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The Armed Career Criminal Act: Sentence Enhancement Statute or New Offense?

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THE ARMED CAREER CRIMINAL ACT: SENTENCE ENHANCEMENT STATUTE OR NEW OFFENSE?

INTRODUCTION

The first sentence of section 1202(a) of title VII of the Omnibus Crime Control and Safe Streets Act of 1968[1] provides that a convicted felon who possesses, receives, or transports a firearm in interstate commerce may be sentenced to imprisonment for up to two years, fined up to $10,000, or both.[2] The second sentence of the statute, the Armed Career Criminal Act of 1984[3] ("ACCA"), requires that a convicted felon who possesses, receives, or transports a firearm in commerce and who has three prior convictions for robbery, burglary, or both, must receive a sentence of at least fifteen years imprisonment and be fined up to $25,000.[4] The ACCA imposes no maximum term of imprisonment.[5] Therefore, upon proof of the defendant's three prior convictions, the sentencing

1. 18 U.S.C. app. § 1202(a) (1982) (repealed by Pub. L. No. 99-308, § 104(b), 1986 U.S. Code Cong. & Admin. News (100 Stat.) 459) (recodified with amendments at 18 U.S.C. § 922(g) (Supp. IV 1986)).

Section 1202(a) provides:

> Any person who —
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or
>
> (2) has been discharged from the Armed Forces under dishonorable conditions, or
>
> (3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or
>
> (4) having been a citizen of the United States has renounced his citizenship, or
>
> (5) being an alien is illegally or unlawfully in the United States,
>
> and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both. In the case of a person who receives, possesses, or transports in commerce or affecting commerce any firearm and who has three previous convictions by any court referred to in paragraph (1) of this subsection for robbery or burglary, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under this subsection, and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

18 U.S.C. app. § 1202(a) (1982 & Supp. III 1985) (repealed 1986).

2. *See id.*

3. *See* 18 U.S.C. app. § 1202(a) (Supp. III 1985) (repealed by Pub. L. No. 99-308, § 104(b), 1986 U.S. Code Cong. & Admin. News (100 Stat.) 459) (recodified with amendments at 18 U.S.C. § 924(e)(1) (Supp. IV 1986)). The ACCA was appended to the first provision of § 1202(a) by Pub. L. No. 98-473, § 1802, 98 Stat. 2185.

4. *See* 18 U.S.C. app. § 1202(a) (Supp. III 1985) (repealed by Pub. L. No. 99-308, § 104(b), 1986 U.S. Code Cong. & Admin. News (100 Stat.) 459) (recodified with amendments at 18 U.S.C. § 924(e)(1) (Supp. IV 1986)).

5. *See id.*; *see also* United States v. Davis, 801 F.2d 754, 756-57 (5th Cir. 1986) ("sentencing statutes are not unconstitutionally vague for failure to fix a maximum sentence").

judge has discretion to sentence the defendant to a jail term ranging from a minimum mandatory sentence of fifteen years without parole to life imprisonment.[6]

Effective November 15, 1986, Congress repealed section 1202(a)[7] but immediately reenacted and recodified it into the Firearm Owners' Protection Act of 1986 in Title 18 of the United States Code.[8] Many courts,

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6. *See* United States v. Blannon, 836 F.2d 843, 845 (4th Cir.), *cert. denied*, 108 S. Ct. 1741 (1988).

7. 18 U.S.C. § 1202(a) (1982) (repealed by Pub. L. No. 99-308, § 104(b), 1986 U.S. Code Cong. & Admin. News (100 Stat.) 459).

8. The first sentence of § 1202(a) was incorporated into 18 U.S.C. § 922(g) (1986), and the Armed Career Criminal Act was incorporated into § 924(e)(1) (1986). The change is effectively a reenactment of the statute. *See* H.R. Rep. No. 99-495, 99th Cong., 2d Sess. 1, 23, 26, *reprinted in* 1986 U.S. Code Cong. & Admin. News 1327, 1349, 1352.

A few slight changes, however, resulted from this relocation. Section 922(g) adds fugitives from justice and unlawful users of, and persons addicted to, controlled substances to the list set forth in the first sentence of § 1202(a). *See* 18 U.S.C. § 922(g) (Supp. IV 1986).

Section 922(g) states:

> It shall be unlawful for any person —
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> (2) who is a fugitive from justice;
>
> (3) is an unlawful user of or addicted to any controlled substance . . . ;
>
> (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
>
> (5) who, being an alien, is illegally or unlawfully in the United States;
>
> (6) who has been discharged from the Armed Forces under dishonorable conditions; or
>
> (7) who, having been a citizen of the United States, has renounced his citizenship;
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g) (Supp. IV 1986).

The ACCA was also slightly modified by its recodification in § 924. Section 924(a)(1) changes the penalty for such an offense from $10,000, two years imprisonment, or both, to $5,000, five years imprisonment, or both. *See* 18 U.S.C. § 924(a)(1) (Supp. IV 1986). Section 924(e)(1), the new ACCA, reads:

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

18 U.S.C. 924(e)(1) (Supp. IV 1986). This language adopts the penalty provision of the second sentence of § 1202(a) for "three previous convictions . . . for a violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1) (Supp. IV 1986). Section 924(e)(2)(B) defines a violent felony as "any crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 924(e)(2)(B) (Supp. IV 1986). Therefore, despite the minor changes resulting from the relocation of the legislation, the question of statutory interpretation remains the same.

Repeal of the ACCA does not affect a conviction if the defendants' criminal acts and

however, continue to discuss the issue in terms of the repealed statute.[9] Therefore, in the interest of clarity and convenience, the statutory analysis that follows will be discussed in terms of 18 U.S.C. app. § 1202(a).

The courts disagree whether the ACCA creates a new federal offense or whether it merely enhances the penalty for a preexisting federal offense.[10] The differing interpretations of the statute pose significant constitutional issues. If the ACCA constitutes a separate offense and this offense has not been set forth in the indictment, the due process rights of the defendant have been violated.[11] Furthermore, if the ACCA creates a separate federal offense, the government carries the burden of proving each element of that offense,[12] and failure to comply with this procedure precludes use of the ACCA to impose the greater sentence.[13]

If the statutory provision is simply one of penalty enhancement, however, the defendant only need be tried for the present crime or crimes, and the jury need not decide whether requirements of the ACCA have been satisfied.[14] In addition, if the ACCA is a sentence enhancement

indictment occurred before its repeal. *See* United States v. Gourley, 835 F.2d 249, 250 n.1 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 1741 (1988); *see also* 1 U.S.C. § 109 (1982) ("repeal of any statute shall not have the effect to release or extinguish any penalty . . . under such statute"). Most case law discussing whether the ACCA is a penalty enhancement statute addresses the issue in terms of § 1202(a). *See, e.g.*, United States v. Brewer, 841 F.2d 667, 668-69 (6th Cir. 1988); United States v. Rush, 840 F.2d 574, 576 (8th Cir.) (en banc), *cert. denied*, 108 S. Ct. 2908 (1988); United States v. Blannon, 836 F.2d 843, 844 (4th Cir.), *cert. denied*, 108 S. Ct. 1741 (1988); United States v. West, 826 F.2d 909, 911-12 (9th Cir. 1987). The analysis contained in this Note, therefore, applies to both the old and new provisions.

9. *See supra* note 8.

10. *Compare Rush*, 840 F.2d at 576 (en banc) (sentence enhancement statute) *and West*, 826 F.2d at 911 (same) *and* United States v. Jackson, 824 F.2d 21, 22-25 (D.C. Cir. 1987) (same), *cert. denied*, 108 S. Ct. 715 (1988) *with* United States v. Brewer, 841 F.2d 667, 668 (6th Cir. 1988) (new federal crime) *and* United States v. Davis, 801 F.2d 754, 755 (5th Cir. 1986) (same).

11. *See In re* Winship, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); Cole v. Arkansas, 333 U.S. 196, 201 (1948) (procedural due process requires notice of specific charges); De Jonge v. Oregon, 299 U.S. 353, 362 (1937) ("Conviction upon a charge not made would be a sheer denial of due process.").

12. *See In re* Winship, 397 U.S. at 361-62; United States v. Brewer, 841 F.2d 667, 668 (6th Cir. 1988); United States v. Davis, 801 F.2d 754, 756 (5th Cir. 1986); Harper v. United States, 666 F. Supp. 902, 906 (N.D. Miss. 1987); 9 J. Wigmore, Evidence § 2497, at 405 (1981).

13. *See* United States v. Brewer, 841 F.2d 667, 668-69 (6th Cir. 1988); United States v. Davis, 801 F.2d 754, 756 (5th Cir. 1986); Harper v. United States, 666 F. Supp. 902, 906 (N.D. Miss. 1987).

14. *See* United States v. Rush, 840 F.2d 574, 576 (8th Cir.) (en banc), *cert. denied*, 108 S. Ct. 2908 (1988); United States v. Wood, 834 F.2d 1382, 1390 (8th Cir. 1987); United States v. Jackson, 824 F.2d 21, 23 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 715 (1988); United States v. Hawkins, 811 F.2d 210, 218 (3d Cir.), *cert. denied*, 108 S. Ct. 110 (1987); *cf.* McMillan v. Pennsylvania, 106 S. Ct. 2411, 2420 (1986) ("there is no Sixth Amendment right to jury sentencing"); Field v. Sheriff of Wake County, 831 F.2d 530, 536-37 (4th Cir. 1987) (judicial consideration of sentencing factors does not violate defendant's constitutional rights); Buckley v. Butler, 825 F.2d 895, 903 (5th Cir. 1987), *cert.*

statute, the government is not required to prove the defendant's prior convictions beyond a reasonable doubt.[15] Consequently, issues of indictment and proof are not implicated.[16]

This Note will show that the ACCA is properly interpreted as a sentence enhancement provision. Part I of this Note demonstrates the ACCA to be a sentence enhancement statute by examining its plain language, structure and legislative history. Part II discusses recidivist statutes and shows, by analogy, that the ACCA is such a statute. Part II also considers policy matters that are implicated in the interpretation of the ACCA. This Note concludes that the ACCA appropriately is deemed a sentence enhancement provision.

I. INTERPRETING THE ACCA

The initial step in interpreting a statute is to examine its plain language.[17] When no more than one meaning is possible, the statutory language is plain and courts must follow the clear legislative directive before them.[18] Unfortunately, no such clarity exists with regard to the ACCA and an examination of the statute's language and structure as well as an investigation of its legislative history, is necessary.[19]

A. *Language and Structure of the ACCA*

The ACCA displays many characteristics of a sentence enhancement statute. The language of the ACCA may be viewed merely as an expan-

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denied, 108 S. Ct. 1738 (1988) ("there is no Fifth Amendment right to grand jury indictment on the sentencing facts, nor any Sixth Amendment right to their determination by a petit jury").

15. *See* United States v. West, 826 F.2d 909, 911 (9th Cir. 1987); *see also* McMillan v. Pennsylvania, 106 S. Ct. 2411, 2419-20 (1986) (preponderance standard satisfies due process when dealing with a sentencing consideration rather than with an element of an offense); Buckley v. Butler, 825 F.2d 895, 903 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1738 (1988) (due process does not require sentencing factors to be shown beyond a reasonable doubt or even by clear and convincing evidence); United States v. Hawkins, 811 F.2d 210, 220 (3d Cir.), *cert. denied*, 108 S. Ct. 110 (1987) (defendant's prior convictions need not be charged nor presented to the jury).

Even if the ACCA is a sentence enhancement statute, the previous convictions upon which the sentence is based must be constitutionally valid. *See* United States v. Tucker, 404 U.S. 443, 448-49 (1972); Burgett v. Texas, 389 U.S. 109, 114-15 (1967). *But see* Lewis v. United States, 445 U.S. 55, 65 (1980) (focusing on fact that if a conviction exists, whether or not that conviction is reliable, court can sentence defendant under § 1202(a)(1) even though his prior conviction was obtained without counsel).

16. *See* United States v. Hawkins, 811 F.2d 210, 220 (3d Cir.), *cert. denied*, 108 S. Ct. 110 (1987); United States v. Gregg, 803 F.2d 568, 572 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1379 (1987).

17. *See* United States v. Turkette, 452 U.S. 576, 580 (1981); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); Lewis v. United States, 445 U.S. 55, 60 (1980); Caminetti v. United States, 242 U.S. 470, 485 (1917).

18. *See Caminetti*, 242 U.S. at 485; Hamilton v. Rathbone, 175 U.S. 414, 421 (1899).

19. *See* Thompson v. Thompson, 108 S. Ct. 513, 516 (1988); Garrett v. United States, 471 U.S. 773, 779 (1985); United States v. Hawkins, 811 F.2d 210, 219 (3d Cir.), *cert. denied*, 108 S. Ct. 110 (1987).

sion of the first provision of the statute.[20] The beginning phrase of the ACCA, "in the case of", implies a connection with the first sentence of section 1202(a).[21] Dependence upon the first sentence demonstrates intent to create a sentence enhancement statute.[22] Inflated penalties for conviction under another statutory provision typically are associated with sentence enhancement statutes.[23] Thus, the interrelationship between the ACCA and the first sentence of 18 U.S.C. § 1202(a) suggests that the ACCA is a sentence enhancement statute.

Nevertheless, the ACCA may be read to create a new offense. It restates the elements of the first sentence of section 1202(a).[24] The ACCA therefore could exist independently of the first sentence and so may be interpreted as creating a separate offense.[25] The two different interpretations of the language of the statute demonstrate that the ACCA's language is ambiguous. As a result, it is not dispositive as to the true construction of the ACCA.[26]

Although the language of the ACCA is unclear, the structure of the statute suggests that Congress did not design it to create a separate offense. Congress appended the ACCA in its original form to the Omnibus Crime Control and Safe Streets Act of 1968 without delineating it by a new number or subdivision.[27] This structure suggests reference to a single offense.[28]

The original ACCA also displays certain features common to sentence enhancement statutes in general.[29] Such characteristics include the im-

20. *See Hawkins*, 811 F.2d at 218; United States v. Gregg, 803 F.2d 568, 570 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1379 (1987).

21. *See* United States v. Rush, 840 F.2d 574, 577 (8th Cir.) (en banc), *cert. denied*, 108 S. Ct. 2908 (1988); *see also* United States v. West, 826 F.2d 909, 911 (9th Cir. 1987) (ACCA expands on the first sentence of the statute); *Hawkins*, 811 F.2d at 218-19 (same).

22. *See Rush*, 840 F.2d at 577; *see also* United States v. Davis, 801 F.2d 754, 756 (5th Cir. 1986) (sentence enhancement statutes "impose an increased punishment for those convicted under another statutory provision").

23. *See Davis*, 801 F.2d at 756; *see also infra* notes 30-32 and accompanying text.

24. *See* 18 U.S.C. app. § 1202(a) (Supp. III 1985) (repealed by Pub. L. No. 99-308, § 104(b), 1986 U.S. Code Cong. & Admin. News (100 Stat.) 459) (recodified with amendments at 18 U.S.C. § 924(e)(1) (Supp. IV 1986)).

25. *See* United States v. Rush, 840 F.2d 574, 577 (8th Cir.) (en banc), *cert. denied*, 108 S. Ct. 2908 (1988); *Davis*, 801 F.2d at 755-56.

26. *See infra* note 41 and accompanying text.

27. *See* United States v. Brewer, 841 F.2d 667, 673-74 (6th Cir. 1988) (Krupansky, J., concurring in part, dissenting in part) (citing United States v. Hawkins, 811 F.2d 210, 218-19 (3d Cir.), *cert. denied*, 108 S. Ct. 110 (1987)); *Hawkins*, 811 F.2d at 218-19.

28. *See Brewer*, 841 F.2d at 673-74 (Krupansky, J., concurring in part, dissenting in part) (citing *Hawkins*, 811 F.2d at 218-19); *Hawkins*, 811 F.2d at 218-19.

29. *See* United States v. Rush, 840 F.2d 574, 577 (8th Cir.) (en banc), *cert. denied*, 108 S. Ct. 2908 (1988); *Hawkins*, 811 F.2d at 218-19. At least one court has concluded that the original ACCA lacks common indicia of sentence enhancement. *See* United States v. Davis, 801 F.2d 754, 756 (5th Cir. 1986). Ironically, the Court of Appeals for the Fifth Circuit, subsequent to its decision in *Davis*, held a Louisiana recidivist statute constitutional and held that the multiple bill proceedings it required merely form part of the sentencing scheme for the subsequent offense, not a separate crime. *See* Buckley v. Butler, 825 F.2d 895, 902-04 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1738 (1988). This

position of a greater sentence for persons convicted under another statutory provision,[30] procedures for sentence hearings,[31] and titles that classify them as sentence enhancing statutes.[32] One court has argued that no dependence exists between section 1202(a) and the ACCA[33] and that conviction under the first provision is mentioned in the ACCA only to show in which court the three previous convictions must have occurred.[34] Thus, arguments support the notion that the ACCA does not impose a greater sentence for those convicted under another statute and may not be construed as a sentence enhancement provision.[35]

The restructuring of the ACCA, however, reinforces the sentence enhancement construction of the statute. Since the relocation of the ACCA, the statute makes specific reference to a person who violates section 922(g)—formerly the first sentence of section 1202(a).[36] The first characteristic of sentence enhancement statutes, therefore, may be found in the ACCA. Moreover, section 924, the location of the reenacted ACCA, bears the new title "Penalties",[37] constituting another characteristic of sentence enhancement provisions.[38] Thus, "Congress has now clearly, albeit prospectively, stated its intent to furnish a sentencing provision, and not a provision defining a separate indictable offense."[39]

"Lamentably, the ACCA . . . was not meticulously drafted . . . ."[40] While different interpretations of the actual language of the Armed Ca-

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multiple bill proceeding allows the prosecutor to alert the court of the defendant's prior convictions and to ask the court for an enhanced penalty without presenting the question to the jury. *Id.* at 902-03. This system resembles the ACCA in that the ACCA also requires previous convictions to impose the greater penalty. *See* 18 U.S.C. app. § 1202(a) (Supp. III 1985) (repealed 1986); 18 U.S.C. § 924(e)(1) (Supp. IV 1986). These similarities undermine the strength of the *Davis* decision. *See* United States v. Brewer, 841 F.2d 667, 673 n.5 (6th Cir. 1988) (Krupansky, J., concurring in part, dissenting in part).

30. *See Davis*, 801 F.2d at 756; United States v. Schell, 692 F.2d 672, 676 (10th Cir. 1982).

31. *See Davis*, 801 F.2d at 756.

32. *See id.*; *infra* notes 37-38 and accompanying text.

33. *See Davis*, 801 F.2d at 755-56.

34. *See id.* at 755-56.

35. *See id.*

36. *See* 18 U.S.C. § 924(e)(1) (Supp. IV 1986). The repeal and the subsequent relocation was a reenactment of the legislation. *See supra* note 8. The specific reference to § 922(g) implies that the ACCA depended on the first sentence of § 1202(a) before the reenactment.

37. *See* 18 U.S.C. § 924 (Supp. IV 1986); *supra* note 30 and accompanying text.

38. *See* United States v. Brewer, 841 F.2d 667, 675 (6th Cir. 1988) (Krupansky, J., concurring in part, dissenting in part); *supra* note 32 and accompanying text.

39. United States v. Jackson, 824 F.2d 21, 23 n.2 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 715 (1988); *see* United States v. Pirovolos, No. 87-1106, slip op. at 10 (7th Cir. Apr. 6, 1988); *see also Brewer*, 841 F.2d at 675 (Krupansky, J., concurring in part, dissenting in part) (labelling 18 U.S.C. § 924 "Penalties" indicates that the ACCA is a sentence enhancement statute); United States v. Rush, 840 F.2d 574, 576 n.6 (8th Cir.) (en banc), *cert. denied*, 108 S. Ct. 2908 (1988) ("Congress has clearly identified the ACCA amendment as a sentence enhancement provision by moving it into 18 U.S.C. § 924(e)(1) . . . .").

40. *Jackson*, 824 F.2d at 25; *see, e.g., Rush*, 840 F.2d at 577 (8th Cir. 1988) (en banc) (plain language and structure of ACCA inconclusive).

reer Criminal Act of 1984 are possible, its structure, especially after reenactment, indicates the ACCA is a sentence enhancement statute. When a statute is susceptible to more than one meaning, the legislative history should be examined to determine congressional intent.[41] An examination of the legislative history breaks this deadlock, showing the ACCA *is* a sentence enhancement statute.

B. *The Legislative History of the ACCA Indicates that Congress Intended to Enact a Sentence Enhancement Provision*

Congress enacted the ACCA to punish habitual, repeat offenders,[42] who, as a group, were found to be responsible for most crimes involving theft and violence.[43] By increasing the sentence[44] for career criminals and by involving the federal law enforcement system,[45] Congress antici-

41. *See* United States v. Public Utils. Comm'n, 345 U.S. 295, 315 (1953); *Jackson*, 824 F.2d at 24; United States v. Davis, 801 F.2d 754, 756 (5th Cir. 1986); *cf.* Hamilton v. Rathbone, 175 U.S. 414, 419 (1899) (other factors can be examined if the statute is ambiguous on its face); Garrett v. United States, 471 U.S. 773, 779 (1985) (existence of textual ambiguities caused Court to rely on language, structure, and legislative history to prove 21 U.S.C. § 848 was intended as a separate offense).

42. *See* 130 Cong. Rec. H10551 (daily ed. Oct. 1, 1984) (statement of committee member Rep. Wyden) ("We simply must put a stop to the career [criminals] . . . [W]e all know that a slap on the wrist won't be enough to deter these criminals."). This raises a question as to what constitutes a career criminal. *Compare* United States v. Wicks, 833 F.2d 192, 193 (9th Cir. 1987) (per curiam) (defendant sentenced under ACCA even though two of his three convictions arose from burglaries that occurred on the same night) *with* United States v. Petty, 828 F.2d 2, 3 (8th Cir. 1987) (per curiam) (six convictions for armed robbery, committed simultaneously, did not justify sentencing under the ACCA) *cert. denied*, 108 S. Ct. 1054 (1988). Exploration of this problem lies beyond the scope of this Note.

43. *See* H.R. Rep. No. 1073, 98th Cong., 2d Sess. 1-3, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3661-63.

44. *See* 18 U.S.C. app. § 1202(a) (Supp. III 1985) (repealed by Pub. L. No. 99-308, § 104(b), 1986 U.S. Code Cong. & Admin. News (100 Stat.) 459) (recodified with amendments at 18 U.S.C. § 924(e)(1) (Supp. IV 1986)). The House Report states that "[i]n 'enhancing' this offense . . . if the defendant has been convicted three times of [a violent felony], we are 'enhancing' an existing Federal crime. . . ." H.R. Rep. No. 1073, 98th Cong., 2d Sess. 5, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3661, 3665. The Court of Appeals for the Fifth Circuit, however, has interpreted the phrase " 'enhancing' an existing Federal crime", *id.*, to mean creating a new crime for firearm possession. *See* United States v. Davis, 801 F.2d 754, 756 (5th Cir. 1986). It stated that enhancing a crime is not synonymous with enhancing a penalty. *See id.*

45. Federal jurisdiction to prosecute under the ACCA is established easily. "[U]nder this statute, the U.S. prosecutor must merely show that a firearm has previously traveled in interstate commerce to establish Federal jurisdiction." H.R. Rep. No. 1073, 98th Cong., 2d Sess. 5, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3661, 3665; *see* United States v. Bass, 404 U.S. 336, 350 (1971); United States v. Patterson, 820 F.2d 1524, 1526 (9th Cir. 1987). Proof that the firearm was manufactured outside the state where the possession occurred suffices to show that commerce was affected. *See, e.g.*, United States v. Gourley, 835 F.2d 249, 251 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 1741 (1988); United States v. Gregg, 803 F.2d 568, 571 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1379 (1987).

pated a major reduction in the crime rate.[46] Senator Thurmond, then chairman of the Judiciary Committee, together with Senators Biden and Kennedy stated, in commenting on an amendment to the proposed ACCA, that the statute created an enhanced penalty for a person with prior convictions.[47] The prior convictions were deemed to be "a matter solely for the judge before the trial without requiring allegation in the indictment or proof at trial."[48]

The principal Senate sponsor of the ACCA, Senator Specter, specifically stated that the ACCA would not create a new federal crime.[49] Rather, the statute would provide a "stiffer sentence for career criminals."[50] Statements by Representative Hughes,[51] one of the principal sponsors of the ACCA in the House of Representatives, and other committee members further corroborate the enhancement purpose of the statute.[52] These statements clearly indicate that the aim of the ACCA

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46. *See* H.R. Rep. No. 1073, 98th Cong., 2d Sess. 1, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3661, 3661.

47. "[T]he enhanced penalties would be available if a person with . . . prior Federal or State . . . convictions were charged with a Federal offense. . . ." 130 Cong. Rec. S1563 (daily ed. Feb. 23, 1984).

48. *Id.*

49. "[The proposed ACCA] would create no new Federal crime. Under present section 1202(a), possession of a firearm by a convicted felon is already a Federal crime. . . ." 130 Cong. Rec. S13080 (daily ed. Oct. 4, 1984) (statement of Sen. Specter). When Senator Specter states the "present section 1202(a)," he is referring to the statute that existed prior to the enactment of the ACCA. That statute made it a federal crime for a convicted felon to possess a firearm. *See* 18 U.S.C. app. § 1202(a) (1982) (repealed by Pub. L. No. 99-308, § 104(b), 1986 U.S. Code Cong. & Admin. News (100 Stat.) 459) (recodified with amendments at 18 U.S.C. § 922(g) (Supp. IV 1986)).

50. 130 Cong. Rec. S13080 (daily ed. Oct. 4, 1984) (statement of Sen. Specter).

51. "[The proposed ACCA] would enhance the sanctions of 18 U.S.C. App. section 1202(a) with a 15-year minimum sentence if the defendant has been convicted three times of felonies for robbery or burglary." 130 Cong. Rec. H10550 (daily ed. Oct. 1, 1984) (statement of Rep. Hughes, Chairman of the Subcommittee on Crime). Representative Hughes further explained that

> [u]nder this approach, if the local authorities arrest a three-time loser [thrice convicted] in possession of a gun—in the course of a robbery or burglary or otherwise—and can convince the U.S. Attorney that circumstances warrant prosecution under the enhanced penalty provisions of this bill, the mandatory 15-year penalty is available.

Id. The word "prosecution" could be viewed as suggesting a new crime. Given the context of the statement, however, this interpretation is not accurate. Section 1202(a), the statute prior to the enactment of the ACCA, was always available to the U.S. Attorney. When the ACCA was enacted, the offense remained the same. The only difference was the effect, i.e. the greater sentence.

52. Representative Sawyer, a member of the House Subcommittee on Crime, stated:

> This proposal does not . . . expand Federal criminal law. H.R. 6248 [the ACCA] takes an existing gun possession statute and enhances the penalty for any violation by a person having been previously convicted three times. . . . [The ACCA] would apply the enhanced penalties of a fine of not more than $25,000 or imprisonment of not less than 15 years, or both, in addition to the penalties for the underlying offense.

130 Cong. Rec. H10550-51 (daily ed. Oct. 1, 1984). Another member of the House Subcommittee on Crime, Representative Smith, declared that the ACCA merely "provides

was to enhance existing sentencing provisions.

The only indication in the legislative history suggesting the creation of a new federal offense is found in the "Sectional Analysis" of the House Report.[53] It states, in part, that "[s]ection 2 amends 18 U.S.C. App. § 1202(a) by adding a new offense proscribing any felon who has been convicted previously of three felonies for robberies and or burglaries . . . ."[54] This statement, however, is inconclusive in light of the overwhelming documentation supporting an enhancement purpose.[55]

The great weight of legislative materials indicates that Congress intended to enhance the penalty for repeat criminals who violate federal firearm possession laws. Any evidence pointing to a contrary conclusion is minimal. The legislative history of the Armed Career Criminal Act evidences that Congress intended the ACCA to be a sentence enhancing provision, rather than a separate offense. The following examination of analogous recidivist statutes further proves that the ACCA was meant as a sentence enhancement statute.

II. BEYOND THE PLAIN MEANING AND LEGISLATIVE HISTORY

A. *Recidivism and the ACCA*

The ACCA is similar in language and structure to other recidivist provisions that have been construed as sentence enhancement statutes.[56] Recidivist statutes authorize increased sentences for criminals who habitually engage in unlawful activity.[57] Such statutes often have been chal-

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enhanced penalties for career criminals possessing a firearm." 130 Cong. Rec. H11982 (daily ed. Oct. 10, 1984).

53. H.R. Rep. No. 1073, 98th Cong., 2d Sess. 6, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3661, 3666.

54. *Id.*

55. *See* United States v. Rush, 840 F.2d 574, 577-78 (8th Cir.) (en banc), *cert. denied*, 108 S. Ct. 2908 (1988). This overwhelming documentation is found in the floor debates. *See supra* notes 47-53 and accompanying text.

While the traditional view of statutory construction disallowed the use of legislative debates under any circumstances, that view has been modified somewhat. *See* 2A N. Singer, Sutherland Statutes and Statutory Construction § 48.13, at 330 (4th ed. 1984). Now explanatory statements by a sponsor of a bill are allowed to be considered when interpreting a statute. *See id.*; *id.* at § 48.15, at 337. "Now the federal courts hold that statements by any members during legislative debates may be considered in the interpretation of a statute where they show a common agreement in the legislature about the meaning of an ambiguous provision." *Id.* at § 48.13, at 330.

56. *Compare* 18 U.S.C. § 924(e)(1) (Supp. IV 1986) (the "new" ACCA) *and* 18 U.S.C. app. § 1202(a) (Supp. III 1985) (repealed 1986) (the "old" ACCA) *with* 21 U.S.C. § 848 (Supp. III 1985) (continuing criminal enterprise statute) *and* 18 U.S.C. § 3575 (1982) (repealed 1987) (dangerous special offender statute) *and* 21 U.S.C. § 849(b) (1982) (repealed 1984) (special drug offender sentencing) *and* 18 U.S.C. § 3147 (Supp. IV 1986) (enhancing sentence for those who commit offenses while on bail).

57. In addition to federal recidivist statutes, *see, e.g.*, 18 U.S.C. § 3147 (Supp. IV 1986) (enhancing sentence for someone who commits an offense while released on bail); 21 U.S.C. § 841(b)(6) (1982) (enhancing penalty provision to be used at sentencing after conviction of the substantive crime), nearly every state has at least one recidivist statute in effect. *See, e.g.*, N.J.S.A. 2C:43-6(c), (d) (1982) (imposing harsher penalty because of

lenged as violating the due process,[58] double jeopardy,[59] equal protection,[60] and cruel and unusual punishment[61] provisions of the Constitution, but the Supreme Court repeatedly has recognized them as constitutional.[62] Because it imposes an increased sentence upon a repeat offender, the ACCA may be characterized as a recidivist statute.

In *Garrett v. United States*,[63] the Supreme Court analyzed a federal statute that imposed a ten-year prison sentence for engaging in a "continuing criminal enterprise," except that when the defendant has one or more prior convictions, he must be sentenced to a minimum of twenty years' imprisonment.[64] The Court construed the "exception" as a "recidivist provision, providing for twice the penalty for repeat violators of

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the defendant's repeated engagement in unlawful activities); 14 V.I.C. § 2253(a) (Cum. Supp. 1987) (merely enhancing the penalty for person with prior convictions); *see also* L. Sleffel, The Law and the Dangerous Criminal 1 (1977) (most states have repeat offender statutes in effect); Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 Harv. L. Rev. 511, 511 (1982) (same) [hereinafter *Selective Incapacitation*].

58. Recidivist statutes have withstood due process scrutiny because they are neither distinct offenses nor elements of the present offense. *See* Oyler v. Boles, 368 U.S. 448, 451-52 (1962); Note, *Recidivist Procedures*, 40 N.Y.U.L. Rev. 332, 332 n.5 (1965) [hereinafter *Recidivist Procedures*].

59. The imposition of a greater sentence for recidivist criminals does not violate the double jeopardy provision of the Constitution because recidivist statutes impose a harsher penalty on the defendant for the underlying present conviction, not for the previous convictions. *See, e.g.*, Gryger v. Burke, 334 U.S. 728, 732 (1948); Graham v. State, 224 U.S. 616, 623 (1912); United States v. Schell, 692 F.2d 672, 676 (10th Cir. 1982); Note, *Recidivist Procedures*, *supra* note 58, at 332, 348-49 (1965).

60. Differential treatment of recidivists, as compared to other criminals, has been held constitutionally permissible under the equal protection clause because recidivist statutes are reasonably related to the legitimate purpose of protecting the public. *See* Spencer v. Texas, 385 U.S. 554, 559-60 (1967); McDonald v. Massachusetts, 180 U.S. 311, 313 (1900); L. Sleffel, The Law and the Dangerous Criminal 20 (1977).

61. No recidivist statute has been found to violate the eighth amendment prohibition against cruel and unusual punishment. *See* Sleffel, *supra* note 60, at 20. Even those statutes that prescribe very harsh penalties have been upheld. *See, e.g.*, Solem v. Helm, 463 U.S. 277, 303 (1983) (South Dakota recidivist statute not unconstitutional but when applied, sentence violated eighth amendment); Rummel v. Estelle, 445 U.S. 263, 285 (1980) (holding Texas recidivist statute sentencing defendant to life imprisonment for the commission of three nonviolent felonies to be not cruel and unusual punishment).

62. *See, e.g.*, *Rummel*, 445 U.S. at 284-85 (1980); Spencer v. Texas, 385 U.S. 554, 559 (1967); Oyler v. Boles, 368 U.S. 448, 456-57 (1962); Graham v. State, 224 U.S. 616, 625-31 (1912); *see also* Note, *Selective Incapacitation*, *supra* note 57, at 513 ("the Supreme Court has repeatedly affirmed the constitutionality of state recidivist legislation").

63. 471 U.S. 773 (1985).

64. 21 U.S.C. § 848 (Supp. III 1985) reads in part:

> Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in section 853 of this title; *except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment, which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000. . . .*

Id. (emphasis added).

th[e] section."[65] It found that portion of the statute to contain language typical of recidivist provisions.[66]

Only two notable differences in language and structure exist between the statute in *Garrett* and the ACCA.[67] One difference is that the ACCA requires prior convictions of certain specified crimes.[68] Section 848, on the other hand, refers to prior convictions under subchapter I or II of that chapter.[69] In addition, section 848 uses the word "except" as a preface to the penalty prescribed for repeat offenders.[70] The ACCA uses the words "in the case of" to introduce the stiffer penalty for career criminals.[71] Section 848 refers to its enhanced penalty in the negative—a defendant gets a light penalty *unless* he has been convicted of certain prior acts.[72] The ACCA refers to its enhanced penalty in the positive—if a defendant has met certain criteria, he gets a heavier sentence.[73] These differences—listing specific crimes versus reference to crimes under other subchapters and the use of "except" versus "in the case of"—are merely different means leading to the same end: the enhanced penalty.

Both the ACCA and section 848 prescribe greater sentences for criminals who have prior convictions and both require the judge to sentence the defendant to a specified minimum period of imprisonment while no maximum is delineated.[74] Since only minor language differences exist between 21 U.S.C. § 848 and the ACCA,[75] the ACCA should also be construed as a recidivist statute.

Similarities also exist between the ACCA and 18 U.S.C. § 3575,[76]

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65. *Garrett*, 471 U.S. at 781. While the Court construed the "exception" as a recidivist provision, it held that another portion of 21 U.S.C. § 848 (Supp. III 1985) created a separate offense. *See id.* at 779-82; 21 U.S.C. § 848 (Supp. III 1985).

66. *Garrett*, 471 U.S. at 782.

67. *Compare* 18 U.S.C. § 924(e)(1) (Supp. IV 1986) (the "new" ACCA) *with* 21 U.S.C. § 848 (Supp. III 1985) (continuing criminal enterprise statute).

68. *See* 18 U.S.C. § 924(e)(1) (Supp. IV 1986) (the "new" ACCA).

69. *See* 21 U.S.C. § 848(a), (b) (1982). These violations include an array of offenses dealing with food and drugs. *See* 21 U.S.C. ch. 13 (1982).

70. *See* 21 U.S.C. § 848 (1982).

71. *See* 18 U.S.C. § 924(e)(1) (Supp. IV 1986) (the "new" ACCA).

72. *See* 21 U.S.C. § 848(a) (Supp. III 1985).

73. *See* 18 U.S.C. § 924(e)(1) (Supp. IV 1986) (the "new" ACCA).

74. *See Jackson*, 824 F.2d at 24; *see also* United States v. Brewer, 841 F.2d 667, 674 (6th Cir. 1988) (Krupansky, J., concurring in part, dissenting in part).

75. *See* United States v. Jackson, 824 F.2d 21, 24 & n.4 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 715 (1988).

76. 18 U.S.C. § 3575 (repealed 1987); *see Brewer*, 841 F.2d at 674 (Krupansky, J., concurring in part, dissenting in part) (noting that the language of several statutes, including § 3575, is "virtually identical to that in the ACCA"). Section 3575(b) stated in relevant part:

> If it appears by a preponderance of the information . . . that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony.

18 U.S.C. § 3575 (repealed 1987).

which, prior to its repeal, was construed consistently as a sentence enhancing statute.[77] Section 3575 required an enhanced sentence to be imposed upon "dangerous special offender[s]."[78] This categorization parallels that of the repeat offender targeted in the ACCA.[79] Both require prior convictions carrying penalties of more than one year imprisonment.[80] Furthermore, Congress aimed both statutes at the repeat offender who, despite previous incarceration, continues to engage in criminal activity.[81] The similarity in language and intent of the two statutes fortifies the position that the ACCA, like 18 U.S.C. § 3575, is a sentence enhancement statute.[82]

The similarities between the ACCA and other sentence enhancement statutes provide valuable insight into the interpretation of the ACCA. The analogies drawn strengthen the view that the ACCA does not create a separate criminal offense.

B. *Policy Considerations Require a Sentence Enhancement Construction*

Matters of policy also compel a sentence enhancement construction of the ACCA.[83] The prejudicial effect of prior conviction evidence requires a sentence enhancement construction of the ACCA. To require the government to prove the defendant's three prior convictions would prejudice the jury and work to the detriment of the defendant.[84] The injurious

77. *See, e.g.*, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 489 n.7 (1985); United States v. Soto, 779 F.2d 558, 563 (9th Cir. 1986), *modified*, 793 F.2d 217 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 110 (1987); United States v. Scarborough, 777 F.2d 175, 180 (4th Cir. 1985); United States v. Haley, 758 F.2d 1294, 1298 (8th Cir.), *cert. denied*, 474 U.S. 854 (1985); United States v. Schell, 692 F.2d 672, 676 (10th Cir. 1982); United States v. Williamson, 567 F.2d 610, 614 (4th Cir. 1977); *see also* United States v. Brewer, 841 F.2d 667, 674 (6th Cir. 1988) (Krupansky, J., concurring in part, dissenting in part).

78. A "special offender" is a defendant who previously has been convicted of at least two separate offenses punishable by death or imprisonment exceeding one year. *See* 18 U.S.C. § 3575(e)(1) (repealed 1987). Less than five years must have passed between the current conviction and the previous conviction(s) or the subsequent parole or release from imprisonment due to that previous conviction. *Id.* A defendant is "dangerous" when a longer sentence than that which the current felony conviction carries is needed to protect society from further criminal conduct by the defendant. *See* 18 U.S.C. § 3575(f) (repealed 1987).

79. *See* 18 U.S.C. § 924(e)(1) (Supp. IV 1986) (the "new" ACCA); 18 U.S.C. app. § 1202(a) (Supp. III 1985) (repealed 1986) (the "old" ACCA).

80. *Compare* 18 U.S.C. § 924(e)(2)(B) (1986) *and* 18 U.S.C. app. § 1202(c)(8), (9) (repealed 1986) *with* § 3575(e)(1) (repealed 1987).

81. *Compare* H.R. Rep. No. 1549, 91st Cong., 2d Sess. 4007, 4038-39, *reprinted in* 1970 U.S. Code Cong. & Admin. News 4007, 4010 (§ 3575 was "designed to deal with the professional offender") *with supra* notes 44-54 and accompanying text (legislative history of ACCA demonstrates an intention to control repeat offenders).

82. United States v. Brewer, 841 F.2d 667, 674 (6th Cir. 1988) (Krupansky, J., concurring in part, dissenting in part).

83. *See* United States v. Jackson, 824 F.2d 21, 25-26 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 715 (1988).

84. *See id.*; United States v. Gregg, 803 F.2d 568, 570, 572 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1379 (1987).

effect of prior conviction evidence[85] has made Congress, as a general rule, reluctant to include past criminal convictions as an element of a criminal offense.[86] No section of the United States Code makes proof of prior criminal convictions an element of another criminal offense.[87] Absent any congressional indication to the contrary, courts should respect and adhere to Congress' policy of excluding prior convictions as elements of crimes, and the ACCA should be construed as a sentence enhancement statute.[88]

Although the prejudicial effect on the jury of prior conviction evidence generally may be avoided by a bifurcated trial,[89] such a solution does not work here. Bifurcation, if intended, is always specifically provided for in the legislative enactment.[90] The statutory language of the ACCA contains no bifurcation provision.[91] The legislative history indicates that Congress did not intend to burden the prosecutors or the court system with bifurcated trials.[92]

The controversy over the ACCA centers on whether a defendant's three prior convictions constitute an element of an offense, which then must be "charged in the indictment and proved in the liability portion of the criminal trial rather than simply established at the sentencing hear-

85. *See* United States v. Brewer, 841 F.2d 667, 674 (6th Cir. 1988) (Krupansky, J., concurring in part, dissenting in part); *Jackson*, 824 F.2d at 25; *Gregg*, 803 F.2d at 570, 572; *see also* United States v. Bailleaux, 685 F.2d 1105, 1109 (9th Cir. 1982); United States v. Foskey, 636 F.2d 517, 523 (D.C. Cir. 1980); Government of Virgin Islands v. Castillo, 550 F.2d 850, 855 (3d Cir. 1977); Harrison v. State, 217 Tenn. 31, 41, 394 S.W.2d 713, 717 (Tenn. 1965); *cf.* Fed. R. Evid. 404(b) (1987) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.").

86. *See Jackson*, 824 F.2d at 25-26; *Castillo*, 550 F.2d at 854 n.7; *see, e.g.*, 18 U.S.C. § 3575(a) (repealed 1987) (that a defendant is an alleged "dangerous special offender" shall not be in issue at trial, nor shall it be disclosed to the jury); 21 U.S.C. § 849(a) (repealed 1984) ("dangerous special drug offender" status not disclosed to the jury without consent of parties).

87. *See* United States v. Jackson, 824 F.2d 21, 25 n.6 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 715 (1988).

88. *See* United States v. Brewer, 841 F.2d 667, 674 (6th Cir. 1988) (Krupansky, J., concurring in part, dissenting in part); *Jackson*, 824 F.2d at 25-26.

89. *See Brewer*, 841 F.2d 667, 669 (*citing* Spencer v. Texas, 385 U.S. 554, 566-68 (1966)); *see also id.* at 674 (Krupansky, J., concurring in part, dissenting in part).

90. *Brewer*, 841 F.2d at 674 (Krupansky, J., concurring in part, dissenting in part).

91. *See* 18 U.S.C. app. § 1202(a) (Supp. III 1985) (repealed 1986) (the "old" ACCA); *see also* 18 U.S.C. § 924(e)(1) (Supp. IV 1986) (the "new" ACCA).

92. As originally introduced, ACCA created a new offense and gave the local district attorneys a "veto" power so that no federal prosecution would be brought without the request or agreement of the local prosecutors. *See* S. Rep. No. 190, 98th Cong., 1st Sess. 3, 8 (1983). Because of the Justice Department's opposition to this veto power, along with the confusion over the coordination of prosecution procedures, the need for increased federal criminal justice resources, and the Subcommittee on Crime's wariness of the propriety of federal prosecution of local crimes, the original ACCA bill was abandoned and reconstituted into the bill that eventually passed. *See* H.R. Rep. No. 1073, 98th Cong., 2d Sess. 1, 1-6, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3661, 3661-66.

ing."[93] The word "conviction" implies a judgment following a verdict or plea of guilty. Under the ACCA, if a defendant has three previous convictions, it is unnecessary to require a jury to verify those convictions.[94] The sentence enhancement construction of the ACCA permits the statute to operate effectively without wasting judicial resources or complicating jury fact finding.[95]

Another argument against construing the ACCA as a sentence enhancement statute is the rule of lenity. This rule of construction states that when the intent of a statute is ambiguous, that statute should be construed in favor of the defendant.[96] While this rule of lenity applies to federal criminal statutes,[97] it plays no role in the interpretation of the ACCA.[98] Although the language of the ACCA is ambiguous, Congress' clear intention to create a sentence enhancement statute cures the ambiguity. Courts may not create ambiguity to frustrate Congress' intended purpose.[99] The rule of lenity, therefore, does not require the ACCA to be construed as creating a new offense.

CONCLUSION

Analysis of the language, structure, legislative history and policy surrounding the Armed Career Criminal Act clearly reveals that Congress intended the Act to serve as a sentence enhancement statute, rather than as a separate federal offense. The ACCA employs language similar to other sentence enhancement provisions. Further, the prejudicial effect of admitting defendants' prior convictions supports legislative intent to avoid creating this sort of new federal offense.

Through the ACCA, Congress sought to punish severely criminal offenders who chronically plague today's society. Congress evidently be-

93. United States v. Brewer, 841 F.2d 667, 668 (6th Cir. 1988); *see, e.g.*, United States v. Rush, 840 F.2d 574, 575-76 (8th Cir.) (en banc), *cert. denied*, 108 S. Ct. 2908 (1988); United States v. Gregg, 803 F.2d 568, 570 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1379 (1987); United States v. Davis, 801 F.2d 754, 755-56 (5th Cir. 1986).

94. "Prior convictions are highly verifiable matters of record which need not be subject to jury inquiry. . . . [N]o additional fact-finding is necessary." United States v. Brewer, 841 F.2d 667, 677 (6th Cir. 1988) (Krupansky, J., concurring in part, dissenting in part); *see also* United States v. Gregg, 803 F.2d 568, 570 (10th Cir. 1986) (though some were stipulated, prior convictions need not be alleged), *cert. denied*, 107 S. Ct. 1379 (1987).

95. *See supra* note 94 and accompanying text.

96. This rule of narrow construction is predicated on "the belief that fair warning should be accorded as to what conduct is criminal and punishable by deprivation of liberty or property." Huddleston v. United States, 415 U.S. 814, 831 (1974); *see, e.g.*, Bifulco v. United States, 447 U.S. 381, 387 (1980); United States v. Naftalin, 441 U.S. 768, 778-79 (1979); Simpson v. United States, 435 U.S. 6, 14-15 (1978).

97. *See Bifulco*, 447 U.S. at 387; United States v. Enmons, 410 U.S. 396, 411 (1973); Rewis v. United States, 401 U.S. 808, 812 (1971); United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977), *vacated*, 439 U.S. 810, *cert. denied*, 444 U.S. 864 (1979).

98. *See* United States v. Blannon, 836 F.2d 843, 845 (4th Cir.), *cert. denied*, 108 S. Ct. 1741 (1988).

99. *See* Bifulco v. United States, 447 U.S. 381, 387 (1980); *Blannon*, 836 F.2d at 845.

lieved that the best way to achieve this goal was to increase the sentence imposed on repeat offenders for federal crimes. The ACCA creates no new crime. Logically then, there is no deprivation of constitutional rights if violation of the ACCA is not alleged in the indictment and subsequently proved.

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