

ARTICLES

TIME AND PUNISHMENT: HOW THE ACCA UNJUSTLY CREATES A “ONE-DAY CAREER CRIMINAL”

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ABSTRACT

In 2017, Adam Longoria was sentenced pursuant to the Armed Career Criminal Act (ACCA) to a fifteen-year term of imprisonment. The ACCA imposes a fifteen-year mandatory minimum sentence for any defendant who knowingly possesses a firearm and has three previous convictions for a “violent felony,” “serious drug offense,” or both, “committed on occasions different from one another.” 18 U.S.C. § 924(e). In Mr. Longoria’s case, the ACCA enhancement was based upon two drug sales committed within the temporal span of a related drug conspiracy. In 2010, he pled guilty to these three interrelated counts in federal court and was sentenced in one judgment later that year. Six years later, his live-in girlfriend tried to sell a gun on Facebook, and Mr. Longoria was charged with constructive possession of a firearm. Because Mr. Longoria’s three interrelated counts from the 2010 drug conspiracy were counted as three serious drug offenses “committed on occasions different from one another,” he was sentenced pursuant to the ACCA’s fifteen-year mandatory minimum.

On appeal, Mr. Longoria argued that because the two 2010 sales occurred within the temporal span of the related drug conspiracy and arose out of one criminal episode, these three counts had not occurred on “occasions different from one another.” The Eleventh Circuit rejected his argument, deciding in 2017 that Mr. Longoria had admitted to sufficient facts during his 2010 guilty plea to conclude that these three counts were sufficiently distinct to be three qualifying ACCA predicate offenses. The Supreme Court declined review. Accordingly, Mr. Longoria will serve fifteen years in prison based on three drug counts for which he was sentenced on one day in 2010, comprised of two sales within a related ongoing conspiracy. The ACCA, intended by Congress as an enhancement for violent criminals, was imposed upon Mr. Longoria, a “one-day career criminal,” without any violent prior convictions.

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As Mr. Longoria's case illustrates, the ACCA's "different occasions" analysis does not work when the predicate offense is conspiracy—an ongoing offense defined by the agreement between parties for an unlawful purpose. When determining whether two offenses occurred on different occasions, the Courts of Appeal ask whether they were simultaneous or successive, and whether the defendant had an opportunity to desist from the lawful conduct of one act before pursuing the other. Conspiracy, by its nature, does not fit this framework. Nevertheless, conspiracy remains a common predicate offense for the ACCA. The Supreme Court has not provided guidance on how a sentencing court should conduct the "different occasions" analysis for temporally overlapping offenses, such as a conspiracy and the substantive acts with which it is comprised.

INTRODUCTION

The Armed Career Criminal Act (ACCA) is a federal recidivist sentencing enhancement that applies to defendants convicted of possessing a firearm as a convicted felon.¹ Ordinarily, the crime of being a felon in possession of a firearm carries a punishment of zero to ten years, and every individual's precise range is determined by the applicable guidelines and a variety of sentencing factors.² But when a defendant has three or more prior convictions for a "violent felony" or "serious drug offense," the ACCA requires a mandatory sentence of fifteen years imprisonment.³ Originally adopted in 1984, a time when mandatory minimum sentences were increasing, the ACCA was designed to deter dangerous, repeat criminals from possessing firearms and separate them from society for a significant period of time if they did.⁴

1. 18 U.S.C. §§ 922(g)(1), 924(c), 924(e) (2012). The felon in possession of a firearm statute is 18 U.S.C. § 922(g), which makes it unlawful for any person convicted of a crime punishable by a prison sentence greater than one year to ship, transport, possess, or receive a firearm in interstate or foreign commerce. *Id.* § 922(g). To be sentenced under the Armed Career Criminal Act ("ACCA"), a defendant must not only violate § 922(g) but also have three prior violent felony or serious drug offenses that qualify as predicate offenses under the ACCA. *Id.* § 924(e). The ACCA defines "serious drug offense" as "an offense under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. § 951 *et seq.*), or chapter 705 of title 46," with a maximum sentence of ten or more years, or a state offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), with a maximum sentence of ten or more years. 18 U.S.C. § 924(e)(2)(A)(i)–(ii). The ACCA defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year . . . that" either includes an element of "use, attempted use, or threatened use of physical force against [another person]" or "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B).

2. 18 U.S.C. § 924(a)(2) (2012).

3. *Id.*

4. See H.R. Rep. No. 98-1073, at 2 (stating that "[b]oth Congress and local prosecutors around the nation have recognized the importance of incapacitating these repeat offenders"). Under the incapacitation theory of punishment, offenders are separated from society in order to protect society and prevent future harm. See, e.g., Dawinder Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671, 678–79 (2015).

Part I of this Article provides a brief review of the common critiques of conspiracy doctrine, particularly in the context of punishing recidivism. Part II explains how the ACCA’s “different occasions” provision evolved, and how the federal appellate courts have been making that determination for an individual with two qualifying offenses that occur close in time. Part III explains why conspiracy does not fit these approaches employed for the “different occasions” determination, and the constitutional implications of a sentencing court making factual inferences about a defendant’s prior conspiracy offense. Mr. Longoria’s case is particularly illustrative of these Sixth Amendment concerns. Finally, after briefly addressing how other recidivist sentencing enhancements address temporally overlapping offenses, Part IV suggests a revision to the ACCA’s “different occasions” requirement that could address offenses for which an individual was charged or sentenced on the same day. A similar statutory revision was recently accomplished to a different federal criminal statute as part of the First Step Act of 2018, and it would avoid the Sixth Amendment concerns with judge inferences about non-elemental facts from prior proceedings. But perhaps most importantly, the revision could minimize the imposition of the ACCA’s severe punishment in situations such as Mr. Longoria’s, where Congress clearly did not intend it to apply.

I. THE UBIQUITY OF CONSPIRACY AND ITS MOST COMMON CRITIQUES

Almost a century has passed since Judge Learned Hand famously referred to conspiracy as the “darling of the modern prosecutor’s nursery,” and opined that consecutive sentences are rarely appropriate “where a conspiracy count is added to a count for the substantive crime.”⁵ Since that time, conspiracy continues to be one of the most commonly charged federal crimes, and virtually all states recognize conspiracy in their criminal codes.⁶ Federal courts have noted the prevalence with which prosecutors choose to charge a conspiracy count, noting that “rare is the case omitting such a charge.”⁷ Although it has been the subject of significant scholarly and judicial criticism, courts consistently uphold the use of conspiracy, which has been referred to as “a cornerstone of criminal law.”⁸

5. *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1995) (“It appears to us that the maximum sentence prescribed by Congress is intended to cover the whole substantive offense in its extremist degree, no matter in how many different ways a draughtsman may plead it, and even though he add a count for conspiracy, that darling of the modern prosecutor’s nursery.”).

6. Beth Allison Davis & Josh Vitullo, *Federal Criminal Conspiracy*, 38 AM. CRIM. L. REV. 777, 778 n.9 (2001) (finding that 4,502 of 70,114 defendants charged in federal court in 1997 were charged with conspiracy under 18 U.S.C. 371, and an additional 15,630 were charged under 21 U.S.C. § 846 or § 963); see WAYNE R. LAFAVE, CRIMINAL LAW 573 n.66 (3d ed. 2000) (stating that the crime of conspiracy “exists in virtually all jurisdictions” and that “[o]f the modern recodifications, only Alaska’s is without a crime of conspiracy”).

7. *United States v. Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990) (“[P]rosecutors seem to have conspiracy on their word processors as Count I; rare is the case omitting such a charge.”).

8. Martin H. Redish & Michael J.T. Down, *Criminal Conspiracy as Free Expression*, 76 ALB. L. REV. 697, 701 (2012).

Although the federal criminal code and most states criminalize conspiracy, its elements vary to some degree by jurisdiction. Typically, a conspiracy is defined as an agreement between two or more persons to commit an unlawful act or to knowingly enter into an agreement in order to complete a crime.⁹ The general federal conspiracy provision, codified in 18 U.S.C. § 371, states the following:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined . . . or imprisoned not more than five years, or both.¹⁰

While this federal conspiracy statute requires an overt act, various other federal statutes proscribe conspiracy separately from the substantive counts, and the conspiracy provision attaches as a subsection to the substantive part of that statute. For example, the Controlled Substances Act, a federal statute directed at drug sale and distribution, contains its own conspiracy provision, 21 U.S.C. § 846.¹¹

Indeed, the three counts of conviction to which Mr. Longoria pled guilty on one day in 2010 were two substantive sales pursuant to § 841 and one count of conspiracy to possess and distribute pursuant to § 846.¹² As the Supreme Court has clarified, conspiracy codified by the Controlled Substances Act does not require a defendant commit any overt act.¹³

A few notable features of conspiracy are also focal points for the primary criticisms of the doctrine. First and foremost, as an inchoate offense, conspiracy permits the indictment of individuals who have not yet committed any crime other than *the agreement* to commit a crime at a later time.¹⁴ The criminalization of the agreement itself, without proof of any action, is a primary source of concern and debate.¹⁵ Critics argue that conspiracy is duplicative because the conduct that is the purpose of the parties' agreement should otherwise be covered by criminal codes, and thus every time it is prosecuted along with the substantive offense, it constitutes double punishment.¹⁶

9. LAFAVE, *supra* note 6, at 657.

10. 18 U.S.C. § 371 (2012).

11. The Controlled Substances Act is codified in 21 U.S.C. § 841 (2012).

12. The Controlled Substances Act provides that "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846 (2012). Mr. Longoria was charged with these three counts in one indictment, pled guilty, and was sentenced to 37 months' imprisonment on each count, to run concurrently. *See United States v. Longoria*, No. 8:09-cr-340, slip op. at 1 (D. Fla. Dec. 28, 2010).

13. *United States v. Shabani*, 513 U.S. 10, 10, 15 (1994). Since the Supreme Court's decision in *Shabani*, it has concluded that several other federal conspiracy provisions do not have, as a requirement, the commission of any overt act. *See, e.g., Whitfield v. United States*, 543 U.S. 209, 209 (2005).

14. *See Iannelli v. United States*, 420 U.S. 770, 777 (1975).

15. *See, e.g., Redish & Down, supra* note 8, at 699.

16. Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1140 (1973).

Second, and relatedly, critics insist that conspiracy is overly broad, and can be used to punish activity that should not be penalized.¹⁷ By focusing on the inchoate agreement rather than the substantive act, this central critique of conspiracy is that it is duplicative and overly broad. Some, for example, insist that the “assumed dangers from conspiracy . . . have never been verified empirically,” and the general notion that group criminal behavior should be punished differently than an individual’s crime is not supported by criminal data.¹⁸ Others contend that permitting punishment to attach at that very “early” moment of the agreement results in overbroad penalization with potential infringement of First Amendment speech rights.¹⁹ Moreover, some note it is simply unjust to punish an agreement to commit a crime whether or not the criminal act is ultimately committed.²⁰

Other inchoate crimes are treated differently than conspiracy. With “attempt,” for example, criminal liability does not attach until an attempt gets close to accomplishing the individual’s criminal purpose.²¹ For conspiracy, however, criminal penalty often attaches well before the “substantial step” or “very near” requirements for attempt, even by imposing liability at the moment of agreement. Critics insist that there is no justification for this difference between conspiracy and other inchoate offenses.²²

Third, the mental state, or *mens rea*, required to prove a defendant’s participation in a conspiracy is broadly criticized.²³ Typically, conspiracy requires specific intent, meaning that an individual *knowingly* enters into the agreement with the purpose of completing the particular crime.²⁴ However, an individual’s knowing participation in the conspiracy can be inferred from circumstantial evidence.²⁵ Therefore, the government does not need to prove that an individual knew the

17. See *Hyde v. United States*, 225 U.S. 347, 387 (1912) (Holmes, J., dissenting) (“And as wherever two or more have united for the commission of a crime there is a conspiracy, the opening to oppression thus made is very wide indeed.”); Johnson, *supra* note 16, at 1140; Ian H. Dennis, *The Rationale of Criminal Conspiracy*, 93 LAW Q. REV. 39, 39 (1977).

18. Johnson, *supra* note 16, at 1140 (recommending that the doctrine of conspiracy be eliminated).

19. Martin H. Redish and Michael J.T. Downey, *Criminal Conspiracy as Free Expression*, 76 Alb. L. Rev. 697 (2012-2013).

20. Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L. J. 1307, 1138 (2003).

21. Federal cases require that a defendant has taken a “substantial step” towards commission of the intended crime, whereas states such as New York require that the attempt must be “very near to the accomplishment of the intended crime.” *United States v. Jackson*, 560 F.2d 112, 117–118 (2d Cir. 1977); *People v. Rizzo*, 158 N.E. 888, 811 (N.Y. 1927); see also *People v. Acosta*, 609 N.E.2d 518, 521 (N.Y. 1993) (quoting *Rizzo*, 158 N.E. at 888) (holding that that punishable acts require acts “very near to the accomplishment of the intended crime”).

22. Benjamin E. Rosenberg, *Several Problems in Criminal Conspiracy Laws and Some Proposals for Reform*, 43 No. 4 CRIM. L. BULL. ART 1 (2007).

23. See, e.g., Katyal, *supra* note 20, at 1326.

24. *Id.*

25. *United States v. Simon*, 839 F.3d 1461, 1469 (11th Cir. 1998) (holding participation in a conspiracy need not be proved by direct evidence); see, e.g., *United States v. Mullins*, 22 F.3d 1365, 1368 (6th Cir. 1994) (holding that a defendant’s participation in a conspiracy can be inferred from circumstantial evidence); see *United States v. Glasser*, 315 U.S. 60, 80 (1942) (finding that a defendant’s participation in a conspiracy “need not be proved by direct evidence”).

details, objectives, or other members of the conspiracy in order to prove specific intent to obtain a conviction.²⁶ For example, the Supreme Court clarified that the “agreement need not be shown to have been explicit. It can instead be inferred from the facts and circumstances of the case.”²⁷ While a jury (or judge) may infer an individual’s entrance into a conspiracy through circumstantial evidence, it is more difficult to prove that an individual has withdrawn from that conspiracy once they have entered. In fact, many jurisdictions require an “affirmative act bringing home the fact of his withdrawal to his confederates, made in time for his companions to effectively abandon the conspiracy.”²⁸ Therefore, while an individual’s knowing entrance into the agreement can be proven circumstantially, that individual’s withdrawal from the agreement requires some objective proof.²⁹ This imbalance contributes to the ubiquity of conspiracy charges and convictions.

In light of this disparity between the proof required to show an individual’s entrance into a conspiracy and the relative difficulty of withdrawing from a conspiratorial agreement, the *Pinkerton* doctrine is the most controversial aspect of conspiracy law.³⁰ *Pinkerton* liability, utilized in many states and in the federal criminal code, permits one conspirator to be held responsible for the crimes of every other co-conspirator made in furtherance of the conspiracy.³¹ Critics of the famous *Pinkerton* doctrine maintain that it “extends the wide limits of the conspiracy doctrine to the breaking-point and opens the door to possible new abuses by overzealous public prosecutors.”³²

The significant legal scholarship on conspiracy primarily addresses the following questions: (i) when criminal responsibility should attach; (ii) whether a defendant should be separately punished for the agreement and substantive acts of a conspiracy; (iii) whether conspirators should be punished even when it would have been impossible to commit their planned crime; and (iv) what is the appropriate extent of *Pinkerton* liability.³³

26. *Blumenthal v. United States*, 332 U.S. 539, 557 (1947) (finding that it is only necessary to show conspirator knew of conspiracy’s general scope); see, e.g., *United States v. Alvarez*, 837 F.3d 1024, 1027 (11th Cir. 1988) (holding that proof of acts committed in furtherance of conspiracy may be sufficient to show knowing participation in conspiracy).

27. *Iannelli v. United States*, 420 U.S. 770, 777 n. 10 (1975) (citing *Direct Sales Co. v. United States*, 319 U.S. 703, 711–13 (1943)).

28. *LAFAVE*, *supra* note 6, at 657.

29. To withdraw from a conspiracy, a defendant must produce evidence that he “disavowed his criminal association with the conspiracy and that he communicated his withdrawal to his co-conspirators.” *United States v. Minicone*, 960 F.3d 1099, 1108 (2d Cir. 1992).

30. *Pinkerton v. United States*, 328 U.S. 640, 646–48 (1946) (holding the defendant criminally liable for his co-conspirators’ crimes even though he was in prison at the time the object crime was committed).

31. *Id.* at 647.

32. Note, *Vicarious Liability for Criminal Offenses of Co-Conspirators*, 56 *YALE L. J.* 371, 378 (1947).

33. See *Dennis*, *supra* note 17, at 41 (“The question then is, why should this form of conduct be criminal? Why should an agreement between two people to commit a crime itself be a crime?”); see Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III and IV*, 87 *COLUM. L. REV.* 920, 948 (1987) (“[T]he procedural and evidentiary consequences directly or indirectly associated with a conspiracy charge . . . create possibilities of abuse.”); see also Abraham Goldstein, *Conspiracy to Defraud the United States*, 68 *YALE L. J.* 405, 414 (1959).

Perhaps as a result of significant criticism, the Federal Sentencing Commission limited some traditional features of conspiracy doctrine in the United States Sentencing Guidelines (“Guidelines”). For example, under the Guidelines, a defendant is typically not punished separately for the conspiracy to commit a crime and the actual commission of that crime.³⁴ Rather, the conspiracy is grouped with the substantive offense for the calculation of a defendant’s base offense level.³⁵

In addition to sparking significant criticism and debate, the expansive scope of criminal conspiracy makes it a troubling offense when used as a predicate offense for criminal recidivism sentencing enhancements. Two central criticisms of conspiracy law—that criminal liability attaches too “early” and that liability is too broadly punished—make it problematic when used to escalate a subsequent criminal sentence.

For example, the Supreme Court has clarified that § 846 conspiracy is defined by the agreement, not any act, and that “[t]he gist of the crime of conspiracy as defined by the statute is the agreement or confederation of the conspirators to commit one or more unlawful acts. . . . A conspiracy is not the commission of the crime which it contemplates.”³⁶ Although general federal conspiracy requires an overt act,³⁷ the government need not prove any overt acts to obtain a conviction under § 846.³⁸ Moreover, the conspiracy continues “as long as the purposes of the conspiracy have neither been abandoned nor accomplished and the defendant has not made an affirmative showing that the conspiracy has terminated.”³⁹

In the Eleventh Circuit, similarly:

[W]hen the indictment charges a defendant with an ongoing conspiracy, the jury may find that he and his coconspirators reached an agreement at any time within the period charged and that the agreement continued throughout the period or, for example, only for one day. Unless the jury gives a special verdict or the sentencing court makes a determination based on the evidence adduced at trial, it is impossible for [the appellate court] to tell when the relevant conduct occurred.⁴⁰

Put differently, conspiracy is a *continuing offense* for which the “government only has to show, either directly or circumstantially, that a conspiracy existed; that

34. See U.S. SENTENCING GUIDELINES MANUAL § 3D1.2(b), application note 4 (U.S. Sentencing Comm’n 2015).

35. *Id.*

36. *United States v. Williams*, 469 F.3d 963, 967 (11th Cir. 2006); see *Braverman v. United States*, 317 U.S. 49, 53–54 (1942).

37. 18 U.S.C. § 371 (2012); see *United States v. McCollum*, 885 F.3d 300, 306 (4th Cir. 2018). According to the Eighth Circuit, at least fifteen federal conspiracy provisions for nonviolent crimes require an overt act, while at least ninety-nine do not. *Id.*; see *United States v. Pascacio-Rodriguez*, 749 F.3d 353, 360 (5th Cir. 2014).

38. *United States v. Shabani*, 513 U.S. 10, 15–16 (1994).

39. *United States v. Gonzalez*, 921 F.2d 1530, 1548 (11th Cir. 1991).

40. *United States v. Cornog*, 945 F.3d 1504, 1509–10 (11th Cir. 1991). In *Cornog*, where the defendant was charged with a conspiracy to distribute cocaine “from on or about January, 1987 . . . and continuing to on or about February 13, 1988,” this Court held that “[a]lthough we know that the jury found him guilty on this count, we do not know when the conspiracy occurred—it could have been at any time within this period.” *Id.* at 1510.

the defendant knew of the conspiracy; and that with knowledge, the defendant became a part of that conspiracy.”⁴¹ As a continuous crime involving many separate transactions,⁴² it is difficult for a court to determine when a particular conspiracy “occurred” for the purposes of a recidivist statute.⁴³ Sentencing enhancements such as the ACCA seek to escalate punishments for individuals with several criminal episodes or convictions.⁴⁴ Both the primacy of the agreement for a conspiracy and its continuous nature make it difficult to decide when a conspiracy “occurred.”⁴⁵ Moreover, when an individual is charged with substantive acts of a conspiracy and separately with conspiring to commit those offenses, using these counts as separate crimes for the purpose of a later recidivist enhancement is challenging.

According to the Sentencing Commission’s data, over 300 individuals were sentenced with the ACCA enhancement in the 2017 fiscal year, which carries a mandatory sentence of fifteen years imprisonment.⁴⁶ At a minimum, federal conspiracy counts constitute a significant number of these ACCA enhancements.⁴⁷ State conspiracy offenses are also applicable predicate offenses. The primary criticisms of conspiracy doctrine are magnified in a case like *Mr. Longoria’s*, where his prior conspiracy offense, along with substantive acts occurring within the temporal span of that conspiracy, were each used as necessary predicates to impose a severe recidivist enhancement.⁴⁸

II. THE ARMED CAREER CRIMINAL ACT’S “DIFFERENT OCCASIONS” REQUIREMENT

A. *Neither the ACCA nor the Supreme Court Have Explained How to Make the “Different Occasions” Determination*

Two years after the ACCA was enacted, a defendant’s sentence was enhanced based on a six-count robbery conviction involving a hold-up of six restaurant patrons.⁴⁹ On appeal, the United States acknowledged that, although the ACCA

41. *United States v. Harriston*, 329 F.3d 779, 783 (11th Cir. 2003).

42. *See United States v. Terzado-Madruga*, 897 F.2d 1099, 1124 (11th Cir. 1990).

43. Courts acknowledge that the “task of determining when multiple prior offenses were part of the same criminal episode” is difficult. *United States v. Mann*, 552 Fed App’x 464, 466 (6th Cir. 2014); *see United States v. Brady*, 98 F.3d 664, 670 (6th Cir. 1993) (en banc) (determining that two robberies committed on the same night against different victims in separate locations constituted separate occasions for the ACCA).

44. 18 U.S.C. § 924(e); *see United States v. Towne*, 870 F.2d 880, 890–91 (2nd Cir. 1989) (stating that the ACCA is “aimed at career criminals, rather than those who merely commit three punishable acts.”); *see United States v. McElyea*, 158 F.3d 1016, 1020 (9th Cir. 1998) (“the ACCA was amended to prevent the application of an enhanced sentence to a defendant who committed simultaneous crimes, regardless of how many convictions resulted from those actions.”).

45. 18 U.S.C. § 924(e) (2012).

46. *See* U.S. Sentencing Comm’n, *Quick Facts: Felon in Possession of a Firearm* (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_in_Possession_FY17.pdf; U.S. Sentencing Comm’n, *Quick Facts: Mandatory Minimum Penalties 2* (2017).

47. *See Davis & Vitullo*, *supra* note 6, at 778 n.1

48. *United States v. Longoria*, 874 F.3d 1278 (11th Cir. 2017).

49. *United States v. Petty*, 798 F.2d 1157, 1160 (8th Cir. 1986).

lacked the language requiring that the predicate convictions be for offenses committed on different occasions, the legislative history showed that Congress intended a requirement that they were committed on occasions different from one another.⁵⁰ The Supreme Court reversed this defendant’s fifteen-year ACCA sentence, and on remand, the Eighth Circuit held that the ACCA was “intended to reach multiple criminal episodes that were *distinct in time*, not multiple felony convictions arising out of a single criminal episode.”⁵¹

In response to this case, Congress amended the ACCA by adding the phrase “committed on occasions different from one another.”⁵² Recognizing that defendants are routinely prosecuted in multiple-count indictments, the “Petty Amendment” reinforced a time requirement between predicates, even when defendants are prosecuted in the same charging instrument.⁵³ Former Senator Biden, then Senate Judiciary Committee Chairman, explained the “different occasions” amendment as follows:

[the] concept of what is meant by a “career criminal”, [sic] that is, a person who over the course of time commits three or more of the enumerated kinds of felonies and is convicted therefor. It is appropriate to clarify the statute . . . to insure that its rigorous sentencing provisions apply only as intended in cases meriting such strict punishment.⁵⁴

This legislative history indicates that the ACCA was meant to be narrowly applied for “recidivist” offenders as they are most commonly perceived—individuals who have been punished but continue to commit crimes.

[Armed career criminals are] people who have demonstrated, by virtue of their definition, that locking them up and letting them go doesn’t do any good. They go on again, you lock them up, you let them go, it doesn’t do any good, they are back for a third time. At that juncture we should say, “That’s it; time out; it is all over. We, as responsible people, will never give you the opportunity to do this again.”⁵⁵

Following this amendment, a sentencing court may apply the ACCA when the government provides sufficient evidence that a defendant committed three

50. *United States v. Petty*, 828 F.2d 2, 3 (8th Cir. 1987) [hereinafter *Petty II*] (noting on remand that the Solicitor General admitted error in applying an ACCA enhancement to Mr. Petty).

51. *Id.* at 3 (emphasis added).

52. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7056, 102 Stat. 4181, 4402 (1988) (codified at 18 U.S.C. § 924(e)(1)); see *United States v. McElyea*, 158 F.3d 1016, 1019–20 (9th Cir. 1998) (explaining Congress’s intent to codify the Solicitor General’s construction of the ACCA in *Petty*).

53. See Anti-Drug Abuse Act of 1988 § 7056 (describing the amendment as a “clarification of predicate offense requirements for Armed Career Criminal Act”).

54. 134 CONG. REC. S17370 (daily ed. Nov. 10, 1988) (remarks of Sen. Biden).

55. *United States v. McElyea*, 158 F.3d 1016, 1020 (9th Cir. 1998) (citing Brief for Respondent at 7, *Petty v. United States*, 481 U.S. 1034 (1987) (No. 86-6263)); see also *Armed Career Criminal Act: Hearing on H.R. 1627 and S. 52 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 98th Cong. 64 (1984) (statement of Stephen S. Trott, Assistant Att’y Gen.) (describing the purpose of the ACCA).

predicate offenses on “occasions different from one another.”⁵⁶ But in the past two decades, the ACCA’s reach has expanded well beyond the serious recidivist criminals that Congress was targeting with the enhancement.⁵⁷ Recidivism is generally understood as the “tendency of a convicted criminal to reoffend,” or an individual’s continued commission of crimes after having been convicted or punished for a prior offense.⁵⁸ In instances like Mr. Longoria’s, however, such a rationale falls short.

Prosecutors have many reasons to apply the ACCA broadly. First, there is no expiration date for the offenses that can trigger the ACCA and second, predicate offenses include felonies that were *punishable* by over a year in prison, even if the individual was actually sentenced to less time for that offense.⁵⁹ In light of the fact that predicates can be from decades in an individual’s past and can be applied whenever the crime was punishable by over a year, the ACCA “is one of the most onerous mandatory sentencing provisions found in the federal criminal code.”⁶⁰ A third reason is that the ACCA applies to individuals with three qualifying “serious drug offenses,”⁶¹ such as drug sales or conspiracies, without any violent criminal history whatsoever.⁶² Fourth, the triggering event is the federal felon-in-possession statute, which is a status offense criminalizing the possession and constructive possession of a firearm.⁶³ Indeed, Mr. Longoria’s ACCA sentence was triggered by his girlfriend’s attempt to sell a firearm on the internet,⁶⁴ and his three qualifying convictions were all nonviolent drug offenses.⁶⁵

A fifth reason for the ACCA’s overly broad application is the ambiguity with which it can be applied to related or temporally overlapping offenses. Indeed,

56. 18 U.S.C. § 924(e) (2012). The government bears the burden of proving at sentencing that the defendant committed the three predicate offenses on different occasions by a preponderance of the evidence.

57. *United States v. Petty*, 828 F.3d 2, 3 (“[The Solicitor General] noted that the legislative history strongly supports the conclusion that the statute was intended to reach multiple criminal episodes that were distinct in time, not multiple felony convictions arising out of a single criminal episode.”); see *McElyea*, 158 F.3d at 1020 (embracing the government’s position that neither Congress nor the Justice Department intended the ACCA to apply more broadly than other recidivist statutes).

58. See *Ewing v. California*, 538 U.S. 11, 26 (2003) (citing a series of studies defining “recidivists” as former inmates released from prison who were charged with at least one serious new crime within three years of release).

59. See 18 U.S.C. § 921(a)(20) (2012) (defining the term “crime punishable by imprisonment of a term exceeding one year” with exclusions).

60. Katherine Menendez, *Johnson v. United States: Don’t Go Away*, CRIM. JUST., Spring 2016, at 12, 13.

61. The ACCA treats as a “serious drug offense” any “offense under the Controlled Substances Act (21 U.S.C. 801 *et seq.*) . . . for which a maximum term of imprisonment of ten years or more is prescribed by law.” 18 U.S.C. § 924(e)(2)(A)(i).

62. See David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guideline Era*, 79 U. COLO. L. REV. 1, 54 (2008).

63. 18 U.S.C. § 922(g) (2012) prohibits certain categories of persons from possessing a firearm or ammunition in interstate commerce. The most common prohibited status is that of a convicted felon. See 18 U.S.C. § 922(g)(1) (2012). Other prohibited statuses include fugitives from justice, unlawful users of any controlled substance, persons committed to a mental institution, persons convicted of a misdemeanor crime of domestic, and, as relevant here, “an alien . . . illegally or unlawfully in the United States.” *Id.* §§ 922(g)(2)–(5), (9).

64. Judgment at 1, *United States v. Longoria*, No. 8:16-cr-335, (D. Fla. Dec. 21, 2016).

65. See Judgment at 1, *United States v. Longoria*, No. 8:09-cr-340 (D. Fla. Apr. 13, 2010).

when Congress inserted the “different occasions” language, it did not address how much time is required between qualifying offenses to count separately. The legislative history and statute show that “simultaneous” offenses should not be separate predicates.⁶⁶ But these sources provide limited guidance on *how* a sentencing court should decide whether related offenses occurred on “different occasions,” or *what evidence* it can consult when making close calls for whether two counts of conviction should be counted as one or two ACCA predicates.

Further, although the Supreme Court has addressed the ACCA dozens of times since its enactment, it has repeatedly addressed the question of what constitutes a “violent felony” in the first clause,⁶⁷ yet has not provided guidance on the “different occasions” analysis. As a result, the “occasions different from one another” amendment actually produced an artificially expanded definition of what constitutes a “criminal career” and who can be enhanced with this severe mandatory sentence.⁶⁸

With respect to a sentencing court’s determination of whether an individual’s prior offense constitutes a “violent felony,” the Supreme Court has repeatedly explained that all that counts are the elements of a defendant’s statute of conviction, and distinguishing between elements and facts is therefore central to ACCA’s operation.⁶⁹ The Supreme Court’s critical decisions in *Taylor v. United States* and *Shepard v. United States* require that when a sentencing court decides whether a

66. See generally Anti-Drug Abuse Act of 1988 § 7056 (describing the amendment as a “clarification of predicate offense requirements for [ACAA]”); 134 CONG. REC. 32702 (1988) (remarks of Sen. Joseph Biden) (describing § 7056 as clarifying the ACCA); 134 CONG. REC. 32702 (remarks of Sen. Joseph Biden); see *United States v. Petty*, 798 F.2d 1157, 1159–60 (8th Cir. 1986), *vacated* 481 U.S. 1034 (1987), *rev’d*, 828 F.2d 2 (8th Cir. 1987); James E. Hooper, Note, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 MICH. L. REV. 1951, 1965 (1991); James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 545–46 (2009) (explaining that the ACCA intends to help law enforcement incapacitate dangerous repeat offenders).

67. See *Johnson v. United States*, 135 S. Ct. 2551 (2015); *Stokeling v. United States*, 139 S. Ct. 544 (2019); *Descamps v. United States*, 570 U.S. 254 (2013).

68. See Jenny Osborne, *One Day Criminal Careers: The Armed Career Criminal Act’s Different Occasions Provision*, 44 J. MARSHALL L. REV. 963, 971–72 (2011); see e.g., *United States v. Jemison*, 292 F. App’x 863, 867 (11th Cir. 2008) (holding that two successive cocaine distributions transactions over 24 hours count as two prior convictions); *United States v. Washington*, 898 F.2d 439, 442 (5th Cir. 1990) (finding that two robberies of the same store clerk committed a few hours apart are separate occasions under the ACCA). See also *United States v. Letterlough*, 63 F.3d 332, 337 (4th Cir. 1995). The *Letterlough* court reasoned that a defendant’s two sales of drugs to one police officer two hours apart constituted two separate offenses, even though the sales may have been part of the defendant’s “master plan to sell crack cocaine as a business venture.” *Id.* Likewise, other courts of appeals have concluded that individual drug sales made close in time to one another are separate offenses for the purpose of the ACCA. See, e.g., *United States v. Cardenas*, 217 F.3d 491, 492 (7th Cir. 2000) (holding sales 45 minutes apart are separate offenses); *United States v. Speakman*, 330 F.3d 1080, 1082–83 (8th Cir. 2003) (holding three sales within one month were separate offenses).

69. Since *Taylor v. United States*, the Supreme Court has repeatedly held that for the ACCA, a sentencing judge may look only to the elements of the offense, and “not to the facts underlying the prior convictions.” 495 U.S. 575, 600 (1990). See, e.g., *James v. United States*, 550 U.S. 192, 214 (2007) (“[W]e have avoided any inquiry into the underlying facts of [the defendant’s] particular offense, and have looked solely to the elements of [burglary] as defined by [state] law.”); *Descamps v. United States*, 570 U.S. 254, 261 (2013). (“The key [under ACCA] is elements, not facts.”).

particular offense qualifies for the ACCA, it can consider statutory definitions, charging documents, jury instructions, written plea agreements, and even the transcripts of plea colloquies.⁷⁰ The elements of an offense are what the prosecution must prove to sustain a conviction at trial and what a defendant necessarily admits when he pleads guilty.⁷¹ “Facts, by contrast, are mere real-world things—extraneous to the crime’s legal requirements. . . . They are ‘circumstance[s]’ or ‘event[s]’ having no ‘legal effect [or] consequence’” and “need neither be found by a jury nor admitted by a defendant.”⁷² Since *Taylor*, the Supreme Court has twice reiterated that a sentencing judge may look only to “the elements of the [offense], not to the facts of each defendant’s conduct” when deciding whether a prior offense constitutes a violent felony.⁷³ However, the Supreme Court has not addressed whether this elemental analysis is required when a sentencing court makes the “occasions different from one another” determination.

The Sixth Amendment of the Constitution guarantees most of a criminal defendant’s trial rights, including the right to trial by a jury.⁷⁴ The Supreme Court has explained that this right entitles a criminal defendant to a “jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt,”⁷⁵ and that only a jury can find facts that increase a defendant’s mandatory sentence of imprisonment.⁷⁶ The “elements-only inquiry” into a defendant’s prior offenses is intended to avoid Sixth Amendment violations and other unfairness to defendants.⁷⁷

Given the constitutional requirement that only a jury may find facts that increase a defendant’s mandatory penalty, “a construction of ACCA allowing a sentencing judge to go any further would raise serious Sixth Amendment concerns.”⁷⁸ Accordingly, the Supreme Court recognizes that permitting a sentencing judge to:

make a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of the prior plea . . . raises the concern underlying *Jones* and *Apprendi*: The Sixth and Fourteenth Amendment guarantee a jury standing between a defendant and the power of the State, and they

70. *Taylor*, 495 U.S. at 600; *Shepard v. United States*, 544 U.S. 13, 26 (2005).

71. *Richardson v. United States*, 526 U.S. 813, 817 (1999); *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

72. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (quoting *Black’s Law Dictionary* 709 (10th ed. 2014)).

73. *Taylor*, 495 U.S. at 600–01; see, e.g., *Descamps*, 570 U.S. at 261 (“The key . . . [under ACCA], is elements, not facts.”).

74. U.S. CONST. amend. VI.

75. *United States v. Gaudin*, 515 U.S. 506, 510 (1995).

76. *Apprendi v. New Jersey*, 530 U.S. 466, 497 (2000).

77. *Taylor*, 495 U.S. at 600–01; *Descamps*, 570 U.S. at 267–68; *Mathis*, 136 S. Ct. at 2253.

78. *Mathis*, 136 S. Ct. at 2252; see *Apprendi*, 530 U.S. at 490; *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (finding an exception to the *Apprendi* rule for judicial fact-finding of the fact of a prior conviction).

guarantee a jury’s finding of any disputed fact essential to increase the ceiling of a potential sentence.⁷⁹

In *Descamps*, the Supreme Court reiterated that if a sentencing court were to answer the ACCA-predicate question by “try[ing] to discern what a trial showed, or a plea proceeding revealed, about the defendant’s underlying conduct,” there would be friction with the Sixth Amendment’s promise that “a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt.”⁸⁰ The Court repeated this sentiment in *Mathis*, holding that “a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. . . . He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.”⁸¹ In addition to avoiding Sixth Amendment concerns, an elements-based inquiry “avoids unfairness to defendants.”⁸² As Justice Kagan explained, “[a]t trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law, to the contrary, he ‘may have good reason not to’—or even be precluded from doing so by the court.”⁸³

Despite these constitutional concerns with the sentencing court’s determination of what constituted an ACCA predicate felony, the Supreme Court has not addressed how to make the “occasions different from one another” determination. In denying Mr. Longoria’s petition for certiorari, the Supreme Court again declined to address how the reasoning from *Taylor*, *Mathis*, and *Descamps* applies to a sentencing court’s determination of whether a defendant’s predicate offenses occurred on different occasions for the ACCA.⁸⁴ Yet, every time a sentencing court applies the ACCA’s fifteen-year mandatory minimum sentence, it must first

79. *Shepard v. United States*, 544 U.S. 13, 26 (2005).

80. *Descamps v. United States*, 570 U.S. 254, 269–70 (2013).

81. *Id.*

82. *Mathis*, 136 S. Ct. at 2253; *see Taylor*, 495 U.S. at 601.

83. *Mathis*, 136 S. Ct. at 2253; *see Descamps*, 570 U.S. at 270–71 (“And during plea hearings, the defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations. In this case, for example, [the defendant] may have let the prosecutor’s statement go by because it was irrelevant to the proceedings. He likely was not thinking about the possibility that his silence could come back to haunt him in an ACCA sentencing 30 years in the future.”).

84. *See* Petition for Writ of Certiorari at i, *Longoria v. United States*, 874 F.3d 1278 (11th Cir. 2017) (No. 18-5439). Mr. Longoria’s case illustrates the problem with relying on facts that are not elements of a prior offense: his objection to the ACCA sentencing enhancement in 2016 was decided entirely by the district court’s interpretation of what he admitted to in a wholly unrelated proceeding in 2009. When Mr. Longoria pled guilty in 2009 to two substantive counts and the related conspiracy count in federal court, there are many reasons why he would not contest any facts that were unnecessary for the court to accept his plea, including: a desire to show his remorse for his conduct, to get credit for his cooperation with law enforcement, and to get a lower sentence from the court. *See Mathis*, 136 S. Ct. at 2253 (explaining that a non-elemental fact may go unchallenged by the defendant in the prior proceeding because “a defendant may have no incentive to contest what does not matter under the law” and may even “have good reason not to” contest those facts at the time.) Also, when Mr. Longoria pled guilty to these three counts, none of the parties considered the temporal or interrelated nature of these counts to be relevant to those proceedings. *See Descamps*, 570 U.S. at 270–71.

determine whether or not the defendant's qualifying offenses occurred on "occasions different from one another."⁸⁵

The absence of guidance for making the ACCA's different occasions determination is particularly notable in the context of conspiracy and related crimes. Indeed, examining how the courts of appeal make the different occasions determination for related offenses, or offenses sentenced on the same day, illustrates the problem.

B. The Courts of Appeal Approach the "Different Occasions" Inquiry by Distinguishing Between Successive and Simultaneous Criminal Episodes

When making the ACCA's "different occasions" determination for related offenses, most circuits aim to determine whether two offenses were successive or simultaneous and if they arose from "separate and distinct criminal episode[s]" or are "crimes that are temporally distinct."⁸⁶ When the successive versus simultaneous question is ambiguous, some courts employ a multifactor test to decide whether two of a defendant's prior offenses occurred on different occasions.⁸⁷ The relevant factors include the passage of time between the offenses, and whether the locations and victims were the same or different.⁸⁸ For example, the Eighth Circuit recognizes three considerations for whether offenses are sufficiently separate and distinct to be separate ACCA predicates: "(1) the time lapse between offenses, (2) the physical distance between their occurrence, and (3) their lack of overall substantive continuity, a factor that is often demonstrated in the violent-felony context by different victims or different aggressions."⁸⁹

85. While the 2017 statistics are not yet available, the Commission has confirmed that there were still over 300 ACCA sentences imposed in 2017. See U.S. Sentencing Comm'n, *Quick Facts: Mandatory Minimum Penalties 2* (2017). Also, although the total ACCA sentences nationally has somewhat decreased without the residual clause, the percentage of the total originating from the Eleventh Circuit has increased. U.S. Sentencing Comm'n, *Interactive Sourcebook*, <https://isb.ussc.gov/Login>, (last visited Oct. 17, 2019) (click "all Tables and Figures" navigate to "Table 22" in the "Guideline Application" subcategory).

86. *United States v. Sneed*, 600 F.3d 1326, 1329 (11th Cir. 2010); see *Pope*, 132 F.3d at 692 ("[S]o long as predicate crimes are successive rather than simultaneous, they constitute separate criminal episodes for the purposes of the ACCA."). Like the Eleventh, the Seventh Circuit holds that a defendant will be subject to the ACCA where "each of [his] prior convictions arose out of a separate and distinct criminal episode." *United States v. Elliott*, 703 F.3d 378, 383 (7th Cir. 2012) (internal quotation marks omitted).

87. See *Brown v. United States*, 636 F.3d 674 (2d Cir. 2011); *United States v. Jones*, 673 F.3d 497, 503 (6th Cir. 2012); *United States v. Antonie*, 953 F.3d 496, 498 (9th Cir. 1991) (applying a three factor test to conclude that armed robberies, committed forty minutes apart, constituted offenses committed on different occasions for the ACCA); *United States v. Willoughby*, 653 F.3d 738 (8th Cir. 2011).

88. See *Brown*, 636 F.3d at 675 (stating that the relevant considerations "include whether victims of the two crimes were different, whether the crimes were committed at different locations, and whether the crimes were separated by the passage of time." (quoting *United States v. Daye*, 571 F.3d 225, 237 (2d Cir. 2009))); *Jones*, 673 F.3d at 503 (imposing a three factor test wherein a defendant commits offenses on different occasions if: "(1) it is possible to discern the point at which the first offense is completed, and the subsequent point at which the second offense begins; (2) it would have been possible for the offender to cease his criminal conduct after the first offense . . . ; or (3) the offenses are committed in different residences or business locations." (internal quotation marks omitted)); *Antonie*, 953 F.3d at 498 (applying a three factor test to conclude that armed robberies, committed forty minutes apart, constituted offenses committed on different occasions for the ACCA).

89. *Willoughby*, 653 F.3d at 743 (8th Cir. 2011).

In an effort to avoid Sixth Amendment problems from finding facts about a defendant’s prior conviction, most courts of appeal limit the evidentiary sources that courts can consult for the “different occasions” determination to the same “*Shepard*-sources” that the Supreme Court permits for the ACCA’s “violent felonies” determination.⁹⁰

For example, in *United States v. King*, the defendant had three prior robbery convictions, all of which qualified as ACCA predicate offenses, all of which occurred on the same day in 2002.⁹¹ The district court applied the ACCA’s fifteen-year mandatory sentence, relying upon three bills of particulars that indicated the offenses occurred approximately twenty-five minutes apart from each other at different locations within the same city.⁹² On appeal, the Sixth Circuit joined most sister circuits in concluding that the evidentiary restrictions for the first clause of the ACCA apply to the “different occasions” analysis, and that a sentencing court cannot rely on bills of particulars to resolve the different occasions question.⁹³ Without this evidence, there was no proof that Mr. King’s three prior offenses occurred on different occasions, and his sentence was not enhanced with the ACCA’s fifteen-year penalty.⁹⁴ Although this decision is consistent with the Supreme Court’s recent ACCA cases, some criticized the result in *King*, arguing that a defendant who committed three armed robberies in different locations on one day should be punished as a dangerous repeat offender with the ACCA.⁹⁵ But for purposes of defining the scope of the ACCA, certainly a defendant who commits three offenses within a few hours is not the type of career criminal the statute envisioned. Indeed, the evidentiary restrictions placed on sentencing courts when they examine prior offenses may help narrow the scope of this onerous mandatory sentencing enhancement to only those who legislators intended.

90. See *United States v. King*, 853 F.3d 267, 273–75 (6th Cir. 2017) (limiting sentencing courts to *Shepard*-approved documents, and holding that a sentencing court cannot rely upon a Bill of Particulars); *Kirkland v. United States*, 687 F.3d 878, 886 n.9 (7th Cir. 2012); *United States v. Boykin*, 669 F.3d 467, 472 (4th Cir. 2012); *United States v. Sneed*, 600 F.3d 1326, 1332 (11th Cir. 2010); *United States v. Thomas*, 572 F.3d 945, 950–51 (D.C. Cir. 2009); *United States v. Fuller*, 453 F.3d 274, 279 (5th Cir. 2006); *United States v. Harris*, 447 F.3d 1300, 1305 (10th Cir. 2006); *United States v. Taylor*, 413 F.3d 1146, 1157 (10th Cir. 2005). *But see* *United States v. Evans*, 738 F.3d 935, 936 (8th Cir. 2014).

91. *King*, 853 F.3d at 269.

92. See *id.* at 270 (“The district court agreed with the Government’s first argument and so it did not reach the other two. In particular, although recognizing that we previously questioned *Thomas*’s viability given *Shepard*, see *United States v. Barbour*, 750 F.3d 535, 543 n.1 (6th Cir. 2014), the district court believed that *Thomas* remained binding precedent. It thus relied on the bills of particulars, concluded that King’s 2002 offenses were ‘committed on occasions different from one another,’ and sentenced King to fifteen years and eight months in prison under the ACCA. Regarding the evidence that may be considered in making the different-occasions determination, the district court remarked, ‘the issue is absolutely teed up for the Sixth Circuit. And now it’s a matter that the Sixth Circuit has to decide.’”).

93. *King*, 853 F.3d at 275.

94. *Id.* at 269.

95. See Kayleigh E. McGlynn, *Incapacitating Dangerous Repeat Offenders (Or Not): Evidentiary Restrictions on Armed Career Criminal Act Sentencing* In *United States v. King*, 59 B.C. L. REV. E-SUPPLEMENT 348 (2018).

While courts of appeal limit the evidentiary sources a sentencing court can consult, they permit a judge to make the “different occasions” determination based on non-elemental facts of a defendant’s prior offense.⁹⁶ The circuits recognize that they are going beyond the elements of a defendant’s prior offenses when making the ACCA’s “different occasions” inquiry. Indeed, some circuits conclude that “for ACCA purposes, district courts may determine both the existence of prior convictions and the factual nature of those convictions, including whether they were committed on different occasions, so long as they limit themselves to *Shepard*-approved documents.”⁹⁷ Nevertheless, some judges have recognized the constitutional problems that arise when a sentencing judge finds facts necessary to establish that a defendant’s predicate convictions were committed on different occasions.⁹⁸ When a sentencing court looks back at a defendant’s prior state and federal offenses to determine whether or not two counts constitute separate occasions, it is making inferences and findings of fact. These findings increase that defendant’s statutory exposure.

Courts recognize that the ACCA “different occasions” determination is difficult for offenses that occurred close in time to one another, acknowledging that the “task of determining when multiple prior offenses were part of the same criminal episode” is hard.⁹⁹ To be sure, the inquiry of whether prior qualifying offenses should be considered one or two occasions is a complex decision when they occurred close in time, were sentenced as part of the same judgment, or are otherwise related offenses.

For example, when the Eleventh Circuit addressed Mr. Longoria’s argument that his conspiracy offenses and related substantive offenses did not occur on “occasions different from one another,” it acknowledged that it had “yet to address the resolution of the ACCA’s different-occasions inquiry when a substantive drug distribution offense occurs within the span of a conspiracy to distribute that

96. *See, e.g.*, *United States v. Elliott*, 703 F.3d 378, 383 (7th Cir. 2012) (“[T]his court, like our sister circuits, has construed *Almendarez-Torres* to permit a district court to make a finding for purposes of the ACCA as to whether a defendant committed three or more violent felonies or serious drug offenses on occasions different from one another.”); *United States v. Davis*, 487 F.3d 282, 287 (5th Cir. 2007); *United States v. Michel*, 446 F.3d 1122, 1133 (10th Cir. 2006). The Supreme Court recognizes that whether a defendant’s prior crimes occurred on occasions different from one another is a question that looks well beyond “the fact of a prior conviction,” *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)), and far beyond the elements essential to that conviction. *See Taylor v. United States*, 495 U.S. 575, 599 (1990).

97. *United States v. Weeks*, 711 F.3d 1255, 1259 (11th Cir. 2013).

98. *See United States v. Thompson*, 421 F.3d 278, 294 (4th Cir. 2005) (Wilkins, J., dissenting) (“I would employ *Apprendi*’s analysis and rule and hold that the facts underlying Thompson’s prior convictions, including the dates on which he committed the underlying crimes, do not fit within the ‘fact of a prior conviction’ exception.”); *United States v. Thomas*, 572 F.3d 945, 952–53 (D.C. Cir. 2009) (Ginsburg, J., concurring in part), *cert. denied*, 559 U.S. 986 (2010).

99. *United States v. Mann*, 552 F. App’x 464, 466 (6th Cir. 2014); *see United States v. Brady*, 98 F.3d 664, 670 (6th Cir. 1993) (en banc) (determining that two robberies committed on the same night against different victims in separate locations constituted separate occasions for the ACCA).

drug.”¹⁰⁰ Indeed, the Fourth and Sixth Circuits have recently vacated defendants’ ACCA sentences based on findings that the government did not meet its higher burden for temporally close offenses from *Shepard*-approved documents.¹⁰¹

When making the “different occasions” determination, appellate courts consider if “it is possible to discern the point at which the first offense is completed, and the subsequent point at which the second offense begins.”¹⁰² This analysis, however, proves highly difficult for temporally overlapping offenses.¹⁰³ For example, the First Circuit explicitly relies on the difference between events forming a “continuous course of conduct” and separate “criminal episode[s],”¹⁰⁴ and employs a case-by-case analysis when the different occasions finding is difficult.¹⁰⁵ In general, appellate courts require that a sentencing court find that a defendant committed three “separate and distinct” criminal episodes before applying the ACCA’s fifteen-year mandatory sentence.¹⁰⁶ This “successive rather than simultaneous” analysis of a defendant’s prior predicate offenses aligns with congressional intent to punish only true recidivist criminals with a severe mandatory sentence.¹⁰⁷

III. CONSPIRACY DOES NOT FIT THE APPROACHES USED TO MAKE THE ACCA’S “DIFFERENT OCCASIONS” DETERMINATION

The unique features of conspiracy discussed above make it a difficult predicate offense to analyze within the paradigms used for the ACCA’s “different

100. *United States v. Longoria*, 874 F.3d 1278, 1281 (11th Cir. 2017).

101. *See United States v. King*, 853 F.3d 267, 274, 276–79 (6th Cir. 2017) (“And to the extent that answering the different-occasions question requires a sentencing judge to identify the who, when, and where of the prior offenses, nothing we say here precludes a judge from doing so. We only hold that in identifying those facts, a sentencing judge is constrained to reviewing evidence approved by *Taylor* and *Shepard*”; concluding that the documents in that case did not establish the facts the defendant necessarily admitted in the prior guilty pleas); *United States v. Span*, 789 F.3d 320, 327, 331–32 (4th Cir. 2015) (vacating ACCA sentence because of discrepancies in the *Shepard*-approved documents and thus not reaching constitutional question, but stating: “Our precedent permits a sentencing court’s dive into *Shepard*-approved documents to sort out the facts of the underlying predicate conviction, not just its elements. *Descamps* intimates that this analysis exceeds a sentencing court’s proper role.”).

102. *United States v. Jones*, 673 F.3d 497, 503 (6th Cir. 2012).

103. *United States v. Hill*, 440 F.3d 292, 297–98 (6th Cir. 2006).

104. *United States v. Stearns*, 387 F.3d 104, 108 (1st Cir. 2004) (“The overnight respite precludes any reasonable inference that [defendant] committed the two burglaries as part of a continuous course of conduct, inasmuch as during the time lapse [defendant] had the opportunity affirmatively to decide whether to initiate another criminal episode.”).

105. *Id.*

106. *United States v. Sneed*, 600 F.3d 1326, 1329 (11th Cir. 2010). To find “separate and distinct” occurrences, the Eleventh Circuit focuses on whether a defendant “had a meaningful opportunity to desist his activity before committing the second offense,” or whether they were part of a continuous course of conduct. *United States v. Pope*, 132 F.3d 684, 690 (11th Cir. 1998).

107. *See United States v. Towne*, 870 F.2d 880, 890–91 (2d Cir. 1989) (stating that the ACCA is “aimed at career criminals, rather than ‘those who merely commit three punishable acts.’” (citing *United States v. Wicks*, 883 F.2d 192, 195 (9th Cir. 1987) (Pregerson, J., dissenting)); *United States v. McElyea*, 158 F.3d 1016, 1020 (9th Cir. 1998) (“[T]he ACCA was amended to prevent the application of an enhanced sentence to a defendant who committed simultaneous crimes, regardless of how many convictions resulted from those actions.”).

occasions” requirement.¹⁰⁸ Typically, the courts of appeal distinguish between simultaneous and successive behavior when presented with the question of whether a defendant’s temporally close or related predicate offenses were committed on different occasions.¹⁰⁹ This analysis emphasizes whether or not a defendant had a meaningful opportunity to desist unlawful conduct between one offense and the other.¹¹⁰ This paradigm, however, is problematic when applied to continuing offenses such as conspiracy, where the agreement can trigger criminal liability even without substantive acts.¹¹¹

The crime of conspiracy simply does not fit these “different occasions” methods. Indeed, a conspiracy is a continuous criminal episode for which the “government only has to show, either directly or circumstantially, that a conspiracy existed; that the defendant knows of the conspiracy; and that with knowledge, the defendant became a part of the conspiracy.”¹¹² The crime continues as long as the purposes of the conspiracy have not been accomplished or abandoned and an individual defendant has not made an affirmative showing that the conspiracy is over.¹¹³

Conspiracy does not fit any of the tests courts of appeal employ to determine whether a defendant’s offenses were committed on different occasions. The Fourth Circuit, for example, defines “occasions” as “those predicate offenses that can be isolated with a beginning and an end—ones that constitute an occurrence unto themselves.”¹¹⁴ In the case such as Mr. Longoria’s, where a defendant’s substantive drug offenses occurred within the time span of an ongoing related conspiracy, three ACCA predicates cannot “be isolated with a beginning and an end.”¹¹⁵

Similarly, the Eighth Circuit approaches the “different occasions” test by noting that “[d]iscrete criminal episodes, rather than dates of convictions, trigger the [ACCA] enhancement,”¹¹⁶ and holding that “[a] continuous course of conduct will not trigger the enhancement.”¹¹⁷ Indeed, when that circuit was presented with a situation where a defendant had a conspiracy conviction and related substantive

108. 18 U.S.C. § 924(e).

109. See, e.g., *Sneed*, 600 F.3d at 1329; *Pope*, 132 F.3d at 692; *Brown v. United States*, 636 F.3d 674, 675 (2d Cir. 2011); *United States v. Jones*, 673 F.3d 497, 503 (6th Cir. 2012).

110. See *supra* Section II; see also *Kirkland v. United States*, 687 F.3d 878, 886 n.9 (7th Cir. 2012) (considering, for the different occasions ACCA determination, the “nature of the crimes, the identities of the victims, and the locations of the offenses, and whether the perpetrator had the opportunity to cease and desist from his criminal actions at any time”); see *Brown v. United States*, 636 F.3d 674, 675 (2d Cir. 2011) (examining “whether the victims of the two crimes were different, whether the crimes were committed at different locations, and whether the crimes were separated by the passage of time.”).

111. See *supra* Section I.

112. *United States v. Harriston*, 329 F.3d 779, 783 (11th Cir. 2003).

113. *United States v. Gonzalez*, 921 F.3d 1530, 1548 (11th Cir. 1991).

114. *United States v. Thompson*, 421 F.3d 278, 284 (4th Cir. 2005) (citing *United States v. Letterlough*, 63 F.3d 332, 335 (4th Cir. 1995)).

115. *Id.* Upon review of Mr. Longoria’s sentence, the Eleventh Circuit held that his “sentence was enhanced because his two distribution convictions and one conspiracy conviction constituted the necessary three serious drug offense predicates.” *United States v. Longoria*, 874 F.3d 1278, 1280 n. 9 (11th Cir. 2017).

116. *United States v. Gray*, 85 F.3d 380, 381 (8th Cir. 1996).

117. *United States v. Willoughby*, 653 F.3d 738, 741 (8th Cir. 2011).

conviction as two of his three qualifying ACCA priors, it acknowledged that “the ongoing nature and often extended time frames involved with conspiracy offenses make the . . . ‘time lapse between offenses’ [factor] a somewhat awkward fit for analysis in the conspiracy context.”¹¹⁸ However, although the Eighth Circuit recognized that the temporal aspect of conspiracy made it an “awkward fit” for analysis, it ultimately concluded that the defendant’s “underlying conspiracy conviction . . . overlaps with a separate conviction for conduct that occurred as a punctuated event within that conspiracy,” and thus constituted two separate ACCA priors.¹¹⁹

In contrast, when addressing a defendant’s two convictions for attempt and conspiracy, the Fourth Circuit concluded that they “stem from the same criminal transaction,” and “[t]he district court therefore counted them as a single predicate offense” for the purposes of the ACCA’s severe sentencing enhancement.¹²⁰

Mr. Longoria’s case illustrates how conspiracy is incompatible with the “different occasions” analysis employed by the appellate courts, particularly where both the conspiracy and a substantive component transaction are separate predicate offenses. In 2010, Mr. Longoria pled guilty, in a three-count federal indictment, to two drug sales occurring within the temporal span of a related drug conspiracy.¹²¹ More than six years later, when his live-in girlfriend tried to sell a firearm on Facebook, Mr. Longoria was charged with and pled guilty to constructive possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1).¹²² Although the government did not believe that his three counts from the 2010 prior conviction would constitute three “serious drug offenses” that “occurred on occasions different from one another,” the probation officer believed that they did, and the district court sentenced him to the ACCA’s mandatory minimum of fifteen years imprisonment.¹²³ The district court then reviewed Mr. Longoria’s 2009 plea agreement and change of plea transcript, and stated that it resolved his “different

118. *United States v. Melbie*, 751 F.3d 586, 589–90 (8th Cir. 2014).

119. *Id.* at 589.

120. *United States v. Davis*, 689 F.3d 349 n. 2 (4th Cir. 2012) (citing 18 U.S.C. § 924(e)(1) (explaining that offenses must be “committed on occasions different from one another”)).

121. Indictment at 1, *United States v. Longoria*, No. 8:09-cr-340 (D. Fla. July 23, 2009); Clerk’s Minutes at 1, *United States v. Longoria*, No. 8:09-cr-340 (D. Fla. Dec. 1, 2009). Mr. Longoria was sentenced to 37 months’ imprisonment, to be served for the three counts concurrently, and his 2010 Judgment states that the two distribution counts “ended” on November 24 and December 3, 2008, and the conspiracy count “ended” on December 10, 2008. Judgment at 1, *United States v. Longoria*, No. 8:09-cr-340 (D. Fla. Apr. 13, 2010).

122. Judgment at 1, *United States v. Longoria*, No. 8:16-cr-335, (D. Fla. Dec. 21, 2016). Notably, upon sentencing Mr. Longoria, the United States did not at first believe that he would qualify for the ACCA mandatory 15-year sentence based upon the three interrelated counts from his 2010 conviction. Transcript of Sentencing Hearing at 16–17, *United States v. Longoria*, No. 8:16-cr-335, (D. Fla. Jan. 11, 2017) (“When I put together the plea agreement, I didn’t think that Mr. Longoria was an armed career criminal. I had thought about the conspiracy and I realized that he had pled to two substantive counts, but in my way of thinking the conspiracy sort of subsumed the two substantive counts.”).

123. Mr. Longoria argued to the district court that he had not committed three qualifying offenses on “occasions different from one another.” 18 U.S.C. § 924(e)(1); *see* Transcript of Sentencing Hearing at 32–36, *United States v. Longoria*, No. 8:16-cr-355, (D. Fla. Jan 11, 2017).

occasions” objection by relying on his assent (when pleading guilty in 2009) to having committed three drug sales on different calendar dates.¹²⁴

On appeal, Mr. Longoria argued that the federal conspiracy count and two drug sale counts occurring within the temporal span of the conspiracy were not three offenses committed on “occasions different from one another.”¹²⁵ Further, Mr. Longoria averred that upon making the “different occasions” determination, the district court erred by relying on the date a hypothetical third sale, which was never charged and is not an element of conspiracy.¹²⁶ Finally, Mr. Longoria insisted that *Descamps* and *Mathis* require the conclusion that a sentencing court cannot rely on non-elemental facts of a prior proceeding when sentencing a defendant under the ACCA.¹²⁷

Without the benefit of oral argument, the Eleventh Circuit affirmed Mr. Longoria’s fifteen-year sentence, holding as a matter of first impression that his conspiracy offense and two distribution counts occurring within the timespan of the conspiracy constituted three “separate criminal episodes.”¹²⁸ The Eleventh Circuit recognized that the circuit “ha[d] yet to address the resolution of the ACCA’s different occasions inquiry when a substantive drug distribution offense occurs within the span of a conspiracy to distribute that drug.”¹²⁹ However, the Eleventh Circuit made its own factual determination that the “end date” of Mr. Longoria’s 2008 conspiracy, though not an element of that crime, occurred on a separate date from the two transactions and sufficed to overrule his “different occasions” objection.¹³⁰

124. During Mr. Longoria’s 2017 sentencing, the district court discussed the prior 2009 proceedings. *See* Transcript of Sentencing Hearing at 36–37, *United States v. Longoria*, No. 8:16-cr-355, (D. Fla. Jan. 11, 2017). (“During the plea colloquy the United States Attorney, looks to be Mr. Miller, recited the factual basis as set forth in the plea agreement, alluding to the November 24, 2008, transaction, the December 3rd transaction, and the December 10th transaction.”). Again, upon overruling the Petitioner’s objection to the ACCA, the court repeated that “the three transactions separately charged in the indictment constitute three prior convictions for serious drug offenses and that those convictions were committed on occasions different from one another and therefore [Mr. Longoria] is properly classified as an armed career criminal.” *Id.* at 37. The district court missed that Mr. Longoria had actually been charged and pled guilty to two substantive sales and a conspiracy count, which is defined by an agreement and does not include any sale. For the different occasions determination, it strongly seems that the district court thought it was addressing three prior drug sales when it was not. *Compare id. with* Judgment at 1, *United States v. Longoria*, No. 8:09-cr-340 (D. Fla. Apr. 13, 2010).

125. *See* Initial Brief of Appellant, *United States v. Longoria*, 874 F.3d 1278 (11th Cir. April 6, 2017) (No. 16-17645) 2017 WL 1315742.

126. *Id.*

127. *Id.*

128. *United States v. Longoria*, 874 F.3d 1278, 1281–82 (11th Cir. 2017) (citing *United States v. Pope*, 132 F.3d 684, 692 (11th Cir. 1998)). On November 20, 2017, Petitioner filed a Petition for Rehearing En Banc. After withholding the mandate for several months, the Eleventh Circuit eventually denied the Petition for Rehearing En Banc on May 4, 2018.

129. *Id.* at 1281.

130. *Longoria*, 874 F.3d at 1281–82. The Eleventh Circuit also dismissed the district court’s repeated reference to “three transactions,” even though Mr. Longoria had been convicted of two drug sales and one related conspiracy. *See id.* at 1280 n.9 (“The District Court’s language, while imprecise, does not constitute error here.

Mr. Longoria’s ACCA sentence shows how conspiracy does not fit into the analyses used for determining whether two predicate offenses, which occurred close in time, occurred on “occasions different from one another.”¹³¹ The Eleventh Circuit requires ACCA predicates to be “successive rather than simultaneous,”¹³² and to arise out of “separate and distinct criminal episode[s].”¹³³ Nevertheless, it affirmed Mr. Longoria’s enhancement based upon two substantive drug offenses that occurred within the temporal span of a conspiracy.¹³⁴ The Eleventh Circuit’s conclusion that Mr. Longoria’s counts of conviction constituted three “separate criminal episodes” and that “[t]here is no question that Longoria ‘had the opportunity to desist but chose instead to commit another crime’” was invalid because conspiracy is one continuous crime involving several transactions.¹³⁵ Certainly, the fifteen-year enhancement for Mr. Longoria seems to fall outside the congressional intent for this recidivist, mandatory enhancement.

In addition, Mr. Longoria’s case illustrates how relying on non-elemental facts to resolve the ACCA’s “different occasions” requirement cannot be reconciled with the Sixth Amendment. In order to resolve Mr. Longoria’s “different occasions” objection, the district court and Eleventh Circuit relied upon non-elemental facts from a 2009 conspiracy count that had never been found by a judge or jury, including the date that the conspiracy ended.¹³⁶ Relying on non-elemental facts from Mr. Longoria’s 2010 proceeding to enhance his statutory minimum in 2017 implicates the precise Sixth Amendment problems that the Supreme Court has attempted to avoid when sentencing courts examine individuals’ ACCA priors.¹³⁷

The Supreme Court’s rationale for the elemental analysis of prior offenses cannot be reconciled with the Eleventh Circuit’s treatment of Mr. Longoria’s ACCA sentence.¹³⁸ In *Shepard, Descamps*, and *Mathis*, the Supreme Court repeatedly concluded that if a sentencing court were to answer the ACCA-predicate question by “try[ing] to discern what a trial showed, or a plea proceeding revealed, about the defendant’s underlying conduct,” this method would conflict with the Sixth

Longoria’s sentence was enhanced because his two distribution convictions and on conspiracy conviction constituted the necessary three serious drug offense predicates.”)

131. 18 U.S.C. § 924(e)(1) (2012).

132. *United States v. Pope*, 132 F.3d 684, 692 (11th Cir. 1998) (holding that “so long as predicate crimes are successive rather than simultaneous, they constitute separate criminal episodes for purposes of the ACCA”).

133. *United States v. Sneed*, 600 F.3d 1326, 1329 (11th Cir. 2010).

134. *Longoria*, 874 F.3d at 1281.

135. *Id.* at 1278–90; see *United States v. Terzado-Madruga*, 897 F.2d 1099, 1124 (11th Cir. 1990).

136. See generally Judgment, *United States v. Longoria*, No. 8:16-cr-355, (D. Fla. Dec. 21, 2016); *United States v. Longoria*, 874 F.3d 1278, 1278 (11th Cir. 2017).

137. See *Taylor v. United States*, 495 U.S. 575, 600–01 (1990); *Descamps v. United States*, 570 U.S. 254, 259–60 (2013); *Mathis v. United States*, 136 S. Ct. 2243, 2245 (2016).

138. See *supra* section II(A); *Descamps*, 570 U.S. at 256 (“Under ACCA, the sentencing court’s finding of a predicate offense indisputably increases the maximum penalty. Accordingly, that finding would (at least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction.”).

Amendment's promise that a jury—not a sentencing court—will find such facts,¹³⁹ unanimously and beyond a reasonable doubt.¹⁴⁰ This fact-finding or “discern [ment],” however, is what the courts did in Mr. Longoria's case: his objection to the ACCA sentencing enhancement in 2016 was decided entirely by judicial interpretation of what he admitted to in a wholly unrelated proceeding in 2010.¹⁴¹

When Mr. Longoria pled guilty—on one day in 2009—to two substantive counts and the related conspiracy count in federal court, there were many reasons why he would not contest any facts that were unnecessary for the court to accept his plea. Such reasons include, for example, desire to show his remorse for his conduct, to get credit for his cooperation with law enforcement, and to get a lower sentence from the court.¹⁴² Also, when he pled to these three temporally overlapping counts, none of the parties considered the temporal or interrelated nature of these counts to be relevant to those proceedings.¹⁴³ Years later, the court of appeals relied upon the “end date” of his conspiracy—a fact to which he did not need to admit when pleading guilty—to determine that the conspiracy offense occurred on “occasions different” from each of the substantive transactions that were within its temporal span.¹⁴⁴ The court's factual inferences about Mr. Longoria's 2009 conspiracy offense, which he never had the opportunity to contest, resulted in a fifteen-year mandatory sentence.¹⁴⁵ This is the Sixth Amendment problem that the Supreme Court has tried to avoid: judicial fact-finding about a defendant's prior offense that leads to the imposition of a higher statutory penalty.¹⁴⁶

Upon examination of Mr. Longoria's case and his resulting mandatory sentence, there can be no question that conspiracy, as a predicate ACCA “serious drug offense,” is particularly ill-suited to the ACCA's different occasions analysis.

139. *Shepard v. United States*, 544 U.S. 13, 26 (2005); *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016); *Descamps v. United States*, 570 U.S. 254, 261 (2013).

140. *Descamps*, 133 S. Ct. at 2288; *Mathis*, 136 S. Ct. at 2252.

141. The district court, while noting that it was limiting its analysis to *Shepard*-approved documents, found that Mr. Longoria did not object to the commission of three transactions during his 2009 plea colloquy. Transcript of Sentencing Hearing at 16–17, 34–37, *United States v. Longoria*, No. 8:16-cr-355, (D. Fla. Jan 11, 2017) (“During the plea colloquy the United States Attorney, looks to be Mr. Miller, recited the factual basis as set forth in the plea agreement, alluding to the November 24, 2008, transaction, the December 3rd transaction, and the December 10th transaction.”).

142. *Mathis*, 136 S. Ct. at 2253 (explaining that a non-elemental fact may go unchallenged by the defendant in the prior proceeding because “a defendant may have no incentive to contest what does not matter under the law” and may even “have good reason not to” contest those facts at the time).

143. *Descamps*, 570 U.S. at 270–71.

144. *United States v. Longoria*, 874 F.3d 1278, 1278–290 (11th Cir. 2017).

145. Judgment at 1–2, *United States v. Longoria*, No. 8:16-cr-355, (D. Fla. Dec. 21, 2016); *United States v. Longoria*, 874 F.3d 1278 (11th Cir. 2017).

146. *Mathis*, 136 S. Ct. at 2253 (“At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he ‘may have good reason not to’—or even be precluded from doing so by the court.”); see *Descamps*, 570 U.S. at 270–71 (“And during plea hearings, the defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations. In this case, for example, [the defendant] may have let the prosecutor's statement go by because it was irrelevant to the proceedings. He likely was not thinking about the possibility that his silence could come back to haunt him in an ACCA sentencing 30 years in the future.”).

IV. HOW COURTS SHOULD TREAT CONSPIRACY AND RELATED OFFENSES IN THE CONTEXT OF THE ACCA’S DIFFERENT OCCASIONS REQUIREMENT

Courts have struggled with the timing and “counting” of conspiracy offenses outside of the ACCA. For example, courts addressed conspiracy in the context of the mandatory life sentence enhancement known as “§ 851 enhancement,” a recidivist enhancement imposing a life sentence where the defendant has a prior felony drug offense.¹⁴⁷ There, courts have permitted a defendant’s sentence for conspiracy to distribute drugs to be enhanced by state felony drug convictions that occurred during the time frame of that conspiracy.¹⁴⁸ In one such case, the Sixth Circuit determined that where (i) a defendant’s state drug conviction occurred more than three years before the conclusion of his participation in a conspiracy, and (ii) he was convicted (on the drug sale) more than a year prior to the end of the conspiracy, the two crimes counted separately for the purposes of the § 851 enhancement.¹⁴⁹ There, the court reasoned that the defendant “had an opportunity after each conviction to cease his criminal activity, but he chose to continue.”¹⁵⁰ Further, in addressing conspiracy as the predicate offense for a § 851 mandatory life sentence, the Eleventh Circuit concluded that a defendant’s continued participation in a single conspiracy to possess with intent to distribute cocaine after his second conviction became final triggered the mandatory minimum in § 841(b)(1)(A)(ii).¹⁵¹

Despite these precedents, criminal defendants argue that their due process and double jeopardy rights are violated when their sentences are enhanced for substantive crimes occurring within the same time frame as an alleged conspiracy.¹⁵² Recently, some appellate courts addressing temporally close, overlapping, or related crimes have acknowledged the government’s burden to prove three true “different occasions” before imposing the ACCA, and have declined to apply the ACCA when the government has not met this burden.¹⁵³

147. See 21 U.S.C. § 851 (2012).

148. See *United States v. Odeneal*, 517 F.3d 406, 417 (6th Cir. 2008) (finding that a felony committed during time frame of charged drug conspiracy could be considered a prior felony conviction for § 851 at sentencing) (reversed on other grounds). The Fourth Circuit also rejected the argument that using convictions for the substantive offenses of a conspiracy to enhance the conspiracy charge violates the constitutional prohibition against double jeopardy. *United States v. Ambers*, 85 F.3d 173, 177–78 (4th Cir. 1996).

149. *United States v. Willoughby*, 653 F.3d 738, 741 (8th Cir. 2011).

150. *Odeneal*, 517 F.3d at 417.

151. *United States v. Williams*, 469 F.3d 963, 965 (11th Cir. 2006); see 21 U.S.C. § 841(a)(1), (b)(1)(A)(ii) (year).

152. See *United States v. Braden*, 612 F. App’x 336, 340 (6th Cir. 2015); see also *United States v. Schaffer*, 586 F.3d 414, 422–23 (6th Cir. 2009) (recognizing that conspiracy is a different crime than the commission of the crimes which it contemplates, and is a crime whether or not it succeeds).

153. See *United States v. King*, 853 F.3d 267, 274, 276–79 (6th Cir. 2017); *United States v. McCloud*, 818 F.3d 591, 596 (11th Cir. 2016) (“When it is equally likely that the crimes were committed simultaneously as it is that they were committed successively, the Government has not met its evidentiary obligation under the preponderance of the evidence standard.”); *United States v. Span*, 789 F.3d 320, 327 (4th Cir. 2015) (vacating district court’s application of ACCA enhancement in finding that the Government failed to meet its burden in

After decades of attempted congressional sentencing reforms, Congress passed the First Step Act in December 2018, which should inject moderate hope for the many concerned with mass incarceration.¹⁵⁴ Indeed, as Judge Mark Bennett explained, the “long term prospects of reducing federal mass incarceration likely will depend on the ability of Congress to repeal the mandatory minimums or at least reduce their harsh impact on so many offenders.”¹⁵⁵

With respect to the use of conspiracy and its related component crimes as separate ACCA predicates, a small revision to the ACCA could “lessen the harsh impact” of this fifteen-year mandatory sentence.¹⁵⁶ A potential revision would eliminate the inappropriate application of the ACCA’s severe sentence by preventing conspiracy from being counted separately from the substantive offenses when one individual has been punished for both.

This Article’s suggested revision would imitate the First Step Act’s recent amendment to the “stacking” provision in 18 U.S.C. § 924(c).¹⁵⁷ Previously, when a prosecutor “stacked” § 924(c) charges to the substantive charges in one indictment, individuals could be sentenced to the twenty-five-year consecutive provision for recidivists.¹⁵⁸ In the First Step Act, Congress clarified that the twenty-five-year consecutive provision does not apply unless a defendant has a § 924(c) conviction that has become final, and then commits a subsequent § 924(c) offense.¹⁵⁹ The revision clarifies that the twenty-five-year sentence does not apply to 924(c) charges

proving through *Taylor*- and *Shepard*-approved materials that prior felonies were separate and distinct criminal episodes); *Kirkland v. United States*, 687 F.3d 878, 889 (7th Cir. 2012) (“[W]e conclude that the more appropriate burden allocation for the separate occasions inquiry requires the government to establish by the preponderance of the evidence—using *Shepard*-approved sources—that the prior convictions used for the ACCA enhancement were ‘committed on occasions different from one another.’ In practice, this means that if the *Shepard*-approved documents before a district court are equivocal as to whether the offenses occurred on the same occasion, the ACCA does not apply.”); see *Duncan v. United States*, 2016 WL 3440560, at *8 (C.D. Ill. June 20, 2016) (“The law is clear that if the *Shepard*-approved documents before a district court are equivocal as to whether the offenses occurred on the same occasion, the ACCA does not apply.”).

154. First Step Act of 2018, Pub. Law 115-391 (S. 756), 132 Stat. 5194 (enacted Dec. 21, 2018) [hereinafter *FSA*]. Signed into law on December 21, 2018, § 404(b) of the First Step Act makes retroactive the Fair Sentencing Act of 2010’s reduction in the disparity between crack and powder cocaine sentences to defendants whose offense occurred before the Act’s passage. *Id.* § 404(b).

155. Mark W. Bennett, *A Slow Lynching? The War on Drugs, Mass Incarceration, Doing Kimbrough Justice, and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873, 914 (2014).

156. *Id.* To be sure, Judge Bennett has argued for the repeal of all mandatory minimums, other than for crimes proximately causing death, crimes of treason, and for production of hands-on child pornography. *Added to Incarceration: A Federal Judge Reveals Shocking Truths About Federal Sentencing and Fleeting Hopes for Reform*, 87 UMKC L. REV. 3 (2018). He believes that federal trial judges know when an offender deserves a long sentence, and when they err, the courts of appeal are available to remand. *Id.* at 21.

157. *FSA*, *supra* note 154, at § 403(a) (“IN GENERAL.—Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking ‘second or subsequent conviction under this subsection’ and inserting ‘violation of this subsection that occurs after a prior conviction under this subsection has become final.’”).

158. 18 U.S.C. § 924(c) (2012).

159. *FSA*, *supra* note 153, at § 403(a).

within the same judgment of conviction.¹⁶⁰ To be clear, the punishments for carrying a firearm while committing another crime remain quite severe. This revision, however, clarified the application of a particularly harsh twenty-five-year sentence in cases where an offender was being enhanced as a recidivist for conduct being indicted or convicted on the same day.

Alternatively, Congress could amend the ACCA to require intervening arrests or convictions between the qualifying “violent felonies” and “serious drug offenses.” Such a revision would parallel the approach utilized for calculating criminal histories with the federal sentencing guidelines. The Sentencing Commission, for the purposes of calculating criminal history points, counts offenses separately if they were separated by an intervening arrest.¹⁶¹ In contrast, the Commission treats as a “single sentence” any offenses charged in the same charging instrument or sentenced on the same day.¹⁶² Should the ACCA be revised to count offenses similarly, Mr. Longoria would have only one qualifying predicate offense from his 2009 indictment for the three related counts. Such a revision would comport with the Sixth Amendment, congressional intent, and a degree of fairness that Mr. Longoria was indeed not afforded.

CONCLUSION

Conspiracy is a ubiquitous crime. As discussed, several of the unique features of the crime of conspiracy make it a highly problematic offense when employed as a predicate for the ACCA’s fifteen-year mandatory sentence. In a conspiracy, criminal liability may attach as early as the agreement between two parties, and the extent of co-conspirator or *Pinkerton* liability is vast.¹⁶³ Further, the continuous nature of conspiracy makes it uncomfortable to analyze within the paradigms employed for the ACCA’s “different occasions” requirement. The problematic use of conspiracy offenses as an ACCA predicate is compounded when an offender’s prior conspiracy offense is counted in addition to substantive offenses of that conspiracy.

The ACCA’s legislative history and “different occasions” amendment demonstrate that the extreme punishment was reserved for individuals who made repeat decisions to commit criminal conduct. Permitting an individual to be enhanced as an armed career criminal for two substantive sales within the temporal span of the

160. *Id.*

161. See U.S. SENTENCING GUIDELINES MANUAL, *supra* note 34, at § 4A1.2(a)(2). When computing the criminal history of an individual with multiple prior offenses, the trial court must “determine whether those sentences are counted separately or treated as a single sentence.” *Id.* Prior sentences “always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Treat any prior sentence covered by (A) or (B) as a single sentence.” *Id.*

162. *Id.*

163. See *supra*, Section I.

related conspiracy contradicts this congressional intent. Finally, when the ACCA is applied to an offender based upon a conspiracy offense and substantive acts within that conspiracy, it necessarily requires the types of judicial fact-finding that the Supreme Court has repeatedly concluded violates the Sixth Amendment. If Congress revises the ACCA to eliminate the use of conspiracy or the use of related substantive offenses as separate predicates, this would moderately reduce the application of this harsh sentence. At the very least, such a revision would have prevented Mr. Longoria's fifteen-year sentence, imposed for the criminal "career" which he pled guilty to on a single day.