction must be in place prior to commission of the third crime. The Balascak plurality believed this intervening convictions approach to be more compatible with congressional intent.\textsuperscript{55}

The remaining judges held that the intervening convictions requirement is unwarranted. Both the dissenting and concurring opinions emphasized that Congress did not specifically mention an intervening convictions requirement.\textsuperscript{56} Therefore, the court should not write one into the statute.

The question of whether to apply the intervening convictions approach or the criminal episodes approach was eventually resolved by the Third Circuit in United States v Schoolcraft,\textsuperscript{57} decided shortly after Balascak. One of the issues before the court in Schoolcraft was the validity of the defendant's sentence enhancement under the ACCA.\textsuperscript{58} The sentence enhancement was based on three previous convictions: a conviction in 1978 for burglary,\textsuperscript{59} a conviction in 1982 for a robbery committed in 1980, and a conviction in 1983 for three armed robberies committed during a two hour period in 1981.\textsuperscript{60}

The two approaches would produce opposite results. Under the intervening convictions approach, the three convictions would not trigger ACCA sentence enhancement because the second conviction (in 1982) was not in place before commission of the third

\textsuperscript{50} See id. at 678-79.
\textsuperscript{51} See id. at 679-82.
\textsuperscript{52} See id. at 683.
\textsuperscript{53} See id. at 682.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} See id. at 683.
\textsuperscript{57} Id. at 684 (Becker, J., concurring); id. at 685 (Greenberg, J., dissenting).
\textsuperscript{58} 879 F.2d 64 (3d Cir.), cert. demed, 493 U.S. 995 (1989).
\textsuperscript{59} See id. at 71.
\textsuperscript{60} Id. (the opinion did not provide a more specific date for the 1978 burglary conviction).
offense (in 1981). However, under the criminal episodes approach, the three previous convictions are sufficient because the timing of the convictions in relation to the adjudication is irrelevant so long as the crimes themselves were distinct in time.

Since Balascak failed to resolve the previous convictions controversy, the Schoolcraft majority decided, by a two to one vote, to adopt the criminal episodes approach presented in the dissenting and concurring opinions of Balascak. The Schoolcraft majority held that "for the purposes of enhanced sentencing under the ACCA, a defendant need not be convicted of one predicate offense before committing the next predicate offense." The dissenting judge favored the intervening convictions approach "[f]or the reasons stated by Chief Judge Gibbons in United States v Balascak."

Other federal circuits have also been unwilling to accept an intervening convictions approach. In United States v Wicks, decided prior to Balascak, the defendant's alleged three previous convictions resulted from burglaries that occurred on the same night at different locations but were prosecuted in one proceeding. Wicks argued that the ACCA sentence enhancement did not apply to him because it was designed for career criminals who "have failed in rehabilitation after three successive prosecutions." The Ninth Circuit rejected this intervening convictions argument saying that "[t]he plain language of the statute contradicts Wicks's contention; the language encompasses any person with three predicate convictions, whenever obtained."

The Sixth Circuit has not yet adopted either approach, but has discussed the issue in two opinions. In United States v Pedigo, the court commented favorably on Wicks as "indi-

61. The "third offense" consisted of the three armed robberies. This is considered a single "conviction" under both the criminal episodes approach and the intervening convictions approach.
62. See supra text accompanying notes 30-33.
63. Schoolcraft, 879 F.2d at 74.
64. Id.
65. Id. at 75 (Scirica, J., dissenting).
67. Id. at 193.
68. Id. Despite the holding in Wicks that "three predicate convictions, whenever obtained" are sufficient for sentence enhancement, the court agreed with United States v. Petty, 828 F.2d 2 (8th Cir. 1987), cert. denied, 486 U.S. 1057 (1988), that the underlying criminal episodes had to be distinct in time. Id. at 194; see supra text accompanying note 33.
69. 879 F.2d 1315 (6th Cir. 1989).
cat[ing] that in order to establish three prior convictions, there must be three corresponding criminal episodes which are distinct in time. The timing of the convictions is not important.\(^70\) However, in United States v. Taylor,\(^71\) the Sixth Circuit was less hostile toward the intervening convictions approach:

> [W]e note that the Third Circuit [in Balascak] has recently ruled that, “at an absolute minimum, convictions for the first two crimes must have been rendered before commission of the third crime.” [The defendant] has not raised this issue, however, and, even if he had, it appears that his convictions for burglary were obtained well before he was convicted of felonious assault.\(^72\)

*Balascak* is the only federal appeals court decision in which the intervening convictions approach has been adopted by even a plurality. Every other “federal court of appeals that has considered the issue has adopted the [criminal] episodes approach [and has] ‘simply required that the criminal episodes be distinct in time.’ ”\(^73\) Therefore, the question is whether the intervening convictions approach is an anomaly that should be rejected or the appropriate method for applying the ACCA?\(^9\)

### III. The Criminal Episodes Approach v The Intervening Convictions Approach

#### A. The Role of Courts

Unless Congress again amends the ACCA, courts must continue to speculate as to which approach, criminal episodes or intervening convictions, is proper. This section examines rules of statutory construction and the legislative history of the ACCA and concludes that the intervening convictions approach is better-reasoned.

1. **Statutory Construction**

Most of the courts that have rejected the intervening convic-

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70. *Id.* at 1317 n.3.
72. *Id.* at 1029 (quoting *Balascak*, 873 F.2d at 681).
tions approach have argued that inquiry into legislative intent is unnecessary because the ACCA is unambiguous. For example, the court in *United States v Schoolcraft*74 stated that, when interpreting a statute, "the starting point must be the language of the statute itself. If the terms of the statute are plain and unambiguous, judicial inquiry is complete."75

This "plain meaning" rule is certainly cogent. The first step in analyzing any legal problem involving a statute is simply to read the statute.76 However, application of this canon of statutory construction is not set in stone. On one extreme is the view that "[s]purious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute."77 The opposite extreme is that when "[t]he legislative history of [the statute] is ambiguous we must look primarily to the statutes themselves to find the legislative intent."78 In addition it has been contended that there is no way to determine which method of interpretation is preferable.79 Therefore, while the plain meaning rule is quite prevalent, other canons of statutory construction encourage courts to look beyond the words of a statute in order to determine the drafters' actual intent.

Courts should adopt a middle position regarding use of legislative history:

In final analysis, any question of statutory construction requires the judge to decide how the legislature intended its enactment to apply to the case at hand. The language of the statute is usually sufficient to answer that question, but "the reports are full of cases" in which the will of the legislature is not reflected in a

75. Id. at 74; accord United States v. Wicks, 833 F.2d 192, 193-94 (9th Cir. 1987), cert. dened, 488 U.S. 831 (1988) ("'[W]e look first to the statutory language and then to the legislative history if the statutory language is unclear' [In this instance] the statutory language is clear." (quoting Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 n.29 (1978) (emphasis in the original)).
76. See, e.g., H. FRIENDLY, BENCHMARKS 202 (1967) (Frankfurter's "threefold imperative to law students [was] (1) Read the statute; (2) read the statute; (3) read the statute!").
79. See Posner, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution, 37 CASE W RES. L. REV. 179, 217 (1986) (arguing that the test of time is the only way to evaluate a court's interpretation).
literal reading of the words it has chosen.\textsuperscript{80}

The ACCA was first read literally in \textit{United States v. Petty},\textsuperscript{81} where six simultaneously committed robberies were considered six separate convictions.\textsuperscript{82} Eventually, the Solicitor General admitted "that the phrase 'three previous convictions' is ambiguous" and that it was an error to apply the ACCA to Petty.\textsuperscript{83} The court in \textit{United States v. Balascak}\textsuperscript{84} stated:

The history of the \textit{Petty} case establishes that the language "who has three previous convictions" does not mean simply "who at the time of sentencing has been convicted of three separate offenses." Had that been the intended meaning, the Solicitor General obviously would have defended the enhanced sentence in \textit{Petty}. Short of such a mechanical reading of the "who has three previous convictions" language, however, the meaning of the provision is far from clear. The \textit{Petty} history establishes that the temporal term "previous" does not mean merely previous to the instant sentence, and the section does not with any clarity point to the additional event to which "previous" refers.\textsuperscript{85}

Other factors further indicate that courts should look beyond the plain meaning rule in interpreting the ACCA. Congress by its prior attempt to clarify the statute has acknowledged the ACCA's ambiguity\textsuperscript{86} The amendment only resulted in an alternative method of application as articulated in \textit{Balascak}.\textsuperscript{87} Also, the name of the Act alone creates substantial doubt regarding proper application of the ACCA. Should someone who robs three homes in one night be characterized as a "career criminal"?\textsuperscript{88}

\textsuperscript{80} Griffin v. Oceane Contractors, Inc., 458 U.S. 564, 577 (1982) (Stevens, J., dissenting). A middle position was also advocated in the dissenting opinion in United States v. Wicks, 833 F.2d 192, 194 (9th Cir. 1987) (Pregerson, J., dissenting), cert. demed, 488 U.S. 831 (1988). Quoting Judge Learned Hand, the opinion stated: "It is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." \textit{Id.} (quoting Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), aff'd, 326 U.S. 404 (1945)).

\textsuperscript{81} 798 F.2d 1157 (8th Cir. 1986), vacated, 481 U.S. 1034 (1987).

\textsuperscript{82} For a discussion of the facts of \textit{Petty}, see supra text accompanying notes 23-27.

\textsuperscript{83} For discussion of the Solicitor General's brief, see supra text accompanying notes 28-33.

\textsuperscript{84} 873 F.2d 673, 678 (3d Cir. 1989) (en banc), aff'd, 902 F.2d 1558 (3d Cir.), cert. demed, 111 S. Ct. 173 (1990).

\textsuperscript{85} \textit{Id.} at 679.

\textsuperscript{86} For a discussion of the 1988 amendments to the ACCA, see supra text accompanying notes 41-43.

\textsuperscript{87} For a discussion of \textit{Balascak}, see supra text accompanying notes 44-73.

\textsuperscript{88} Looking to a statute's title to glean the purpose of the act has long been recog-
2. The Legislative History

The legislative history of the ACCA includes no specific discussion regarding methods of determining the requisite convictions. The original bill was an attempt by Senator Arlen Specter to create federal jurisdiction over state armed burglary and armed robbery offenses committed by career criminals. The purpose of this legislation was to deal with repeat, habitual offenders.

As originally proposed, the federal government would prosecute defendants who were charged with burglary or robbery and had two prior burglary or robbery convictions. If convicted in federal court, the defendant would be sentenced to life imprisonment with no opportunity for suspended sentence.

Senator Specter then introduced a revised bill that lessened the penalty to a minimum of fifteen years without suspension. The more lenient sentencing was introduced to allow for circumstances in which a life sentence might not be justified. Furthermore, the revised bill recognized and accounted for the rapid decline in the number of offenses committed by career criminals once they reach the age of thirty. This version of the bill was passed by both houses but was pocket vetoed by President Reagan because of potential federalism problems. The bill was altered to allow federal prosecution only where the crime gives rise to federal jurisdiction. However, all versions of this bill required that two convictions be in place before committing the offense underlying the third conviction.

See, e.g., Church of the Holy Trinity v. United States, 143 U.S. 457, 462 (1892).

The House of Representatives then proposed to make the ACCA a penalty provision for the federal crime of possession of a firearm by a felon.\textsuperscript{100} Because the penalty was to follow commission of a federal crime, all federalism concerns were eliminated.\textsuperscript{102} Congress would therefore not have to create federal jurisdiction over state crimes or limit application of the statute to situations already based on federal jurisdiction. Under this proposal, a felon who has been arrested for possession of a firearm and has three previous convictions would be eligible for an enhanced sentence.\textsuperscript{102} This proposal was enacted in 1984.\textsuperscript{103}

The original version of the ACCA required that a defendant have two convictions in place prior to commission of the third crime;\textsuperscript{104} the purpose was to incarcerate the career criminal. The revision introduced by the House and passed into law was solely intended to eliminate federalism concerns, not to change the entire purpose of the law. Consequently, at an absolute minimum, two convictions should be in place before commission of the crime underlying the third required conviction.\textsuperscript{108}

The relationship between the first and second convictions

\begin{quote}
\textit{inal Act: Hearing Before the Subcommittee on Crime of the Committee of the Judiciary, 98th Cong., 2d Sess. 7 (1984) ("[A burglary or robbery offense, which may lead to sentence enhancement under the ACCA] shall not be prosecuted unless the United States proves beyond a reasonable doubt that the defendant has been convicted of at least two [previous] offenses "). Balascsak noted:

[A] person who committed three burglaries on the same night could not (without other prior convictions) be considered a career criminal. Only a person who had been twice convicted \textit{before committing} the third crime would possibly be prosecuted under the bill. While the required relationship between the two priors themselves is not obvious, it is obvious that the two priors must have resulted in convictions \textit{before} the third crime took place.


104. \textit{See supra} text accompanying note 99.

105. \textit{See United States v. Balascsak, 873 F.2d 673, 681 (3d Cir. 1989) (en banc), aff'd, 902 F.2d 1558 (3d Cir.), cert. denied, 111 S. Ct. '173 (1990). The counterargument is that Congress partially altered its original intent through the compromises made with President Reagan in order to alleviate any federalism problems with the statute. \textit{See supra} text accompanying notes 97-98. Under this theory, the prior drafts of what eventually became the ACCA are not important to the analysis. Indeed, Judge Greenberg, writing in dissent, agreed that "reliance upon the language of prior drafts of the statute [is] unpersuasive." Balascsak, 873 F.2d at 686 (Greenberg, J., dissenting).}
poses a more difficult question because Congress has never indicated whether the first conviction must be in place before the commission of the crime underlying the second conviction. However, Congress probably intended that the first conviction be in place before commission of the second crime in order to enhance the sentences of only career criminals. By analogy, most state habitual offender statutes are interpreted as requiring:

that each successive felony ______ be committed after the previous felony conviction in order to count towards habitual criminal status.

Accordingly, it has been held that two or more convictions on the same day on two or more indictments, or on two or more counts of the same indictment, constitute only one conviction for the purposes of the habitual offender statute.

The underlying rationale is that a habitual criminal statute serves "as a warning to first time offenders and provide[s] them with an opportunity to reform. ... Sanctions become increasingly severe 'not so much that [the] defendant has sinned more than once as that he is deemed incorrigible when he persists in violations of the law after conviction of previous infractions.'" In other words, sentence enhancement can be given only after "conviction and punishment have failed to reform."

The ACCA certainly supports a similar interpretation. In order to incapacitate only the career criminal incapable of rehabilitation, Congress probably would have adopted the intervening convictions approach had it expressly addressed this issue. The intervening convictions approach provides the felon an opportunity to reform before being incarcerated for an increased period of time. Under the criminal episodes approach, however, an individual who commits three crimes prior to being convicted of any is immediately eligible for sentence enhancement and receives only one opportunity for rehabilitation. Therefore, it is important to as-

106. Balascak, 873 F.2d at 682.
108. Carlson, 560 P.2d at 28-29 (quoting Annotation, Chronological or Procedural Sequence of Former Convictions as Affecting Enhancement of Penalty for Subsequent Offense Under Habitual Criminal Statutes, 24 A.L.R.2d 1247, 1249 (1952)).
109. Kansas v. Lohrbach, 217 Kan. 588, 592, 538 P.2d 678, 681 (1975) (emphasis in original). Lohrbach is another state case adopting an intervening convictions approach. See id. at 593, 538 P.2d at 682-83 (holding that the trial court erred in sentencing defendant as habitual offender based on four prior felony convictions rendered on the same date).
certain the congressional view of rehabilitation.

There are several indications that Congress intended the ACCA to apply to those criminals who had failed rehabilitation as opposed to those who had no opportunity at rehabilitation. Assistant Attorney General Stephen Trott testified before the House Subcommittee on Crime when the House of Representatives considered the ACCA. He stated:

These are people who have demonstrated, by virtue of their definition, that locking them up and letting them go doesn't do any good. They go on again, you lock them up, you let them go, it doesn't do any good, they are back for a third time. At that juncture we should say, "That's it; time out; it is all over. We as responsible people, will never give you the opportunity to do this again." ¹¹⁰

Furthermore, Senator Specter, the author of the ACCA, discussed from the Senate floor his concern regarding career criminals:

The critical need to target the habitual offender was also one of the major findings in 1973 by the National Commission on Criminal Justice Standards and Goals, of which I was a member. One of the Commission's key recommendations included the need to incarcerate unrehabilitative repeat violent felons for lengthy periods. It is my view that the only way to deal with such hardened criminals is with stiff prison terms with no prospect for parole. It was this view that led to my sponsorship of the Armed Career Criminal Act which was enacted during the 98th Congress. ¹¹¹

Senator Specter has repeatedly demonstrated support for rehabilitation efforts. While speaking at a congressional hearing, he stated his desire "to have a correctional system that rehabilitates where possible, and confines when rehabilitation is not possible." ¹¹² Indeed, Senator Specter has stated that one of his goals is to assure "corrections programs designed to rehabilitate first or second offenders convicted of violent felonies and incapacitate third offenders with lengthy sentences. [This agenda] to improve rehabilitation programs complements the approach of The


Armed Career Criminal Act "Unlike the criminal episodes approach, the intervening convictions approach furthers Senator Spector's goal of rehabilitation. Under this approach, the ACCA would incarcerate only "the worst," as Senator Spector characterizes the career criminal.

3. Statutory Effect

An example of the type of individual the ACCA was designed to remove from society is Warren Bland. Bland's criminal career began in 1958 when he stabbed a man with a knife. Bland was convicted and given probation for this offense. In 1960, Bland was arrested for a series of sexual assaults. Although the female victims of these assaults fought back and avoided rape, one had her jaw broken. Following conviction for these offenses, Bland was sent to the state mentally disordered sex offender program for seven years. Soon after his release, Bland was convicted of two rapes. He served another seven years for these offenses.

At this point, under the intervening convictions approach, Bland would be eligible for ACCA sentence enhancement if later found in possession of a firearm. However, after serving seven years for the rapes, Bland kidnapped an eleven year old girl and her mother. He molested the mother and sexually assaulted and tortured the girl. For these offenses Bland plea-bargained his way to a mere three-year sentence. Following release, Bland sodomized and tortured a small boy. Although he was sentenced to serve nine years for this offense, he was released on parole in four and a half years. When Bland finished serving this sentence in 1986, he became a suspect in the murder of a seven year old girl. While investigating Bland, police found a gun in his

115. Id.
116. Id.
117. Id.
118. Id.
119. Id.
120. Id.
121. Id.
122. Id.
123. Id.
124. Id.
car. This enabled the federal government to prosecute for possession of a firearm by a convicted felon.\footnote{125}{\textit{Id.}} As a result, Bland was finally given a life sentence, without parole, under the ACCA.\footnote{126}{\textit{Id.}} Although this is an extreme example, it shows exactly what the ACCA is designed to do. Warren Bland represents "the worst" to which Senator Specter referred.\footnote{127}{See infra note 153 and accompanying text.} After numerous chances, Bland failed to reform, and has now been removed from society. It is arguable that the intervening convictions approach is too lenient and fails to remove dangerous criminals from society quickly enough. Many individuals not yet eligible for sentence enhancement under the intervening convictions approach may already constitute substantial threats to society. Such individuals are perhaps as much a threat as those who do fall into the net cast by the intervening convictions approach. For instance, Congress may consider Mr. Balascsak, who has a history of committing burglaries, to be as much of a threat to society as Mr. Bland. If this is true and Congress did intend to incarcerate such individuals pursuant to the ACCA, then it probably would favor the criminal episodes approach.

The ACCA merely enhances the sentence of a felon who is in possession of a firearm. One can imagine an individual who serves one concurrent jail term for three previous convictions and then obtains a gun illegally after being released. The felon has had one chance at rehabilitation, yet has broken the law again. The firearm may have been obtained through the black market, which is malum in se,\footnote{128}{An act is malum in se if "it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences" \textit{BLACK'S LAW DICTIONARY} 959 (6th ed. 1990). Dealings with the black market would generally fall within this category.} or from a legitimate dealer, which is likewise illegal.\footnote{129}{A legitimate dealer is prohibited from selling a firearm or ammunition to someone the dealer knows "has been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year." \textit{27 C.F.R.} § 178.99(c)(1) (1990). Thus, the convicted felon has probably been untruthful on the various registration forms that one must complete when purchasing a firearm. These forms inquire whether the purchaser has any previous felony convictions and an affirmative answer will preclude a felon's purchase of the firearm. \textit{See, e.g., United States v. Balascsak}, 873 F.2d 623, 674 (3d Cir. 1989) (en banc) (discussing false information to which defendant attested when purchasing a firearm from a licensed gun dealer), \textit{aff'd}, 902 F.2d 1558 (3d Cir.), \textit{cert. demed}, 111 S. Ct. 173 (1990).} Under this reasoning, the intervening convictions approach may be too lenient because the individual, who has been given an
opportunity for rehabilitation, avoids sentence enhancement without regard to the threat to society.

There are also those criminals who engage "in a 'Bonnie and Clyde' type spree over a long period of time, but [have] managed to evade apprehension."130 These criminals are the most wily and perhaps the most dangerous threat to society. They may have committed several crimes, but likely have three or fewer convictions. If these convictions are not in the proper sequence with respect to commission of subsequent felonies, then the criminals will not be eligible for enhanced sentences under the intervening convictions approach.

These arguments against the intervening convictions approach are not persuasive. Ultimately, it must be recognized that Congress required three previous convictions rather than one, thus indicating its intent to afford criminals several opportunities to reform before imposing long term incarceration. Moreover, even in an intervening convictions jurisdiction, defendants not eligible for sentence enhancement may nevertheless be imprisoned for long periods of time on the underlying criminal offense.131

Lastly, those advocating the criminal episodes approach argue that the "recent [1988] amendment of the Armed Career Criminal Act buttresses [their] analysis of the legislative intent."132 It is argued that because Congress clarified the law by stating that the underlying offenses must be "committed on occasions different from one another,"133 it explicitly rejected the idea that there must be intervening convictions. However, Balascasak was decided after Congress amended the ACCA. Congress therefore was likely not aware of the question Balascasak posed. In fact, Congress was probably reacting to the Petty decision134 when it

130. Balascasak, 873 F.2d at 688 (Greenberg, J., dissenting).
131. For example, a defendant who has been convicted of two armed robberies and has three previous convictions that are not in the proper sequence to trigger an enhanced sentence under the intervening convictions approach will not necessarily go free. He will still be sentenced for the robberies and for unlawful possession of a firearm. See 18 U.S.C. § 922(g) (1988) (prohibiting possession of a firearm by a felon). Someone convicted of violating section 922(g) can be imprisoned up to 10 years. See 18 U.S.C. § 924(a)(2) (1988) ("Whoever knowingly violates subsection[] (g) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years or both.").
132. Balascasak, 873 F.2d at 688 (Greenberg, J., dissenting).
133. Id., see supra text accompanying notes 41-43 (discussing the 1988 amendment to the ACCA).
passed the 1988 amendment.\textsuperscript{135}

Indeed, there is no relevant legislative history accompanying the amended legislation. The fact that the amendment is merely three lines of text contained within a massive bill dealing with a separate subject suggests that little consideration went into the so-called clarification of law. Thus, it is doubtful that Congress has seriously contemplated the intervening convictions approach one way or the other. In contrast, the legislative history and intent of the original ACCA strongly favors application of the intervening convictions approach.

B. The Role of Congress

In addition to congressional intent, various policy considerations further support the adoption of the intervening convictions approach. This section argues that accuracy in the identification of career criminals and ease of application require that Congress again clarify the ACCA in favor of the intervening convictions approach.

1. Predictive Accuracy

The selective incapacitation theory purports that “a small number of offenders [are] responsible for a large portion of crimes or arrests.”\textsuperscript{136} This suggests that the crime rate can be reduced by targeting a relatively small number of offenders for incapacitation.\textsuperscript{137} Selective incapacitation effectively removes the most threatening criminals from society.\textsuperscript{138} Congress has based the ACCA upon similar notions of selective incapacitation.\textsuperscript{139}

\textsuperscript{135} For a discussion of the Petty case, see \textit{supra} text and accompanying notes 21-31. Because of the relatively harsh sentence given to the defendant in Petty, the case was subject to much public attention. \textit{See U.S. Admits Error in Enhanced Sentence}, Chicago Daily L. Bull., May 7, 1987, at 1, col. 1-3; \textit{see also} Brief of the Solicitor General of the United States, United States v. Petty, 486 U.S. 1057 (1988) (No. 87-6768); \textit{supra} text accompanying notes 26-31. Congress was therefore more likely to be aware of the case and influenced by its results.


\textsuperscript{137} \textit{See} Cohen, \textit{supra} note 136, at 253.

\textsuperscript{138} \textit{See Note}, \textit{supra} note 136, at 512.

\textsuperscript{139} Congress accepted the premise “that a large percentage of crimes are committed by a very small percentage of repeat offenders.” H.R. REP. No. 1073, 98th Cong., 2d Sess. 1, \textit{reprinted in} 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3661. Congress reached this conclusion through reliance on studies conducted by Professor Marvin Wolf-
The problem, however, is accurately predicting which individuals will commit most of the crimes. Initially, predictions of recidivism were based upon general criteria such as violence or dangerousness. These criteria proved ineffective because individuals were mistakenly classified as violent or dangerous between fifty-four and ninety percent of the time.

To avoid these "false positives," researchers have begun to focus on high rate crimes, such as robbery or burglary, as the criterion offenses rather than violence or dangerousness. These studies have produced various levels of accuracy. For instance, a study conducted for INSLAW was only twenty-nine percent accurate in predicting the worst recidivists. A Rand study could boast only fifty percent accuracy in identifying high rate offenders. In a more recent INSLAW study, however, eighty-five percent of those predicted to be recidivists were rearrested for a serious offense, while only thirty-three percent of those identified as noncareer criminals were rearrested.

While these percentages may be acceptable, the predictive accuracy of the ACCA in identifying career criminals would be increased under the intervening convictions approach. This contention rests upon the assumption that the more incorrigible a defendant is, the more likely that defendant is to commit future crimes that would lead to convictions.

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140. See Cohen, supra note 136, at 260 ("[P]redictive accuracy remains an important issue to be resolved before implementing any selective incapacitation policy."); Note, supra note 136, at 514 ("[T]he assumption that [career criminals are identifiable] remains controversial.").


142. False positives are instances where individuals are "incorrectly predicted to commit future crimes." Cohen, supra note 136, at 261 n.16.

143. See Note, supra note 136, at 515.


147. Professor Monahan suggests that "prediction is morally acceptable even when extremely inaccurate." J. Monahan, Predicting Violent Behavior: An Assessment of Clinical Techniques 35 (1981).
The predictive accuracy problem is especially exigent given
the current version of the ACCA which closely resembles the less
accurate recidivism models that were based upon violence or dan-
gerousness. Originally, the ACCA was triggered only by previ-
ous convictions for burglary or robbery These criterion offenses
are the same ones upon which the more accurate models are
based. However, in 1986 the ACCA was amended to be triggered
by three previous convictions for a violent felony, a serious drug
offense, or both. Consequently, the current version of the
ACCA may falsely predict a career criminal as often as ninety
percent of the time.

In addition to removing dangerous criminals from society, a
selective incapacitation scheme could decrease the burgeoning
prison population by successfully targeting the most active
criminals. Specifically, “[i]f high-rate criminals could be sen-

148. Put simply, the offender who does not feel the moral sting of a conviction is
more likely to be caught in the intervening convictions net. See supra text accompanying
notes 107-13. For an argument that an intervening convictions interpretation will target the
most incorrigible offenders, see supra text accompanying notes 107-13.

149. See supra text accompanying notes 140-41; see also Note, supra note 136, at
515 n.22 (“It is extremely difficult to predict any low-base-rate event.”).

150. See supra text accompanying note 103.

3207-39. Admittedly, one of the offenses included in the ACCA’s definition of “violent
felony” is burglary. See 18 U.S.C. 924(e)(2)(B) (1988). Burglary is, indeed, a high rate
crime upon which the more accurate prediction models are based. However, the ACCA
also defines “violent felony” as a crime punishable by imprisonment for over a year that
“has as an element the use, attempted use, or the threatened use, of physical force against
another; or involves conduct that presents a serious potential risk of physical
injury to another.” Id. This latter definition includes low rate events of the type upon which
the less accurate prediction models are based. See supra text accompanying notes 140-41.

An ancillary issue created by the focus on violent felonies and serious drug offenses is
the proper definition of “burglary” under the ACCA. There is some dispute over whether
to apply statutory or common law burglary. See Comment, The Armed Career Criminal
that Congress intended that courts apply state definitions of burglary).

152. See supra text accompanying note 141.

153. See Cohen, supra note 136, at 253-54 (“Researchers have discovered that
a small number of offenders [are] responsible for a large portion of crimes
With such a distribution, the potential exists to achieve the same, or improved, crime reduction
benefits from incarceration by selectively targeting prison use on the smaller number of
high-rate offenders.”); Armed Career Criminal Act, Hearing on H.R. 1627 and S. 52
Before the Subcomm. on Crime of the Comm. of the Judiciary, 98th Cong., 2d Sess. 15
(1984) (“You can’t prosecute everybody. You can’t put everybody in jail whom you’d like to
It is discretionary and you always select the worst group. [These career criminals
are] the worst group It is that simple, and the [ACCA] will have an enormously
tenced to prison for longer terms, low-rate offenders could be incarcerated for shorter periods, and the amount of crime on the streets could conceivably be reduced without any increase in the current prison population." 184 This is, of course, based upon the presumption "that a large percentage of crimes are committed by a very small percentage of repeat offenders." 185 The greater accuracy that the intervening convictions approach affords facilitates this goal much more readily than the less accurate criminal episodes approach.

2. Ease of Application

Adoption of the criminal episodes approach has lead to uncertainty in the law. Courts still have difficulty ascertaining previous convictions because they cannot easily determine when one "occasion" ends and another "occasion" begins. The Balascsak case illustrates this problem. Although Judge Becker, in his concurring opinion, did not adopt the intervening convictions application of the ACCA, he did state that the statute should "ensnare only hard core repeat offenders [and so] the separate criminal episode[s] requirement must be read rigorously [to require] that the government prove convincingly that the crimes (and the episodes of which they were part) were truly separate." 186 The facts of Balascsak made this distinction difficult because two of the defendant's prior crimes occurred on the same night. Balascsak had committed one burglary at 10:45 P.M. and a second burglary one block away some time between 11:00 P.M. and 7:00 A.M. the following morning. 187 Therefore, the government faced the difficult evidentiary task of proving that the crimes were "committed on occasions different from one another." 188

Moreover, the judiciary must split hairs to determine when one "occasion" ends and another "occasion" begins. 189 Judge

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154. Note, supra note 136, at 512 (footnote omitted).
157. Id. at 675.
158. See supra notes text accompanying notes 41-43 (discussing of the 1988 amendment to the ACCA).
159. This realization caused Judge Becker to remark, "I concede my inability to..."
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Becker was not persuaded that the Balascak burglaries occurred on separate occasions. Accordingly, he concurred with the Balascak majority in vacating Balascak’s enhanced sentence.\textsuperscript{160} The five dissenting judges, however, were persuaded that the occasions were separate.\textsuperscript{161} This vague evidentiary standard is likely to be a continuing problem.

The most recent example of the ambiguity resulting from the criminal episodes approach is \textit{United States v Schieman}.\textsuperscript{162} A major issue in \textit{Schieman} was whether the defendant’s crime and subsequent escape constituted one criminal episode or two.\textsuperscript{163} On May 1, 1974, the defendant burgled a business establishment.\textsuperscript{164} After fleeing the scene with $30.50, including two roles of pennies, Schieman walked three blocks to a public telephone. There he attempted to call a taxicab to obtain transportation for his escape.\textsuperscript{165} However, Schieman was observed by a police officer who was investigating the burglary. When the officer approached the defendant to question him, Schieman knocked him to the ground.\textsuperscript{166} This pushing incident, which occurred about five minutes following the burglary,\textsuperscript{167} led to an aggravated assault conviction.\textsuperscript{168}

Apparently, the majority believed that five minutes and three blocks were sufficient distinction to create two criminal episodes. In determining whether the escape was separate from the burglary, the majority concluded:

To consider the aggravated battery offense a continuation of the burglary offense would preclude from [ACCA] consideration any offense which is designed to prevent detection of the original crime. Had Officer Sandell questioned Schieman about this robbery the following day, or three weeks later, Schieman’s attack undoubtedly would be considered a separate and distinct episode. Once the original crime is complete, there is no principled way to distinguish between an attack in response to an investiga-

establish a bright line, e.g., as to whether two days’ or two weeks’ hiatus is enough.”\textit{Balascak}, 873 F.2d at 685 (Becker, J., concurring).

\textsuperscript{160} See id. (Becker, J., concurring) (noting that this law should be developed on a case-by-case basis).

\textsuperscript{161} \textit{Id.} at 688 (Greenberg, J., dissenting).

\textsuperscript{162} 894 F.2d 909 (7th Cir. 1990).

\textsuperscript{163} \textit{Id.} at 910.

\textsuperscript{164} \textit{Id.}

\textsuperscript{165} \textit{Id.}

\textsuperscript{166} \textit{Id.}

\textsuperscript{167} \textit{Id.} at 913 (Ripple, J., dissenting).

\textsuperscript{168} \textit{Id.} at 910.
tion commenced within ten minutes of the burglary and an attack in response to an investigation commenced a day after the burglary. To make a distinction in this situation would grant the criminal an unintended windfall for the quick detection of his crime. Because Schieman ‘committed separate crimes against separate victims in separate locations,’ we find that Schieman’s offenses for burglary and aggravated battery should count as two separate convictions for [ACCA] sentencing purposes.

In dissent, Judge Ripple argued that “the crimes were committed as part of the same operation or episode—a burglary and the immediate escape. The crimes do not meet the rigorous standard that should be met for determining separate criminal episodes.” Despite disagreeing with the Schieman majority, however, Judge Ripple stated that such a determination “is hardly an impossible task.” He argued that felony-murder requires a similar determination. “‘A transaction is continuous [for felony-murder purposes] when the commission of both the homicide and felony are closely connected in time, place and continuity of action.’” Furthermore, Judge Ripple contended that since RICO requires “that the government prove ‘continuity plus relationship’ in order to show a pattern [of racketeering activity]’ there is no reason why the same sort of assessment cannot be made here.”

Judge Ripple is correct that felony-murder and RICO issues often involve line drawing. However, such difficult line drawing

169. Id. at 913 (quoting United States v. Towne, 870 F.2d 880, 891 (2d Cir.), cert. denied, 490 U.S. 1101 (1989)).
170. Id. at 915 (Ripple, J., dissenting).
171. Id. (Ripple, J., dissenting); cf. Lasko v. Owens, 881 F.2d 44, 63 n.4 (3d Cir. 1989) (Cowen, J., dissenting) (“The difficulty in determining where one crime begins and another ends is illustrated in our recent decision in United States v. Balascak involving an interpretation of the phrase ‘three previous convictions’ as used in the Armed Career Criminal Act ”).
172. Schienan, 894 F.2d at 915 (Ripple, J., dissenting) (citations omitted) (quoting Sheckles v. State, 501 N.E.2d 1053, 1056 (Ind. 1986)).
174. A similar distinction is also made with multiple pleading. Multiple pleading is the discouraged practice of charging the commission of a single offense in multiple counts. In these instances, courts are required to determine when a crime is a single or multiple offense. See, e.g., United States v. Allied Chem. Corp., 420 F. Supp. 122, 123 (E.D. Va. 1976) (holding that defendant could be charged separately for each day it deposited chemical waste into a nearby waterway).
was not intended under the ACCA. The legislative history indicates that "ordinarily, the prior convictions would be established by the federal prosecutor with certified court records. [And] rarely, if ever, would a serious question arise concerning these prior convictions."176

The difficult and possibly arbitrary line drawing inherent in the criminal episodes approach is entirely avoided under the intervening convictions approach. No complicated evidentiary hearing is needed to determine when one occasion ends and another begins.177 The only evidence necessary to enhance a defendant's sentence is the prior charging instruments. The court will simply "compare the dates of the convictions with the dates of the crimes. This is a much less cumbersome procedure than taking evidence and evaluating the precise temporal, spatial, or jurisprudential relationship between two crimes."177 This less awkward procedure is especially appealing considering that federal courts are already overwhelmed with criminal trials.178

3. The Proposed Clarification

Congress should enact the intervening convictions approach. The amendment could be simple and straightforward. Congress should simply replace the language "committed on occasions different from one another" with "and each of the three previous convictions preceded the commission of the next crime for which

176. It is not suggested that evidentiary hearings were not contemplated by Congress. See S. Rep. No. 190, 98th Cong., 1st Sess. 12 (1983) (explaining that the first stage of a two part procedure would involve an evidentiary hearing regarding the two prior convictions); S. Rep. No. 585, 97th Cong., 2d Sess. 14 (1982) (explaining that the subsequent proceedings regarding prior convictions "would be in the nature of an evidentiary hearing.").
178. See, e.g., Armed Career Criminal Act, Hearing on H.R. 1627 and S. 52 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 126 (1984) ("Our courts are overloaded. We are concerned now about taking care of the litigation that we have, particularly when you see the nightmare that our Federal courts have because of the tremendous criminal load that they are carrying right now." (statement of Representative Shaw)). Given the benefits of the intervening convictions approach, if Congress does want to apply the ACCA to those criminals whose sentences will not be enhanced through an intervening convictions approach, it should amend the ACCA by implementing an intervening convictions approach mechanism, while reducing the number of required predicate convictions to two. Such an amendment would provide courts with an effective standard.
conviction could be considered.” The proposed clarification would amend the ACCA to read:

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, [and each of the three previous convictions preceded the commission of the next crime for which conviction could be considered], 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.\(^\text{179}\)

In addition, Congress should include appropriate legislative history. The original ACCA contained no legislative history relating specifically to the three previous convictions requirement issue, nor did the 1988 amendment. With appropriate legislative history, courts would not have to speculate as to the proper interpretation.

The legislative history should briefly describe the confusion surrounding the three previous convictions requirement to demonstrate congressional awareness of the problem. It should also contain a blanket statement that, “Congress rejects the ‘criminal episodes’ approach in favor of the ‘intervening convictions’ approach articulated in United States v Balascak.” New statutory language, in conjunction with thorough legislative history, finally would eliminate the ambiguity surrounding the three previous convictions requirement by firmly establishing the intervening convictions approach.

**CONCLUSION**

Congress has attempted to remove career criminals from society, yet the ambiguities of legislation have hindered progress. The three previous convictions requirement of the ACCA presents one such ambiguity. Until Congress clarifies its intent, courts should apply the intervening convictions approach. The statutory language is sufficiently vague to permit courts to examine the appropriate legislative history, which supports adoption of this approach.

Furthermore, Congress should address this issue. By specifically adopting the intervening convictions approach, Congress would protect the Act's original purpose of incarcerating the career criminal, more accurately identify career criminals, and impose a less arduous task on courts seeking to apply the ACCA.

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