NOTE

THE ARMED CAREER CRIMINAL ACT AND THE U.S. SENTENCING GUIDELINES: MOVING TOWARD CONSISTENCY

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I. INTRODUCTION

In January 1986, police officers found a gun in Charles McClinton's hotel room at the Red Roof Inn in Florissant, Missouri.[1] Mr. McClinton was sharing the room with Liddell Green, and the police were investigating Mr. Green's alleged illegal drug use.[2] Despite Mr. McClinton's denial that the gun belonged to him, the district court convicted him of illegally possessing a firearm.[3] Although Mr. McClinton had committed three minor burglaries in 1962 "in which the total value of the property taken was, in all probability, less than $500," he had not committed a felony during the succeeding twenty-four years.[4] Nonetheless, he received a mandatory minimum fifteen-year sentence under the Armed Career Criminal Act ("ACCA")[5] for possessing a firearm as a felon. His sentence was upheld by the Eighth Circuit Court of Appeals.[6]

In September 2004, New Mexico police officers received a report that Larry Begay had threatened his sister and aunt with a rifle.[7] After a night of heavy drinking, Begay pointed a rifle at his aunt and repeatedly pulled the trigger of the unloaded gun in an attempt to shoot her.[8] Mr. Begay had previously been convicted a dozen times (and arrested twenty-two times) for driving under the influence of alcohol ("DUI"), a crime that becomes a felony the fourth (and each subsequent) time an individual commits it under New Mexico law.[9] Mr. Begay pled guilty to illegally possessing a firearm as a felon.[10] The United States Supreme Court held that despite his twelve prior convictions for driving under the influence and his violent behavior, Mr.

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[1] *See* United States v. McClinton, 815 F.2d 1242, 1243 (8th Cir. 1987).
[2] *See id.* at 1244.
[3] *Id.* at 1243.
[4] *Id.* at 1245.
[5] 18 U.S.C. § 924(e) (2006).
[6] *See McClinton*, 815 F.2d at 1245.
[7] *See* Begay v. United States, 128 S. Ct. 1581, 1592 (2008).
[8] *See id.*
[9] *See id.*
[10] United States v. Begay, 377 F. Supp. 2d 1141, 1142 (D.N.M. 2005).

Begay was not eligible for a mandatory minimum fifteen-year sentence under the ACCA.[11]

The cases of Mr. McClinton and Mr. Begay illustrate how the ACCA as currently enacted is both overinclusive and underinclusive. Although Mr. McClinton had not committed a felony during the twenty-four years preceding his arrest for mere gun possession, he received a mandatory minimum fifteen-year sentence under the ACCA. Yet Mr. Begay, who had a dozen prior convictions for felony DUI and pointed a rifle at his aunt and pulled the trigger, was not eligible for the ACCA's mandatory minimum fifteen-year sentence. Before turning to an analysis of the ACCA, which is the focus of this Note, it will be helpful to briefly consider the broader context of the debate regarding mandatory minimum sentencing.

Vigorous debate surrounds legislation that imposes mandatory minimum prison sentences.[12] Supporters make several arguments in defense of these laws. First, they fear that without mandatory minimum sentences, judges will impose sentences that are too lenient given the crime and that, as a result, criminals will not receive their "just deserts."[13] Second, supporters contend that imposing mandatory minimum sentences prevents crime.[14] They point out that those who are incapacitated as a result of such sentences are unable to commit additional crimes while imprisoned and that mandatory minimum sentences deter both convicted and potential criminals from committing crime when they are not imprisoned.[15] In addition, they maintain that mandatory minimum sentences ensure fairness and prevent unwarranted disparities by assuring that there is a lower bound to the sentences that defendants convicted of the same offense can receive.[16] Furthermore, supporters of mandatory minimum sentences argue that such laws induce valuable cooperation from criminal defendants, which assists in the successful prosecution of other criminals and in the prevention of additional crime.[17]

Opponents of mandatory minimum sentences challenge the assumptions of the laws' supporters. They seek to undercut claims that mandatory minimum sentences deter crime by marshalling empirical evidence indicating that no such deterrence occurs in practice.[18] They similarly use empirical

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[11] *See id.* at 1588.

[12] *See generally Mandatory Minimum Sentencing Laws—The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. (2007).

[13] U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 13 (1991), *available at* http://www.ussc.gov/r_congress/manmin.pdf.

[14] *See id.*

[15] *See id.*

[16] *See id.*

[17] *See id.*

[18] *See, e.g.*, Michael Tonry, *Mandatory Penalties*, 16 CRIME & JUST. 243, 243–44 (1992) ("[T]he weight of the evidence clearly shows that enactment of mandatory penalties has either no demonstrable marginal deterrent effects or short-term effects that rapidly waste away."); BARBARA S. VINCENT & PAUL J. HOFER, FED. JUDICIAL CTR., THE CONSEQUENCES OF

evidence not only to challenge the assertion that mandatory minimums ensure fairness and eliminate unwarranted sentencing disparities, but also to explain that mandatory minimums actually contribute to such disparities through prosecutorial discretion in charging decisions.[19] In addition, critics argue that mandatory minimum sentences are simply unjust because they do not permit judges to consider the individual facts and circumstances of each case so as to impose a sentence that fits the crime and the criminal; they maintain that "[m]andatory minimum sentences mean one-size-fits-all injustice."[20] Furthermore, they argue that laws imposing mandatory minimum sentences waste limited tax dollars and are an inefficient way to punish offenders.[21]

This Note does not join this important, decades-long debate regarding the advisability of laws that impose mandatory minimum sentences. Instead, its scope is limited to evaluating one such federal law, which has been in effect for twenty-five years and has recently received significant attention from the U.S. Supreme Court, and to examining ways to improve the law to better achieve Congress's primary purpose in enacting it. This Note assumes that the statute will continue to require mandatory minimum sentences and thus considers under what circumstances those sentences should be imposed.

The ACCA imposes a mandatory minimum sentence of fifteen years of imprisonment upon those felons who violate 18 U.S.C. § 922(g) (which prohibits felons from shipping, transporting, possessing, or receiving any firearm or ammunition in or affecting interstate or foreign commerce) after having previously been convicted of either three "violent felon[ies]"[22] or three serious drug offenses.[23] In light of two recent Supreme Court opinions deciding which crimes constitute "violent felon[ies]" and consequently qualify as predicate offenses for sentence enhancement purposes under the ACCA,[24] this Note suggests amendments to the scope of prior convictions that qualify as ACCA predicate offenses. It identifies several flaws in both the timing and substance of prior convictions that qualify as predicate offenses under the ACCA. It argues that the ACCA should be amended to be consistent with the Sentencing Guidelines because the Guidelines are

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MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS 14 (1994), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/$file/conmanmin.pdf ("Mandatory minimums have had no observable effect on crime").

[19] *See, e.g.*, U.S. SENTENCING COMM'N, *supra* note 13, at 53–54; ABA JUSTICE KENNEDY COMM'N, REPORT TO THE HOUSE OF DELEGATES 28 (2004), *available at* http://www.abanet.org/leadership/2004/annual/dailyjournal/121A.doc); David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 623–24 (2005); VINCENT & HOFER, *supra* note 18, at 17.

[20] *Mandatory Minimum Sentencing Laws—The Issues*, *supra* note 12, at 46 (statement of J. Paul G. Cassell on behalf of the Judicial Conference of the United States).

[21] *See id.* at 76–77.

[22] *Id.*

[23] 18 U.S.C. § 924(e)(1) (2006).

[24] *See* Begay v. United States, 128 S. Ct. 1581 (2008); Chambers v. United States, 129 S. Ct. 687 (2009).

promulgated and updated by an expert congressionally-appointed commission that is statutorily bound to promote the purposes of sentencing that Congress has set forth, which includes those purposes that motivated the enactment of the ACCA,[25] and to integrate modern advances in understanding what motivates and controls criminal behavior.[26]

This Note makes three proposals with regard to issues of timing. First, crimes committed more than fifteen years before the instant violation of 18 U.S.C. § 922(g) should not qualify as predicate offenses.[27] Second, juvenile crimes should not qualify as predicate offenses.[28] Third, prior convictions that were not separated by an intervening arrest and were for offenses that were either contained in the same charging instrument or resulted in sentences imposed on the same day should not qualify as separate predicate offenses.[29]

In addition, the Note proposes three amendments regarding the substantive categories of predicate offenses that qualify to enhance a criminal's sentence. First, burglary of a structure other than a dwelling should qualify as a predicate offense only if the conduct expressly charged, by its nature, presented a serious potential risk of physical injury to another.[30] Second, felony DUI should qualify as a predicate offense. Finally, escape should qualify as a predicate offense as long as the conduct expressly charged, by its nature, presented a serious potential risk of physical injury to another.

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[25] In fact, the Sentencing Guidelines explicitly aim to further the purposes of sentencing set forth in the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1976 (1984), of which the ACCA was one chapter. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.1, introductory cmt. (2008). *See also* James E. Hooper, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 MICH. L. REV. 1951, 1990 (1991).

[26] *See* 28 U.S.C. § 991(b) (2006); U.S. SENTENCING GUIDELINES MANUAL §1A2 (2008) ("The mandate rested on congressional awareness that sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies . . . as more is learned about what motivates and controls criminal behavior.").

[27] *See* Stephen R. Sady, *The Armed Career Criminal Act—What's Wrong with "Three Strikes, You're Out"?*, 7 FED. SENT'G REP. 69, 69 (1994). *Cf.* Thomas W. Hillier, *Comparing Three Strikes and the ACCA—Lessons to Learn*, 7 FED. SENT'G REP. 78, 80 (1994) (arguing that under 18 U.S.C. § 3559(c), the federal three-strikes law mandating life imprisonment for those convicted of a third serious violent felony, prior serious violent felonies committed more than ten or fifteen years before the instant offense should not qualify as predicate serious violent felony offenses).

[28] *See* Jason Abbott, *The Use of Juvenile Adjudications Under the Armed Career Criminal Act*, 85 B.U. L. REV. 263, 271–72 (2005) (arguing that under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a juvenile adjudication is not a conviction, and for this reason courts should not use juvenile adjudications to enhance sentences under the ACCA). *See infra* Part V.A.2 for a discussion of the implications of *Apprendi*.

[29] *See* Derrick D. Crago, Note, *The Problem of Counting to Three Under the Armed Career Criminal Act*, 41 CASE W. RES. L. REV. 1179, 1194 (1991); Hillier, *supra* note 27, at 79; Hooper, *supra* note 25, at 1992–93 (1991); Sady, *supra* note 27, at 69.

[30] *See generally* Michael M. Pacheco, *The Armed Career Criminal Act: When Burglary is not Burglary*, 26 WILLAMETTE L. REV. 171 (1989).

Part II of this Note discusses *Begay v. United States*,[31] the first of two recent Supreme Court opinions determining which crimes constitute violent felonies and consequently qualify as predicate offenses for sentence enhancement purposes under the ACCA. Part III considers the second of these two opinions, *Chambers v. United States*,[32] in light of *Begay*. Part IV recounts the legislative history of the ACCA. Part V critiques the ACCA and offers proposals for improvement. Part VI concludes.

II. *Begay v. United States*

The ACCA mandates a minimum prison term of fifteen years for any person convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) if that person has "three previous convictions . . . for a violent felony or a serious drug offense."[33] The ACCA defines "violent felony" to include, *inter alia*, a felony offense that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."[34]

After a night of heavy drinking, Larry Begay pointed a rifle at his aunt, threatened to shoot her, and then repeatedly pulled the trigger of the unloaded gun.[35] After he was arrested, Mr. Begay conceded he was a felon and pled guilty to a federal charge of unlawful possession of a firearm in violation of 18 U.S.C. § 922(g)(1).[36] Mr. Begay's pre-sentence report noted that he had been convicted a dozen times for DUI, a crime that, under New Mexico law, becomes a felony (punishable by a prison term of more than one year) the fourth (and each subsequent) time an individual commits it.[37] The sentencing judge consequently found that Mr. Begay had at least three prior convictions for a crime "punishable by imprisonment for a term exceeding one year" and that Mr. Begay's "felony DUI convictions involve[d] conduct that present[ed] a serious potential risk of physical injury to another."[38] As a result, the judge concluded that, under the ACCA, Mr. Begay had three or more prior convictions for a "violent felony" and should receive a sentence that reflected a mandatory minimum prison term of fifteen years.[39] The question presented on appeal was whether DUI qualifies as a "violent felony" under the ACCA. The Tenth Circuit Court of Appeals panel held that it does.[40] The Supreme Court reversed.[41]

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[31] 128 S. Ct. 1581 (2008).
[32] 129 S. Ct. 687 (2009).
[33] 18 U.S.C. § 924(e) (2006).
[34] 18 U.S.C. § 924(e)(2)(B)(ii) (known as the "otherwise" clause).
[35] *See Begay*, 128 S. Ct. at 1592.
[36] *See id.*
[37] *See id.*
[38] United States v. Begay, 377 F. Supp. 2d 1141, 1145 (D.N.M. 2005).
[39] *Begay*, 128 S. Ct. at 1583–84.
[40] United States v. Begay, 470 F.3d 964 (10th Cir. 2006).
[41] *See Begay*, 128 S. Ct. at 1586.

In *Begay*, the Court held that to qualify as an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another"[42] and consequently qualifies as a predicate violent felony under the ACCA, an offense must be "roughly similar, *in kind* as well as in degree of risk posed, to the [statutory] examples" of burglary, arson, extortion, and offenses involving use of explosives.[43] The Court determined that to qualify under the "otherwise" clause, a crime must "typically involve purposeful, 'violent,' and 'aggressive' conduct,"[44] just as the examples that precede the "otherwise" clause do. The Court held that the offense of felony DUI considered in *Begay* did not qualify because, even assuming it "presents a serious potential risk of physical injury to another," it typically does not involve "purposeful" conduct.[45] This is because the strict liability offense of drunk driving does not require any criminal intent.[46] Consequently, the Court held that Begay's convictions for felony DUI did not qualify as predicate offenses under the ACCA.[47]

III. *Chambers v. United States*

The Court's holding in *Begay* did not eliminate all uncertainty regarding what crimes qualify as violent felony predicate offenses under the ACCA. On November 10, 2008, just seven months after deciding *Begay*, the Supreme Court heard oral arguments in *Chambers v. United States*[48] on the question of whether felony escape qualifies as a violent felony predicate offense under the ACCA. Given the Supreme Court's recent holding in *Begay*,[49] it appeared likely that the Court's ruling in *Chambers* would similarly interpret the ACCA in a narrow way, further limiting which crimes qualify as predicate violent felony offenses.

After Deondery Chambers pled guilty to being a felon in possession of a firearm, the U.S. District Court for the Southern District of Illinois sentenced Chambers to 188 months in prison under the ACCA.[50] The question presented on appeal was whether Chambers's previous conviction under Illinois law for escape was a "violent felony" and thus subjected Chambers to a mandatory minimum 180-month (fifteen-year) sentence under the ACCA.[51]

Writing for the Seventh Circuit, Judge Richard Posner somewhat reluctantly affirmed the district court's sentence.[52] First, he explained that

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[42] *Id.* at 1586.
[43] *Id.* at 1584–85 (emphasis added).
[44] *Id.* at 1586 (citations omitted).
[45] *Id.* at 1585 (internal quotation marks omitted).
[46] *See Begay*, 128 S. Ct. at 1586–87.
[47] *Id.* at 1588.
[48] 129 S. Ct. 687 (2009).
[49] 128 S. Ct. 1581.
[50] United States v. Chambers, 473 F.3d 724, 725 (7th Cir. 2007).
[51] *Id.*
[52] *See id.* at 727.

> Illinois defines felonious escape not only as 'intentionally escap[ing] from a penal institution or from the custody of an employee of that institution' but also as 'knowingly fail[ing] to report to a penal institution or to report for periodic imprisonment at any time.' . . . The defendant's escape was in the latter category—failing to report to a penal institution.[53]

Judge Posner went on to suggest that "[t]here would be no impropriety in dividing escapes, for purposes of "crime of violence" [(violent felony)] classification, into jail or prison breaks on the one hand and walkaways, failures to report, and failures to return, on the other."[54]

However, in light of recent binding Seventh Circuit precedent holding that any violation of the Illinois statute prohibiting escape, whether in the form of a prison break or a failure to report, is a violent felony under the ACCA,[55] Judge Posner could not bring himself to engage in such a classification effort:

> [W]e shrink from trying to overrule a decision that is only a few months old . . . that tracked an earlier and materially identical decision of this court (*Bryant*), and that has overwhelming support in the decisions of the other circuits . . . . We shall adhere to the precedents *for now*.[56]

Though affirming the district court's sentencing of Chambers under the ACCA, Judge Posner appeared to invite the Supreme Court to reverse his decision and to distinguish between peaceful failures to report and violent prison escapes in determining whether a prior conviction for escape qualifies as a violent felony under the ACCA. On January 13, 2009, the Supreme Court accepted Judge Posner's implicit invitation to reverse and to draw the distinction.[57] The Court determined that, under the Illinois statute, a failure to report is a separate crime, distinct from the crime of escape.[58]

The Court then went on to hold that a failure to report is not a violent felony under the ACCA.[59] In doing so, it focused on whether a failure to report "involves conduct that presents a serious potential risk of physical injury to another."[60] Relying on a U.S. Sentencing Commission report providing data on whether federal escape offenses in fiscal years 2006 and 2007 involved the use of force or a dangerous weapon or resulted in injury,[61] the

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[53] *Id.* at 725.
[54] *Id.* at 726.
[55] *See* United States v. Golden, 466 F.3d 612 (7th Cir. 2006).
[56] *Chambers*, 473 F.3d at 726 (emphasis added).
[57] *See* Chambers v. United States, 129 S. Ct. 687 (2009).
[58] *Id.* at 691.
[59] *Id.* at 693.
[60] *See id.* at 691 (quoting 18 U.S.C. § 924(e)(2)(b)(ii) (2000)).
[61] *See* U.S. Sentencing Comm'n, Report on Federal Escape Offenses in Fiscal Years 2006 and 2007 2 n.7 (2008).

Court concluded that a failure to report simply does not involve a serious potential risk of physical injury and thus does not qualify as a violent felony predicate offense under the ACCA.[62]

In focusing on whether a failure to report "involves conduct that presents a serious potential risk of physical injury to another,"[63] the Court seemed to fail to rely on its holding in *Begay* that to qualify as a violent felony under the ACCA's "otherwise" clause,[64] a crime must be "roughly similar, *in kind* as well as in degree of risk posed, to the [statutory] examples" of burglary, arson, extortion, and offenses involving use of explosives.[65] Although in *Begay* the Court held that to qualify under the "otherwise" clause, a crime must "typically involve purposeful, violent, and aggressive conduct"[66] (just as, according to the Court, the statutory examples preceding the "otherwise" clause do), the Court in *Chambers* did not appear to impose such a requirement. Instead, it merely observed that, "[c]onceptually speaking, the crime amounts to a form of inaction, a far cry from . . . purposeful, violent, and aggressive conduct."[67] Thus, while the Court in *Begay* found that the strict liability offense of felony DUI cannot qualify as a violent felony under the ACCA simply because it does not involve purposeful, violent, and aggressive conduct, a similar conclusion regarding a failure to report did not end the inquiry in *Chambers*. Instead, after concluding that a failure to report is not purposeful, violent, and aggressive, the Court went on to consider whether the crime presents a serious potential risk of physical injury.[68] While this might help to explain why more justices joined the Court's majority opinion in *Chambers* than its majority opinion in *Begay*,[69] it adds uncertainty to how the Court will determine in the future whether a crime qualifies as a violent felony predicate offense under the ACCA. Given the Court's reasoning in *Chambers*, it is now less clear that the requirement in *Begay* that the crime be purposeful, violent, and aggressive still applies.[70]

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[62] *Chambers*, 129 S. Ct. at 693.
[63] 18 U.S.C. § 924(e)(2)(b)(ii).
[64] *See* 18 U.S.C. § 924(e)(2)(b)(ii).
[65] Begay v. United States, 128 S. Ct. 1581, 1585 (2008) (emphasis added).
[66] *Id.* at 1586.
[67] *Chambers*, 129 S. Ct. at 692 (internal quotation marks omitted).
[68] *See id.* at 691–92.
[69] Only Chief Justice Roberts and Justices Stevens, Kennedy, and Ginsburg joined Justice Breyer's majority opinion in *Begay*, 128 S. Ct. at 1581, while his opinion in *Chambers* was also joined by Justices Scalia and Souter, 129 S. Ct. at 687. In *Begay*, Justice Scalia filed an opinion concurring in the judgment because, contrary to the Court, he concluded "that the residual clause unambiguously encompasses *all* crimes that present a serious risk of injury to another," regardless of whether they typically involve purposeful, violent, and aggressive conduct. *Begay*, 128 S. Ct. at 1588 (Scalia, J., concurring). Justice Souter dissented in *Begay*. *Id.* at 1592 (Souter, J. dissenting).
[70] Justice Alito's concurrence indicated his concern with the uncertainty surrounding which crimes qualify as violent felony predicate offenses under the ACCA. *See Chambers*, 129 S. Ct. at 694 (Alito, J., concurring). He suggested that Congress formulate a list of expressly defined crimes that qualify as violent felonies. *Id.* at 695. Thus, perhaps the Sentencing Com-

IV. Legislative History of the ACCA

In evaluating the ACCA, this Note focuses on how the ACCA could better further the primary congressional purpose that motivated its enactment. Thus, it is helpful to examine the purpose of the ACCA as indicated by its legislative history to inform the consideration of which crimes should qualify as violent felony predicate offenses under the ACCA.[71]

Congress began to target career criminals for punishment in light of social scientific research conducted in the 1970s and 1980s concluding that a relatively small number of habitual offenders are responsible for a large fraction of crimes.[72] For example, Congress funded the establishment of career criminal prosecutorial units in local prosecutors' offices through the federal Law Enforcement Assistance Administration.[73] In addition, seeking to provide federal prosecutors with the ability to pursue career criminals, Senator Arlen Specter (D-Pa.), a former district attorney, introduced legislation that ultimately became the ACCA.[74] Senator Specter later explained the motivation behind the legislation:

> 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 . . . [to] incapacitate[e] the truly dangerous criminal . . . . 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.[75]

Senator Specter's comments indicate that the ACCA aimed to incapacitate repeat offenders who had proven unable or unwilling to stop re-offending and would pose significant dangers if not incarcerated. The House Judiciary Committee Report on the Armed Career Criminal Act of 1984 supports this understanding.[76] This report explains in its section entitled "Purpose of This

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mission should be tasked with researching which crimes present a serious potential risk of physical injury to another (as it did in its recent report on felony escapes) and, based on that research, recommend to Congress a list of crimes that it believes present a serious potential risk of physical injury to another.

[71] *See generally* Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958). *But see* William N. Eskridge, Jr., Dynamic Statutory Interpretation 222-29 (1994) (discussing critiques of the use of legislative history in statutory interpretation).

[72] *See* H.R. Rep. No. 98-1073, at 1–2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3661–62.

[73] *See* H.R. Rep. No. 98-1073, at 2.

[74] S. 1688, 97th Cong. (1981). *See also* 129 Cong. Rec. 22,669-72 (1981) (statement of Sen. Specter).

[75] 134 Cong. Rec. 15,806–07 (1988) (statement of Sen. Specter).

[76] *See* H.R. Rep. No. 98-1073.

Legislation" that "[t]his bill is designed to increase the participation of the Federal Law enforcement system in efforts to curb armed, habitual (career) criminals."[77]

Senator Specter's original 1981 career criminal bill was modified before it was eventually passed into law as the Armed Career Criminal Act of 1984. The Career Criminal Life Sentence Act of 1981 made robbery or burglary a federal crime when committed by an offender who had two prior convictions for robbery or burglary.[78] As originally introduced, the Act mandated life imprisonment without the possibility of a suspended sentence for those convicted.[79] Recognizing that a life sentence might not always be justified and that career criminals commit many fewer offenses after age thirty, Senator Specter later introduced a revised bill that reduced the penalty to a mandatory minimum fifteen-year sentence.[80] Both the House and the Senate passed this version of the bill, but President Reagan pocket vetoed it in 1983, likely due to federalism concerns related to providing federal jurisdiction over state crimes.[81]

Such federalism concerns led to an amendment to the bill. Senator Specter and Congressman Ron Wyden (D-Or.) reintroduced the bill in the 98th Congress,[82] and on June 28, 1984, the House Committee on the Judiciary, Subcommittee on Crime, held a hearing to consider it.[83] At this hearing, representatives of the American Bar Association and the National District Attorneys Association expressed serious reservations regarding the federal prosecution of local robberies and burglaries.[84] In addition, the Department of Justice opposed a provision of the bill that provided local district attorneys with the power to "veto" the federal government's decision to prosecute a robber or burglar under the Act.[85] To allay these federalism concerns and limit the potential for turf wars, Congressman William Hughes (D-N.J.), Chairman of the Subcommittee on Crime, introduced an amendment to the bill.[86]

Congressman Hughes's amendment significantly changed the legislation. To address the federalism concerns, it eliminated the creation of federal jurisdiction over local robberies and burglaries committed by repeat offenders.[87] Instead of expanding federal jurisdiction, the amendment created a sentence enhancement for repeat offenders convicted of violating a preexisting

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[77] *Id.* at 1.
[78] S. 1688, 97th Cong. § 2 (1981).
[79] *See id.*
[80] *See* Crago, *supra* note 29, at 1192.
[81] *See id.*
[82] H.R. 1627, 98th Cong. (1984).
[83] H.R. REP. NO. 98-1073 (1984).
[84] *See id.* at 4.
[85] *See id.*
[86] *See* 130 CONG. REC. 28,095 (1984) (statement of Rep. Hughes).
[87] *See id.*

federal law.[88] More specifically, the amendment created a mandatory minimum sentence of fifteen years of imprisonment for offenders previously convicted three or more times of robbery or burglary who violate the federal law prohibiting felons from possessing, receiving, or transporting firearms.[89] The subcommittee accepted this amendment,[90] and the amended bill was passed into law as the Armed Career Criminal Act of 1984.[91]

Although the ACCA enhances the punishment for illegally possessing firearms, it does not appear that Congress's primary intent was to punish career criminals for possessing guns or to deter such possession. On the contrary, the desire to incapacitate career criminals seems to have been the principal motivation for the ACCA.[92] In fact, it appears that the only reason that the minimum fifteen-year sentence is mandated for illegally possessing firearms is that imposing the sentence on all career criminals regardless of whether they were convicted of violating a federal law (such as by illegally possessing a gun) was not a politically feasible option due to the aforementioned federalism concerns. As the House committee report explains, the purpose of the legislation was to "giv[e] law enforcement officials another option in dealing with career criminals . . . without permitting a radical expansion of Federal jurisdiction over common law crimes and without creating a need for a local veto over the exercise of Federal jurisdiction."[93] Thus, while Senator Specter and other supporters of the ACCA likely wanted to impose a mandatory minimum fifteen-year sentence on all those convicted three times of burglary or robbery, to address federalism concerns and ensure passage of the bill, they tied the punishment to a violation of the federal law prohibiting felons from possessing firearms.

A 1986 amendment to the ACCA expanded the class of qualifying predicate offenses that can trigger the mandatory minimum fifteen-year sentence. While the 1984 ACCA only enhanced sentences of offenders with at least three prior convictions "for robbery or burglary, or both,"[94] the 1986 amendment broadened the sentence enhancement to cover those with three or more prior convictions "for a violent felony or a serious drug offense, or both."[95] This allowed for incapacitating a wider variety of career criminals than just robbers and burglars. Although the amendment included definitions of the terms "violent felony" and "serious drug offense," varying interpretations of these definitions have led to much litigation in recent years.[96]

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[88] *See id.*
[89] *See id.*
[90] *See* H.R. REP. NO. 98-1073 (1984).
[91] 130 CONG. REC. 28,096 (1984). The law passed by a voice vote.
[92] *See* H.R. REP. NO. 98-1073, at 2–3.
[93] *Id.* at 5.
[94] Pub. L. No. 98-473, ch. XVIII, 98 Stat. 1837, 2185 (1984).
[95] H.R. REP. NO. 99-849, at 6 (1986).
[96] *See, e.g*, Chambers v. United States, 129 S. Ct. 687 (2009); Begay v. United States, 128 S. Ct. 1581 (2008); United States v. Rodriquez, 128 S. Ct. 1783 (2008); James v. United States, 550 U.S. 192 (2007).

A final amendment to the ACCA was enacted two years later. The Anti-Drug Abuse Act of 1988 added language to the ACCA requiring the three predicate offenses to be "committed on occasions different from one another."[97] This amendment appears to have come in response to the Eighth Circuit's decision in *United States v. Petty*,[98] which held that the ACCA's requirement of three previous convictions was met by a defendant having previously been convicted for robbing six different people at a restaurant at the same time.[99] While it is not exactly clear what it means for offenses to be committed "on occasions different from one another," with the exception of the Third Circuit,[100] all of the circuits have held that offenses are committed on occasions different from one another if they arise out of separate and distinct criminal episodes.[101] However, the D.C. Circuit has observed that "the courts have not settled on a precise test for determining what are separate and distinct criminal episodes."[102] As a result, there has been much litigation surrounding the interpretation of this language.[103]

V. Criticisms of the ACCA and Proposals for Improvement

Given the ACCA's primary goal of incapacitating career criminals who are likely to re-offend and pose a danger to the public if not incarcerated,[104] the current scope of felonies that qualify as predicate offenses for sentence enhancement purposes is overly broad in many respects. The ACCA currently applies to individuals whom few would describe as career criminals and who are unlikely to re-offend or pose a danger. The ACCA is flawed with regard to the class of offenses that qualify as predicate felonies in two significant ways. First, it does not provide sufficient consideration to issues of timing. For instance, the ACCA does not adequately take into account the amount of time that has elapsed since the defendant last committed a crime,[105] or whether the defendant had an opportunity, after committing each

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[97] Pub. L. No. 100-690, § 7056, 102 Stat. 4181, 4402 (1988).

[98] 798 F.2d 1157, 1159–60 (8th Cir. 1986).

[99] *See* 134 Cong. Rec. 32,702 (1988) (statement of Sen. Joseph Biden (D-Del.)).

[100] *See* United States v. Balascsak, 873 F.2d 673, 681, 684 (3d Cir. 1989).

[101] *See* United States v. Jackson, 113 F.3d 249, 253 (D.C. Cir. 1997) (noting the general agreement among circuit courts).

[102] *Id.*

[103] *See, e.g.*, United States v. Hobbs, 136 F.3d 384, 387–90 (4th Cir. 1998); *Jackson*, 113 F.3d at 253–54; United States v. Schofield, 114 F.3d 350, 352 (1st Cir. 1997); United States v. Towne, 870 F.2d 880, 888–91 (2d Cir. 1989).

[104] *See supra* Part IV.

[105] *See* Sady, *supra* note 27, at 69. *Cf.* Hillier, *supra* note 27, at 80 (arguing that under 18 U.S.C. § 3559(c), the federal three-strikes law mandating life imprisonment for those convicted of a third serious violent felony, prior serious violent felonies committed more than ten or fifteen years before the instant offense should not qualify as predicate serious violent felony offenses).

of the predicate offenses, to be rehabilitated or specifically deterred[106] from re-offending.[107] Second, the substantive scope of qualifying predicate offenses that trigger the mandatory minimum fifteen-year sentence is in some ways overly broad[108] and in others too narrow. For example, repeat shoplifters, such as the movie star Winona Ryder,[109] can qualify for enhanced mandatory minimum fifteen-year sentences under the ACCA, while a felon convicted a dozen times for felony DUI and later found aiming a rifle at innocent civilians, such as Larry Begay, does not.[110]

Congress should rectify the ACCA's shortcomings by bringing it into conformity with the Sentencing Guidelines promulgated by the U.S. Sentencing Commission.[111] Like the ACCA, the Sentencing Guidelines seek to advance the congressional purpose of "protect[ing] the public from further crimes of the particular defendant" by incapacitating offenders.[112] In fact, the Sentencing Guidelines explicitly aim to further the purposes of sentencing that Congress set forth in the Comprehensive Crime Control Act of 1984, of which the ACCA was one chapter.[113] This is particularly significant, for it suggests that the Sentencing Guidelines would serve as an excellent model to consider when amending the ACCA.[114] These Guidelines came into effect in their original form in 1987, three years after the passage of the ACCA.[115] Just like the ACCA, the Guidelines call for sentence enhancements based

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[106] The phrase "specific deterrence" is used here to denote the deterrence of the offender himself or herself, as opposed to the general deterrent effect that operates on other potential criminals.

[107] *See* Crago, *supra* note 29, at 1194; Hillier, *supra* note 27, at 79; Hooper, *supra* note 25, at 1992–93; Sady, *supra* note 27, at 69.

[108] *See* Sady, *supra* note 27, at 69.

[109] *See* Rick Lyman, *Winona Ryder Convicted of 2 Counts in Shoplifting*, N.Y. TIMES, Nov. 7, 2002, at A24.

[110] *See Begay*, 128 S. Ct. at 1588.

[111] *See* Hooper, *supra* note 25, at 1990–94.

[112] U.S. SENTENCING GUIDELINES MANUAL § 4A, introductory cmt. (2007).

[113] *Id. See also* United States v. Wilson, 350 F. Supp. 2d 910, 912 (D. Utah 2005) ("Over the last 16 years, the Sentencing Commission has promulgated and honed the Guidelines to achieve these congressional purposes. Congress, too, has approved the Guidelines and indicated its view that Guidelines sentences achieve its purposes."). *Contra* United States v. Jaber, 362 F. Supp. 2d 365, 373–74 (D. Mass. 2005). The *Jaber* opinion directly disagrees with the *Wilson* opinion on this point. *Id.* at 371–72. However, it focuses its criticism on the Sentencing Guidelines' recommended sentencing ranges, which result from a formula that takes into consideration a wide variety of factors; it does not criticize the Guidelines' choice of what crimes can qualify as predicate offenses for sentence enhancement purposes. *See id.* Because this Note looks to the Sentencing Guidelines for suggestions regarding what class of crimes should qualify as predicate offenses, not what the sentencing ranges should be, the criticisms of the Guidelines offered by the *Jaber* opinion do not fundamentally address the subject of this Note. Furthermore, the author of the *Jaber* opinion and other leading critics of the Guidelines believe that the Guidelines recommend sentences that are too long. *See, e.g.*, Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569 (2005). This Note, however, primarily relies on the Guidelines to advocate for fewer applications of the ACCA's mandatory minimum sentence and, as a result, shorter sentences.

[114] *See* Hooper, *supra* note 25, at 1990–94.

[115] *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2008).

upon an offender's criminal history.[116] Moreover, like the ACCA, section 2K2.1 of the Guidelines specifically addresses what prior offenses should serve to enhance the sentences of felons who violate 18 U.S.C. § 922(g).[117] Unlike the ACCA, however, the Guidelines are created by an expert, congressionally-appointed commission that has spent years studying sentencing and reviewing empirical evidence on the costs and benefits of various forms and lengths of punishment in an attempt to achieve Congress's sentencing goals,[118] and they are required by statute to integrate modern advances in understanding what motivates and controls criminal behavior.[119] Furthermore, while the ACCA has not been amended for over twenty years, the Guidelines are regularly updated[120] and were amended as recently as May 1, 2008.[121] Thus, Congress should take advantage of the Sentencing Commission's expertise by amending the ACCA to make it consistent with section 2K2.1 of the Sentencing Guidelines. The rest of this Part proposes such changes.

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[116] *See id.* § 4A1.1 (2008).

[117] *See id.* § 2K2.1(a) (2008).

[118] *See* Kimbrough v. United States, 128 S. Ct. 558, 574 (2007) ("Carrying out its charge, the Commission fills an important institutional role: It has the capacity courts lack to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.'" (citations omitted)); Gall v. United States, 128 S. Ct. 586, 594 (2007) ("[E]ven though the Guidelines are advisory rather than mandatory, they are, as we pointed out in *Rita*, the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions."); Rita v. United States, 127 S. Ct. 2456, 2464 (2007) ("The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process . . . . The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly."); United States v. Booker, 543 U.S. 220, 264 (2005) ("[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly."); U.S. SENTENCING GUIDELINES MANUAL § 1A2 (2008) ("[A]s contemplated by the Sentencing Reform Act, the guidelines are evolutionary in nature. They are the product of the Commission's fulfillment of its statutory duties to monitor federal sentencing law and practices, to seek public input on the operation of the guidelines, and to revise the guidelines accordingly."). *But see Jaber*, 362 F. Supp. 2d at 374 (arguing that, as of 2005, "[t]he Commission [h]as [n]ot [f]unctioned as a [s]entencing [e]xpert in the [w]ay the [s]tatute [e]nvisioned.").

[119] *See* 28 U.S.C. § 991(b) (2006).

[120] *See* Hooper, *supra* note 25, at 1993.

[121] In fact, the amendments that went into effect in November of 2007 included changes to the Guidelines' criminal history chapter that offer a suggestion for addressing the ACCA's failure to consider whether the defendant had an opportunity after committing each of the predicate offenses to be rehabilitated or specifically deterred from re-offending. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(a)(2) (2008). *See also infra* Part V.B.

A. The Temporal Scope of Qualifying Predicate Offenses Under The ACCA Should Be Amended

1. Crimes Committed More Than Fifteen Years Before a Violation of 18 U.S.C. § 922(g) Should Not Qualify as Predicate Offenses

By not considering how recently an 18 U.S.C. § 922(g) violator previously committed the crimes that trigger the ACCA's sentencing enhancement, the ACCA is overinclusive. It can impose mandatory minimum fifteen-year sentences for criminals who are very unlikely to re-offend.[122] Under the ACCA, even an elderly defendant who has not committed a crime for the fifty years preceding his or her violation of 18 U.S.C. § 922(g) is subject to the ACCA's sentence enhancement. Given the ACCA's goal of incapacitating career criminals due to the likelihood they will re-offend,[123] it seems illogical to imprison for fifteen years a defendant who has not committed a crime for the past fifty years even if he or she has illegally possessed a firearm.

The case of Charles McClinton illustrates the real possibility of such an unjustified result. Police officers searched a hotel room that Mr. McClinton was sharing with Liddell Green.[124] The officers suspected that Mr. Green was using illegal drugs.[125] They found a gun in the room.[126] Although Mr. McClinton denied that the gun was his, the district court convicted him of illegally possessing the firearm.[127] The court sentenced Mr. McClinton to fifteen years in prison under the ACCA even though it had been twenty-four years since he had last committed a felony.[128] The court found that because Mr. McClinton had pled guilty to committing three burglaries in 1962, he had three previous convictions for "violent felon[ies]" and was therefore subject to the ACCA's mandatory minimum sentence.[129]

Although the Eighth Circuit upheld Mr. McClinton's fifteen-year sentence, it did so reluctantly.[130] It suggested that such a result was unjust and urged Congress to consider amending the ACCA to impose a recency requirement upon the prior convictions that qualify as predicate violent felony

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[122] *See* Sady, *supra* note 27, at 69. *Cf.* Hillier, *supra* note 27, at 80 (arguing that under 18 U.S.C. § 3559(c), the federal three-strikes law mandating life imprisonment for those convicted of a third serious violent felony, prior serious violent felonies committed more than ten or fifteen years before the instant offense should not qualify as predicate serious violent felony offenses).

[123] *See supra* Part IV.

[124] *See* United States v. McClinton, 815 F.2d 1242, 1243 (8th Cir. 1987).

[125] *See id.* at 1244.

[126] *See id.* at 1243.

[127] *See id.* at 1244.

[128] *See id.* at 1244–45.

[129] *McClinton*, 825 F.2d at 1245.

[130] *Id.*

offenses.[131] Mr. McClinton challenged his sentence by arguing that the ACCA violated his constitutional right to equal protection of the laws.[132] He claimed that the statute reflected an irrational and arbitrary exercise of the government's authority because it unjustifiably enhanced the sentences of defendants like him.[133] The Eighth Circuit recognized that "McClinton's argument is not entirely without merit," noting that there is no "limit on the length of time for which a conviction may be considered."[134] The court expressed its discomfort with Mr. McClinton receiving a fifteen-year sentence simply because he "had been convicted of three burglaries some twenty-five years ago in which the total value of the property taken was, in all probability, less than $500."[135] Yet the court reluctantly explained that

> despite the obvious merit of McClinton's argument, it is difficult to say that the increased penalty provided in the statute was not rationally related to a legitimate concern of the federal government . . . . Thus, although we have no choice but to affirm McClinton's conviction, we would urge Congress to consider whether it intended the result reached here and whether the result is just.[136]

This court recognized that it may be unjust for crimes committed more than fifteen years prior to the instant offense to qualify as violent felony predicate offenses under the ACCA.

As is the case under the Sentencing Guidelines, violent felonies and serious drug offenses committed more than fifteen years before a violation of 18 U.S.C. § 922(g) should not enhance a criminal's sentence under the ACCA. Just as the ACCA seeks to incapacitate career criminals because they are likely to re-offend, the Sentencing Guidelines endeavor to advance the congressional purpose of "protect[ing] the public from further crimes of the particular defendant" by incapacitating offenders.[137] To determine the conditions under which an offender's previous felony convictions should enhance his or her sentence, the U.S. Sentencing Commission reviewed empirical research assessing which types of prior convictions are associated with an increased risk of recidivism and considered the purposes of sentencing Congress set forth in the Comprehensive Crime Control Act of 1984, of which the ACCA was one chapter.[138] Thus, the Commission considered data regarding whether one who previously committed a felony but has not done so for

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[131] *See id.*
[132] *See id.* at 1244.
[133] *See id.*
[134] *Id.*
[135] *McClinton*, 825 F.2d at 1245.
[136] *Id.*
[137] U.S. SENTENCING GUIDELINES MANUAL § 4A1.1, introductory cmt. (2008).
[138] *See id.* ("The specific [criminal history] factors . . . are consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior . . . . [T]he Commission will review additional data insofar as they become available in the future.").

fifteen years is likely to re-offend. Like its predecessor, the U.S. Parole Commission, the Sentencing Commission concluded that "the correlation between a defendant's criminal history and predictable recidivism diminishes after a prolonged period of conviction-free behavior."[139] As a result, the Commission decided that "a sentence imposed more than fifteen years prior to the defendant's commencement of the instant offense is not counted" when determining whether to enhance an offender's sentence.[140] By amending the ACCA to make it consistent with the Sentencing Guidelines, Congress could ensure that resources are not wasted by tying a fifteen-year sentence to gun possession charges solely because the accused had committed a crime decades before illegally possessing a firearm.

2. Juvenile Crimes Should Not Qualify as Predicate Offenses

Prior juvenile convictions also should not trigger mandatory minimum sentences under the ACCA.[141] In its current form, the ACCA allows acts "of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for [a term exceeding one year] if committed by an adult" to qualify as predicate "violent felony" offenses.[142] This "represents a broad departure from other enhancement provisions, which generally exempt juvenile convictions that are not treated by the prosecuting state as adult convictions."[143] For instance, a conviction for an offense committed prior to the age of eighteen does not qualify as a predicate offense under section 2K2.1 of the Guidelines unless it is "classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted."[144] Thus, a juvenile conviction involving the use or carrying of a firearm, knife, or destructive device and punishable by more than one year's imprisonment if committed by an adult, but not actually classified as an adult conviction in the jurisdiction of conviction, is a predicate offense under the ACCA but not under the Guidelines. Like the Sentencing Commission's decision to exclude convictions committed more than fifteen years prior to the instant offense from serving as predicate offenses, its decision not to count juvenile convictions is in accord with existing empirical research assessing which prior convictions are associated

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[139] Hillier, *supra* note 27, at 80.

[140] U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 cmt. n.1 (2008). *See also id.* § 4A1.2(e).

[141] *See* Abbott, *supra* note 28, at 271–72 (arguing that under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a juvenile adjudication is not a conviction, and thus courts should not use juvenile adjudications to enhance sentences under the ACCA). *See infra* Part V.A.2, for a discussion of the implications of *Apprendi*.

[142] 18 U.S.C. § 924(e)(2)(B) (2006).

[143] Lynn Hartfield, *Challenging Crime of Violence Sentence Enhancements in Federal Court*, THE CHAMPION, May 2006, at 28, *available at* http://www.nacdl.org/public.nsf/698c98dd101a846085256eb400500c01/bcf2b37d57fd87cb852571940068b6cc?OpenDocument&Highlight=0,apprendi.

[144] U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 cmt. n.1 (2008).

with an increased risk of recidivism.[145] The ACCA should be amended to follow the Sentencing Commission's expert judgment that prior juvenile convictions should not trigger sentence enhancements for violators of 18 U.S.C. § 922(g).

A significant disagreement among the federal courts of appeal and among state courts of last resort also supports amending the ACCA to prevent prior juvenile convictions from qualifying as predicate offenses. The disagreement centers on whether the Sixth and Fourteenth Amendments prevent juvenile convictions not decided by a jury from serving as the basis for a sentence enhancement. In *Apprendi v. New Jersey*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[146] The Court carved out a "narrow exception,"[147] for prior convictions because it had decided in *Almendarez-Torres v. United States*[148] that the Sixth Amendment allows courts to increase defendants' sentences based on their prior convictions. However, the Court also described the *Almendarez-Torres* precedent as "at best an exceptional departure from the historic practice that we have described" and arguably "incorrectly decided."[149]

In addition to the four justices who dissented in *Almendarez-Torres*, Justice Thomas, who was in the majority, has expressed the belief that the case was wrongly decided.[150] As a result, there is significant doubt regarding the continued viability of *Almendarez-Torres* and the exception allowing the fact of a prior conviction to be decided by a judge as opposed to a jury.[151] Even if there is a valid prior conviction exception, it is not clear that it covers prior convictions that were issued by a judge and not by a jury. If a judge convicted the defendant, then the underlying facts that led to the con-

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[145] *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.1, introductory cmt. (2008).

[146] 530 U.S. at 490.

[147] *Id.*

[148] 523 U.S. 224 (1998).

[149] *Apprendi*, 530 U.S. at 487, 489.

[150] *See* ALISON M. SMITH, ARMED CAREER CRIMINAL ACT (ACCA): USING PRIOR JUVENILE ADJUDICATIONS FOR SENTENCE ENHANCEMENTS 3–4 (Cong. Research Serv. 2007). In his concurrence in *Apprendi*, Justice Thomas acknowledged that

> one of the chief errors of Almendarez-Torres—an error to which I succumbed—was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence. For the reasons I have given, it should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence . . . . When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute . . . . One reason frequently offered for treating recidivism differently, a reason on which we relied in *Almendarez-Torres* . . . , is a concern for prejudicing the jury by informing it of the prior conviction. But this concern . . . does not make the traditional understanding of what an element is any less applicable to the fact of a prior conviction.

Apprendi, 530 U.S. at 520–21 (Thomas, J., concurring).

[151] *See* SMITH, *supra* note 150.

viction would not have been submitted to a jury, and consequently the *Apprendi* concern would still be implicated.

Since *Apprendi*, many federal appellate courts and state courts of last resort have issued conflicting opinions regarding whether prior juvenile adjudications in the thirty-seven states that do not afford all juveniles defendants the right to a jury trial constitute "prior convictions" under the *Apprendi* exception.[152] Congress has recognized the impact that this division among the courts has on the ACCA; a February 2007 Congressional Research Service report on the ACCA concluded that "the future of the 'prior conviction' exception and its applicability to juvenile adjudications remain unclear, as the U.S. Supreme Court has denied petitions for writ of certiorari in the cases that have adopted the majority view and in cases that have adopted the minority view."[153] Thus, amending the ACCA to prohibit prior juvenile convictions from qualifying as predicate offenses would not only make the ACCA consistent with the Sentencing Guidelines, which reflect existing empirical research on which types of prior convictions are correlated with an increased risk of recidivism,[154] but would also eliminate the inconsistency and uncertainty that now surround the constitutionality of an ACCA sentence enhancement that is based upon a prior juvenile conviction.

3. Prior Convictions Not Separated by an Intervening Arrest and for Offenses That Were Either Contained in the Same Charging Instrument or Resulted in Sentences Imposed on the Same Day Should Not Qualify as Separate Predicate Offenses

The ACCA's failure to consider whether the defendant had an opportunity, after committing each of the predicate offenses, to be rehabilitated or specifically deterred from re-offending also makes it overinclusive and, contrary to its title, expands its reach beyond career criminals.[155] Although Congress amended the ACCA in 1988 to require that the three predicate offenses are "committed on occasions different from one another,"[156] several circuit courts have interpreted this condition as allowing three offenses committed "in rapid succession" to qualify as having been committed on separate occasions.[157] Because the ACCA was motivated by a desire "to incarcerate *un-*

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[152] *See* SMITH, supra note 150, at 5–6 (citing United States v. Smalley, 294 F.3d 1030 (8th Cir. 2002); United States v. Tighe, 266 F.3d 1187 (9th Cir. 2001); State v. Brown, 879 So. 2d 1276 (La. 2004); People v. Bowden, 125 Cal. Rptr. 2d 513, 518 (Ct. App. 2002)).

[153] SMITH, *supra* note 150, at 6.

[154] U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 introductory cmt. (2008).

[155] *See* Crago, *supra* note 29, at 1194; Hillier, *supra* note 27, at 79; Hooper, *supra* note 25, at 1992–93; Sady, *supra* note 27, at 69.

[156] Pub. L. No. 100-690, 102 Stat. 4181, 4402 (1988).

[157] *See, e.g.*, United States v. Godinez, 998 F.2d 471, 472–73 (7th Cir. 1993) (holding that "one crime hard on the heels of another" can be a separate transaction); United States v. Brady, 988 F.2d 664, 669 (6th Cir. 1993) (holding that two separate robberies "less than an hour" apart were separate transactions); United States v. Washington, 898 F.2d 439, 442 (5th

rehabilitative repeat violent felons,"[158] it seems inconsistent with its primary purpose to apply it to those without any intervening opportunity to be rehabilitated or deterred by arrest or imprisonment.

For example, the ACCA would impose a mandatory minimum fifteen-year sentence for gun possession on one who committed three serious drug offenses on one day, but had since served a lengthy prison sentence, received drug treatment, and resolved never to commit a serious drug offense or violent felony again. An offender without the opportunity to be rehabilitated or deterred in between his or her commission of drug offenses should not be considered "unrehabilitative" and likely to commit a violent felony or drug offense simply because he or she later possessed a firearm. One who has been convicted and incarcerated on three separate occasions and subsequently violates 18 U.S.C. § 922(g) by possessing a firearm appears far more "unrehabilitative," but the law draws no distinction.

The ACCA should be amended to be consistent with the Sentencing Guidelines' approach to criminal histories such that the counting of previous felony convictions takes into consideration whether the offender had an opportunity to be rehabilitated or deterred after committing each of the felonies.[159] Like the ACCA, the Sentencing Guidelines call for sentence enhancements based upon an offender's criminal history.[160] Unlike the ACCA, however, the Guidelines do not, both generally[161] and specifically with regard to violations of 18 U.S.C. § 922(g),[162] count prior convictions as separate if they were not separated by an intervening arrest and were for offenses that were either contained in the same charging instrument or resulted in sentences imposed on the same day. This procedure for counting prior convictions recognizes that one who commits three serious drug offenses on one night, is incarcerated, and never commits another felony prior to illegally possessing a firearm seems less likely to commit another serious drug offense or violent felony than one who twice re-offends after serving a lengthy prison term for committing a serious drug offense.

Moreover, this method of counting prior convictions reflects the Sentencing Commission's studies in 2006 and 2007 of the circumstances under which prior convictions should be counted as separate offenses.[163] The Commission "hosted round-table discussions to receive input . . . from federal judges, prosecutors, defense attorneys, probation officers, and members of

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Cir. 1990) (holding that two robberies of the same clerk at the same store separated by several hours were separate transactions); United States v. Wickes, 833 F.2d 192, 193–94 (9th Cir. 1987) (finding the statute "unambiguous" in holding that robberies of two separate locations on the same evening were separate transactions).

[158] 134 Cong. Rec. 15,806–07 (1988) (statement of Sen. Specter) (emphasis added).

[159] *See* Crago, *supra* note 29, at 1194; Hillier, *supra* note 27, at 79; Hooper, *supra* note 25, at 1992–93; Sady, *supra* note 27, at 69.

[160] *See* U.S. Sentencing Guidelines Manual § 4A1.1 (2008).

[161] *See id.* § 4A1.2(a)(2) (2008).

[162] *See id.* § 2K2.1 cmt. n.10 (2008).

[163] *See* Sentencing Guidelines for the United States Courts, 72 Fed. Reg. 28,558, 28,575 (May 21, 2007).

academia. In addition, the Commission gathered information through its training programs, the public comment process, and comments received during a public hearing."[164] The current method of counting prior convictions under the Guidelines reflects the expert Sentencing Commission's recent extended study and analysis. It should therefore be preferred to the ACCA's method of counting convictions, which has not been amended for more than twenty years.

The Sentencing Commission's extended consideration of which prior convictions should be counted as separate offenses supports amending the general class of prior convictions that enhance sentences under the ACCA to make it consistent with the Sentencing Guidelines. The Commission's specialized capacity to investigate which prior convictions should count as separate offenses by conducting independent research and drawing on advice from experts suggests that it is well-positioned to study more broadly which crimes should qualify as predicate offenses for sentence enhancement purposes. It had these tools at its disposal when it determined that those crimes committed more than fifteen years before the instant offense, and those committed by juveniles, are associated with a lower risk of recidivism and should not enhance sentences.[165] This suggests that the entire class of prior convictions that enhance the sentences of felons who violate 18 U.S.C. § 922(g) under the ACCA should be amended to be consistent with the Guidelines.

Furthermore, the federal "three strikes law," enacted after the passage of the ACCA, also implicitly takes into consideration whether a defendant had an opportunity, after committing each of the predicate offenses, to be rehabilitated or specifically deterred from re-offending.[166] Under that related statute, 18 U.S.C. § 3559,

> a person who is convicted . . . of a serious violent felony shall be sentenced to life imprisonment if . . . the person has been convicted . . . on separate prior occasions . . . of (i) 2 or more serious violent felonies; or (ii) one or more serious violent felonies and one or more serious drug offenses; and (B) each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony or serious drug offense.[167]

Thus, under the federal three strikes law, each predicate offense, other than the first, must be committed after the defendant's conviction for the preceding predicate offense. This gives the defendant intervening opportunities to

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[164] *Id.* at 28,575.

[165] *See supra* note 118 and accompanying text (discussing the Sentencing Commission's institutional capacity to make decisions based on empirical data and national experience).

[166] *See* 18 U.S.C. § 3559 (2006).

[167] 18 U.S.C. § 3559(c)(1).

be rehabilitated or deterred. The ACCA should follow the federal three strikes law and take into consideration whether the offender had this opportunity by adopting the Sentencing Guidelines' approach to counting previous convictions.[168]

B. The Substantive Scope of Qualifying "Violent Felony" Predicate Offenses Under the ACCA Should Be Amended

The substantive scope of qualifying "violent felony" predicate offenses that trigger a mandatory minimum fifteen-year sentence under the ACCA should be modified to be in accord with the Sentencing Guidelines. Under the ACCA, a criminal with three prior "violent felony"[169] convictions who violates 18 U.S.C. § 922(g) qualifies for an enhanced sentence.[170] Similarly, section 2K2.1 of the Sentencing Guidelines calls for enhanced sentences for violators of 18 U.S.C. § 922(g) who were previously convicted of a "crime of violence."[171] Although the language in the ACCA is very similar to that of the Guidelines, the ACCA and the Guidelines differ with regard to the types of predicate offenses that qualify to enhance a criminal's sentence.

Given the Sentencing Commission's expertise and attention to developments in understanding what motivates and controls criminal behavior, the ACCA's definition of which crimes qualify as predicate offenses because they constitute violent felonies should be amended to mirror the Sentencing Guidelines. A felony can qualify as a "violent felony" under the ACCA if it "(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 use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."[172] The Sentencing Guidelines use nearly identical language to define the analogous term "crime of violence."[173] The only difference in the language is that the Sentencing Guidelines use the phrase "burglary of a dwelling"[174] instead of "burglary" in clause (ii).[175] However, unlike the ACCA, the Guidelines refine the above definition by providing an application note to clarify which crimes qualify as "crime[s] of violence."[176]

As a result of this application note, courts have interpreted the term "crime of violence" in the Sentencing Guidelines more broadly than they

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[168] For a similar argument, see Hillier, *supra* note 27, at 78.
[169] 18 U.S.C. § 924(e)(1) (2006).
[170] *Id.*
[171] U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(2) (2008).
[172] 18 U.S.C. § 924(e)(2)(B).
[173] *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2008).
[174] *Id.* § 4B1.2(a)(2) (2008).
[175] *Id.* § 4B1.2(a) (2008). *See also infra* Part V.B.1.
[176] *Id.* § 4B1.2 cmt. n.1 (2008).

have interpreted the term "violent felony" in the ACCA.[177] The note explains that an offense is a "crime[ ] of violence" if

> (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.[178]

Of particular relevance is the final clause, which makes clear that as long as the conduct expressly charged by its nature presented a serious potential risk of physical injury to another, that conduct can qualify as a "crime of violence." This differs from the ACCA, which states that a crime can qualify as a "violent felony" if it "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."[179] As discussed in Part II, *supra*, the Supreme Court recently interpreted this "otherwise" clause as requiring that the offense "be roughly similar in kind as well as in degree of risk posed, to the [statutory] examples" to qualify as a predicate "violent felony" offense.[180] Under the Guidelines' text and corresponding case law, no such limitation exists.[181] As a result, the scope of crimes that qualify as "crime of violence" predicate offenses under the Guidelines is broader than the scope of crimes that qualify as analogous "violent felony" predicate offenses under the ACCA.

1. *Burglary of a Structure Other Than a Dwelling Should Qualify as a Predicate Offense Only If the Conduct Expressly Charged, by its Nature, Presented a Serious Potential Risk of Physical Injury to Another*

The ACCA should be amended to conform to the Sentencing Guidelines such that burglary of a structure other than a dwelling does not automatically qualify as a predicate offense for the purpose of significantly enhancing the sentence of a violator of 18 U.S.C. § 922(g). Under the ACCA, "any crime punishable by imprisonment for a term exceeding one

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[177] For a discussion of the case law, see THOMAS W. HOFFMAN ET AL., FEDERAL SENTENCING LAW AND PRACTICE § 4B1.2 (2008) and *infra* Parts V.B.2–3.

[178] *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1 (2008).

[179] 18 U.S.C. § 924(e)(2)(B) (2006).

[180] *Begay*, 128 S. Ct. at 1585.

[181] *See* HOFFMAN ET AL., *supra* note 177, and *infra* Parts V.B.2–3. While some circuits have recently applied the *Begay* interpretation of "violent felony" to the Guidelines' "crime of violence" definition, others view the two definitions as distinct. *See, e.g.*, United States v. Parson, 955 F.2d 858 (3d Cir. 1992).

year . . . that . . . is burglary" qualifies as a predicate offense.[182] The Supreme Court has interpreted this to mean that a prior conviction for "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime" qualifies as a predicate offense.[183] As a result, burglaries of structures other than dwellings constitute predicate offenses under the ACCA. For instance, "convictions for second degree burglaries, such as breaking into empty businesses and shoplifters' entry into a store from which they had been barred, are included as violent offenses that can lead to designation as an armed career criminal."[184] Under the Court's interpretation of the ACCA, repeat shoplifters (such as actress Winona Ryder)[185] who possess a firearm in violation of 18 U.S.C. § 922(g) can conceivably receive mandatory minimum sentences of fifteen years in prison even if they have never presented a serious potential risk of physical injury to another. Courts have recognized this as a potential problem. For example, the Ninth Circuit has suggested that courts should "avoid[ ] such 'bizarre results' as enhancement on the basis of such crimes as shoplifting."[186] Given that the ACCA seeks to incapacitate armed career criminals who pose a danger to the public, such an extraordinary result would seem particularly unjustified.

Moreover, the text of the ACCA suggests that only those burglaries that present a serious potential risk of physical injury to another should qualify as predicate offenses. Under the ACCA, a crime "punishable by imprisonment for a term exceeding one year . . . that . . . is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another" qualifies as a violent felony predicate offense for sentence enhancement purposes.[187] The "otherwise" clause clearly suggests that the listed offenses that precede it are understood as involving conduct that presents a serious potential risk of physical injury to another; the use of the word "otherwise," like the phrase "in some other way," indicates that the offenses that precede it in some way present a serious potential risk of physical injury to another.

It seems clear that either Congress intended the term "burglary" to refer only to burglaries that present a serious potential risk of physical injury to another or Congress simply assumed that all burglaries present a serious potential risk of physical injury to another. If the former is true, then there should be no hesitation to limit the definition of "violent felony" to encompass only those burglaries that present a serious potential risk of physical injury to another. And if the latter is true, then Congress appears to have

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[182] 18 U.S.C. § 924(e)(B).
[183] Taylor v. United States, 495 U.S. 575, 599 (1990).
[184] Sady, *supra* note 27, at 69–70.
[185] *See* Richard Johnson, *Ryder Report*, N.Y. Post, Mar. 21, 2008, at 14.
[186] United States v. Chatman, 869 F.2d 525, 529 (9th Cir. 1989).
[187] 18 U.S.C. § 924(e)(B).

been mistaken; some crimes that technically qualify as burglaries, such as entering a store from which one has been barred due to shoplifting, present a much lower risk of physical injury to another than do traditional burglaries. Furthermore, Congress has recognized that the Sentencing Commission's unique institutional capacity and expertise make it well-equipped to make determinations such as whether all burglaries present a serious potential risk of injury.[188] In fact, Congress's recognition that "sentencing is a dynamic field that requires continuing review by an expert body" to incorporate advances in understanding crime[189] led to the creation of the U.S. Sentencing Commission.[190] This commission has concluded that not all burglaries present a serious potential risk of physical injury to another and consequently qualify as predicate violent felony offenses under the ACCA.

Under section 2K2.1 of the Sentencing Guidelines, burglaries of structures other than dwellings do not automatically qualify as predicate offenses that significantly enhance sentences for violators of 18 U.S.C. § 922(g). Unlike the ACCA, the Guidelines focus on burglaries of dwellings: "any offense . . . punishable by imprisonment for a term exceeding one year, that . . . is burglary *of a dwelling*" constitutes a predicate offense under section 2K2.1.[191] In addition, however, any offense that "by its nature, presented a serious potential risk of physical injury to another" also qualifies as a predicate offense under section 2K2.1.[192] Thus, under the Guidelines, burglaries of structures other than dwellings that do not by their nature present a serious potential risk of physical injury to another do not qualify as predicate offenses even though they do under the ACCA.

Although the First,[193] Second,[194] and Eighth[195] Circuits have held that all commercial (as opposed to residential) burglaries by their nature present a serious potential risk of physical injury to another, and thus qualify as predicate offenses under section 2K2.1, no other circuit has agreed.[196] For instance, the Tenth Circuit held in *United States v. Smith* that commercial burglary does not present a serious potential risk of physical injury to an-

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[188] *See* U.S. SENTENCING GUIDELINES MANUAL § 1A, introductory cmt. (2008).

[189] *Id.* § 1A1.1 background cmt. (2008).

[190] Pub. L. No. 98-473, tit. II, 98 Stat. 1987 (1984).

[191] U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(A) (2008) (emphasis added).

[192] *Id.*

[193] *See* HOFFMAN, ET AL., *supra* note 177, § 4B1.2. n.129 (citing United States v. Chhien, 266 F.3d 1, 11 (1st Cir. 2001)).

[194] *See id.* § 4B1.2. n.131 (citing United States v. Brown, 514 F.3d 256, 264–69 (2d Cir. 2008)).

[195] *See id.* § 4B1.2. n.130 (citing United States v. Bell, 445 F.3d 1086, 1087–91 (8th Cir. 2006)).

[196] *See id.* § 4B1.2 n.133 (citing United States v. Wenner, 351 F.3d 969 (9th Cir. 2003); United States v. Turner, 349 F.3d 833, 836 (5th Cir. 2003); United States v. Wilson, 168 F.3d 916, 926–29 (6th Cir. 1999); United States v. Nelson, 143 F.3d 373, 374 (7th Cir. 1998); United States v. Harrison, 58 F.3d 115, 119 (4th Cir. 1995); United States v. Spell, 44 F.3d 936, 938 (11 Cir. 1995) (explaining that by explicitly including the burglary of a dwelling as a crime of violence, the Commission intended to exclude burglaries that do not involve dwellings and occupied structures); and United States v. Jackson, 22 F.3d 583, 585 (5th Cir. 1994)).

other;[197] therefore, commercial burglary would not qualify as a predicate offense under section 2K2.1. The *Smith* court explained that unlike the ACCA:

> The Commission's definition [of qualifying predicate offenses] conspicuously omitted burglary, with the single exception of "burglary of a dwelling." From 1989 to the present, the Commission has retained this distinction . . . . A recent proposal to amend [the Guidelines] "to include all burglaries, and not just burglaries of a dwelling," was not adopted . . . . [On] the question of whether a "mere" unlawful entry of a non-dwelling for the purpose of stealing property is regarded as conduct which presents a "serious potential risk of physical harm to others," . . . Congress says it does. The Sentencing Commission, however, says it does not.[198]

Thus, it is clear that the Sentencing Commission has decided that not all burglaries present a serious potential risk of physical injury to another. For if the Commission thought otherwise, it would have mirrored the ACCA's text[199] and listed "burglary," and not the more limited "burglary of a dwelling," in its list of qualifying predicate offenses. The Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits have agreed that commercial burglary does not necessarily present a serious potential risk of physical injury to another and therefore does not automatically serve to significantly enhance the sentences of violators of 18 U.S.C. § 922(g) under section 2K2.1.[200]

Thus, outside of the First, Second, and Eighth Circuits, the ACCA and the Sentencing Guidelines diverge with regard to whether all burglaries of structures other than dwellings qualify as predicate offenses for the purpose of enhancing the sentence of a felon who illegally possesses a firearm. Congress should amend the ACCA by adopting the specialized Sentencing Commission's conclusion that burglaries of structures other than dwellings should not automatically qualify as predicate offenses that enhance the sentences of violators of 18 U.S.C. § 922(g).

2. *Felony Driving Under the Influence Should Qualify as a Predicate Offense*

The Supreme Court held in *Begay* that felony DUI is not a predicate violent felony offense under the ACCA.[201] The Court determined that to qualify as a violent felony and thus serve as a predicate offense for sentence enhancement purposes under the "otherwise" clause of the ACCA, a crime

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[197] 10 F.3d 724, 732–34 (10th Cir. 1993).

[198] *Id.* at 733 (citations omitted).

[199] The ACCA defines the term "violent felony" as a crime that, *inter alia*, "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii) (2006).

[200] *See* HOFFMAN ET AL., *supra* note 181, § 4B1.2. *See also* cases cited *supra* note 196.

[201] 128 S. Ct. 1581 (2008).

must be "roughly similar, *in kind* as well as in degree of risk posed, to the examples"[202] (which directly precede the "otherwise" clause in the statute) of burglary, arson, extortion, and crimes that involve the use of explosives.[203] The Court further explained that while the example crimes "all typically involve purposeful, 'violent,' and 'aggressive' conduct," felony DUI does not (i.e., it need not be purposeful or deliberate and is a crime of negligence or recklessness rather than violence or aggression), and therefore it is not a violent felony under the ACCA.[204]

A five-justice majority[205] held that a crime is not a violent felony predicate offense under the ACCA if it does not typically involve purposeful, violent, and aggressive conduct.[206] Its primary rationale was that the ACCA only seeks to enhance the sentences of those criminals who, based on their criminal histories, have an increased likelihood of using a gun to deliberately harm a victim if they should later come to posses a firearm.[207] For instance, it expressed concern "that an offender, later possessing a gun, will use that gun *deliberately* to harm a victim"[208] and suggested that the ACCA was intended to focus on criminals whose past behavior suggested there was "an increased likelihood that the offender is the kind of person who might *deliberately* point the gun and pull the trigger."[209] While the Court was correct to recognize, through a consideration of the legislative history, that the ACCA seeks to incapacitate criminals who would pose a significant threat to the public if not incarcerated,[210] its concern with only deliberate harm, and not with harm more generally, seems misplaced.

Given that the ACCA was motivated by a desire to incapacitate career criminals who are likely to re-offend and cause further harm if not imprisoned, whether or not the harm is caused deliberately should be of little consequence to efforts to advance the ACCA's primary purpose.[211] Instead, what is relevant is whether the criminal is likely to cause harm if not incapacitated. Actions taken by one who knows that harm will result, by one who acts recklessly, or by one who acts negligently all can harm victims and

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[202] *Id.* at 1585 (emphasis added).

[203] *Id.* (referring to the definition in 18 U.S.C. 924(e)(2)(B)(ii) (2006)).

[204] *Id.* at 1586–87 (quoting United States v. Begay, 470 F.3d 964 (10th Cir. 2006) (McConnell, J., dissenting in part)).

[205] Justices Alito, Souter, and Thomas dissented. 128 S. Ct. at 1592 (Alito, J., dissenting). Justice Scalia concurred in the judgment only and criticized the majority's interpretation of the ACCA. *See id*. at 1588–92.

[206] *Id.* at 1586–88.

[207] *Begay,* 128 S. Ct. at 1586.

[208] *Id.* (emphasis added).

[209] *Id.* at 1587 (emphasis added).

[210] *See supra* Part IV.

[211] The Court suggested that its aim was to advance the ACCA's basic purposes. *See Begay*, 128 S. Ct. at 1588. *See also id*. at 1590 ("The Court supports its argument with . . . the (judicially) perceived statutory purpose") (Scalia, J., concurring). While considering the retributive justification for punishment would suggest that whether harm is caused deliberately is of great significance, the ACCA's primary aim is not to promote retribution but rather to prevent future harm through incapacitation. *See supra* Part IV.

society. A drunk driver's reckless driving can kill as surely as a burglar's pistol. In fact, as Justice Scalia pointed out in his opinion, one of the enumerated examples that precedes the "otherwise" clause, the unlawful use of explosives, may involve merely negligent or reckless conduct.[212] It thus seems clear that the Court's focus on preventing deliberate harm and qualifying past crimes as predicate offenses only if they were purposefully committed is misplaced. Not only is a requirement that a crime be purposeful, violent, and aggressive to qualify as a violent felony predicate offense not explicitly required by the text of the statute,[213] but also such a requirement would frustrate the ACCA's purpose of incapacitating those repeat offenders who are most likely to cause harm if not incapacitated.[214] For that reason, whether a criminal has previously committed crimes that present a serious potential risk of physical injury to another, regardless of whether that risk was created deliberately, should be of greatest relevance in determining whether an ACCA sentence enhancement will apply.

The Sentencing Commission has taken this approach. Consequently, under the Guidelines, felony DUI is a predicate offense that enhances the sentences of felons who illegally possess firearms.[215] In applying the Guidelines, the courts of appeals have consistently held that felony DUI does present a serious potential risk of physical injury to another and therefore qualifies as a crime of violence and enhances the sentences of 18 U.S.C. § 922(g) violators.[216] As the United States explained in its brief in *Begay*, the Sentencing Commission "has never repudiated the court of appeals' uniform conclusion that felony DUI is an offense that presents a serious risk of physical injury to others."[217] Thus, because classifying felony DUI as a violent felony under the ACCA furthers the primary purpose of the ACCA to incapacitate criminals who are likely to cause harm if not imprisoned and is consistent with the decision of the expert U.S. Sentencing Commission, the ACCA should be amended to reverse the decision in *Begay* and establish felony DUI as a violent felony predicate offense.

3. Escape Should Qualify as a Predicate Offense as Long as the Conduct Expressly Charged, by its Nature, Presented a Serious Potential Risk of Physical Injury to Another

Just as felony DUI should qualify as a predicate offense for sentence enhancement purposes under the ACCA, so, too, should felony escape as long as the conduct "expressly charged . . . by its nature, presented a serious

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[212] Begay v. United States, 128 S. Ct. 1581, 1590 (2008) (Scalia, J., concurring).

[213] *See id.* at 1592 ("the Court's interpretation simply cannot be reconciled with the statutory text") (Alito, J., dissenting). *See also id.* at 1589. ("the problem with the Court's holding today is that it is not remotely faithful to the statute that Congress wrote.").

[214] *See* H.R. REP. NO. 98-1073, at 3 (1984).

[215] *See* U.S SENTENCING GUIDELINES MANUAL § 4A1.2 cmt. n.5 (2008).

[216] Brief for the United States at 9, *Begay*, 128 S. Ct. 1581 (2008) (No. 06-11543).

[217] *Id.*

potential risk of physical injury to another."[218] As discussed in Part III, *supra*, the Court's holding in *Begay* suggests that felony escape now only qualifies as a predicate offense under the ACCA if it is found to "typically involve purposeful, 'violent,' and 'aggressive' conduct."[219] While the Court in *Chambers v. United States*[220] did not appear to rely on this holding,[221] it certainly did not overturn it, and so a requirement that the crime typically involve purposeful, violent, and aggressive conduct may still apply. In fact, the Eleventh Circuit recently held in a post-*Chambers* case that this requirement from *Begay* does still apply.[222] As a result, walk-away escapes and stealthy escapes likely do not qualify as ACCA predicate offenses.

The Sentencing Guidelines do not impose such a restriction in determining whether escape qualifies as a "crime of violence"[223] and therefore serves to enhance the sentence of an 18 U.S.C. § 922(g) violator. Under the Guidelines, escape, like felony DUI, qualifies as a crime of violence predicate offense for sentence enhancement purposes[224] as long as the conduct "expressly charged . . . by its nature, presented a serious potential risk of physical injury to another."[225] Given the ACCA's goal of incapacitating career criminals who pose a threat of harm to the public, it makes sense to include among those eligible for sentence enhancements under the ACCA those criminals whose escapes have posed a serious potential risk of physical injury to another.

All of the circuit courts, except for the Ninth Circuit, have concluded that felony escape creates a serious potential risk of physical injury to another and is therefore "a crime of violence" under the Sentencing Guidelines even if the escape does not involve purposeful, violent, and aggressive conduct.[226] As the Tenth Circuit explained:

> [E]very escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious potential to do so. A defendant who escapes from a jail is likely to possess a variety of supercharged emotions and in evading those trying to recapture him may feel threatened by police officers, ordinary citizens, or even fellow escapees. Consequently, violence could erupt at any time. Indeed, even in a case where a defendant escapes from a jail

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[218] U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1 (2008).
[219] *Id.*
[220] 129 S. Ct. 687 (2009).
[221] *See supra* Part III.
[222] *See* United States v. Harrison, No. 08-12635, 2009 WL 395237 (11th Cir. Feb. 19, 2009).
[223] U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a) (2008).
[224] *Id.*
[225] U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1 (2008).
[226] *See* U.S. SENT'G COMM'N, REPORT ON FEDERAL ESCAPE OFFENSES IN FISCAL YEARS 2006 AND 2007 2 n.7 (2008).

> by stealth and injures no one in the process, there is still a serious potential risk that injury will result . . . .[227]

Convicted e-mail "spam king" Edward Davidson's July 20, 2008 walk-away escape supports this conclusion.[228] Four days after walking away from a federal minimum security work camp, Davidson injured a teenager and shot to death himself, his wife, and his child.[229] And even the Ninth Circuit has held that some forms of escape do create a serious potential risk of physical injury to another.[230] For example, although it held, in a walk-away escape case, that escape is not necessarily a crime of violence under the Guidelines,[231] it later held that escape is a crime of violence when the defendant has escaped from a jail.[232]

In addition, a recent Sentencing Commission report analyzing federal escape crimes for which the offender was sentenced in fiscal year 2006 or 2007 indicates that many felony escapes do present a serious potential risk of physical injury to another. The report found that among the cases it analyzed in which the offender escaped from the custody of a location with a secure perimeter, such as a prison or jail, 15.6% involved the use of force, 31.3% involved a dangerous weapon, and 10.9% resulted in injury.[233] In addition, 15.4% of all escapes from the custody of a law enforcement officer (e.g. escapes during transport between institutions) resulted in injury.[234] It therefore seems clear that many escapes do present a serious potential risk of physical injury to another.[235] Consequently, the ACCA should be amended to be consistent with the Sentencing Guidelines such that felony escape qualifies as a predicate offense for enhancing the sentences of 18 U.S.C. § 922(g) violators as long as the conduct expressly charged, by its nature, presented a serious potential risk of physical injury to another.

VI. Conclusion

The ACCA should be amended to remedy its deficiencies with regard to both the temporal and substantive scope of prior convictions that enhance

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[227] United States v. Gosling, 39 F.3d 1140 (10th Cir. 1994).

[228] *See* Kieran Nicholson et al., *Escapee Kills Family, Self*, Denver Post, July 24, 2008, at A1.

[229] *See id.*

[230] *See* United States v. Savage, 488 F.3d 1232 (9th Cir. 2007).

[231] *See* United States v. Piccolo, 441 F.3d 1084 (9th Cir. 2006).

[232] *See Savage*, 488 F.3d at 1236-37 (holding that the likelihood that guards would attempt to use force to stop escapees created a greater "potential risk of injury").

[233] U.S. Sent'g Comm'n, supra note 226, at 7.

[234] *Id.* However, only thirteen cases involving escape from law enforcement custody were analyzed, so the sample is very limited.

[235] Not all crimes that qualify as escapes, however, appear to create a serious potential risk of physical injury. Relying on the Sentencing Commission's report, the Court in *Chambers* appropriately concluded that a failure to report simply does not involve a serious potential risk of physical injury and thus does not qualify as a violent felony predicate offense under the ACCA. *See Chambers*, 129 S. Ct. at 693.

the sentences of felons illegally possessing firearms under 18 U.S.C. § 922(g). The Sentencing Guidelines provide an excellent model upon which to base such reforms, because the Guidelines are promulgated and updated by an expert congressionally-appointed commission statutorily bound to promote the purposes of sentencing that Congress has set forth and to integrate modern advances in understanding what motivates and controls criminal behavior. Three amendments limiting the temporal scope of qualifying predicate offenses should be made. First, crimes committed more than fifteen years before the instant violation of 18 U.S.C. § 922(g) should not qualify as predicate offenses. Second, juvenile crimes should not qualify as predicate offenses. Finally, prior convictions not separated by an intervening arrest and for offenses that were either contained in the same charging instrument or resulted in sentences imposed on the same day should not qualify as predicate offenses.

In addition, the ACCA's definition of "violent felony" should be amended to be consistent with the Guidelines' definition of "crime of violence." Such an amendment would have three significant, concrete results. First, burglary of a structure other than a dwelling would qualify as a predicate offense only if the conduct expressly charged, by its nature, presented a serious potential risk of physical injury to another. Second, felony driving under the influence would qualify as a predicate offense. Finally, escape would qualify as a predicate offense as long as the conduct expressly charged, by its nature, presented a serious potential risk of physical injury to another. Making these amendments to the ACCA would not only advance the congressional purpose that motivated its enactment but also would help to promote justice and ensure that resources are not inefficiently expended on imprisoning 18 U.S.C. § 922(g) violators for a minimum of fifteen years.