United States v. Leeson: The U.S. Court of Appeals Properly Sentences a Criminal Defendant under the Armed Criminal Career Act Leaving Remaining Sentencing Issues

INTRODUCTION

Evidentiary and criminal laws are designed to protect the presumption of innocence of individuals and give all criminal defendants a fair, unbiased trial.[1] The admissibility of statements and expert testimony against a criminal defendant depend on the facts of the particular case.[2] The admission of statements, testimony, and prior felony convictions can be very important in prosecution under the Armed Career Criminal Act ("ACCA") which punishes repeat offenders more severely than non-repeat offenders.[3]

In *United States v. Leeson*,[4] the United States Court of Appeals for the Fourth Circuit emphasized the right of the State in deciding a criminal trial against a repeat offender.[5] In the case, the U.S. Court of Appeals admitted statements made by the defendant while being handcuffed, admitted expert testimony based upon statements of other inmates in a mental health facility with the defendant, and applied the ACCA to find that Leeson had committed three earlier felony offenses making him eligible for an extended criminal sentence.[6]

This Note will first review the facts and holding of *United States v. Leeson*.[7] The Note will then examine how Federal Rules of Evidence 403 and 703 have been interpreted by most

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[1] 22A C.J.S. *Criminal Law* § 959 (2007).

[2] *Id.*

[3] 18 U.S.C. § 924(e) (2007).

[4] *See* United States v. Leeson, 453 F.3d 631 (4th Cir. 2006).

[5] *Id.*

[6] *Id.*

[7] *See infra* notes 11-45 and accompanying text.

courts and legal authority regarding similar criminal trials.[8] Then, this Note will look at other cases and authority discussing what constitutes three separate offenses to make one eligible for a longer prison sentence under the ACCA.[9] This Note will illustrate: 1) the court properly admitted Leeson's statement while being handcuffed by authorities, 2) the testimony of Dr. Dana regarding Leeson's sanity was properly admitted, and 3) the court properly found that Leeson had committed three earlier offenses making him eligible for an extended sentence under the ACCA although some sentencing issues remain unclear after the *Leeson* decision.[10]

FACTS AND HOLDING

In *United States v. Leeson*,[11] Leeson was a resident of Nutter Fort, West Virginia who presented himself at the Veteran's Administration (V.A.) hospital in Pittsburgh, Pennsylvania on August 6, 2003.[12] After speaking with Leeson, the admissions desk clerk at the hospital reported to hospital security that Leeson was acting strangely because he used three different surnames in an attempt to obtain medical treatment or medication.[13] In addition, the desk clerk noticed a bulge in Leeson's pocket and reported to authorities that it might be a gun.[14]

After receiving the report, two uniformed police officers of the V.A. arrived on the scene to investigate.[15] After observing a bulge in Leeson's belt, the first officer asked Leeson if he was

[8] *See infra* notes 46-70 and accompanying text.

[9] *See infra* notes 71-89 and accompanying text.

[10] *See infra* notes 90-149 and accompanying text.

[11] United States v. Leeson, 453 F.3d 631 (4th Cir. 2006).

[12] *Id.* at 632.

[13] *Id.*

[14] *Id.*

[15] *Id.*

a police officer.[16] Leeson falsely identified himself as "Larry McDonald" and claimed to be a Federal Bureau of Investigation (F.B.I.) agent.[17] The first officer asked Leeson whether he had a weapon and Leeson replied, "of course I have a weapon".[18]

After hearing this statement, the two officers requested Leeson to accompany them to the police station at the V.A. hospital in order to secure Leeson's weapon.[19] At the police station, Leeson surrendered his gun.[20] Since officers thought that Leeson's F.B.I. badge was suspicious, a supervising officer contacted the F.B.I. to verify Leeson's badge.[21] In the meantime, Leeson was allowed to return to his vehicle in the parking lot with his firearm to retrieve photographic identification and once in his car, Leeson quickly drove away.[22]

As Leeson began fleeing, the officers learned of Leeson's true identity and notified the Nutter Fort Police Department stating that Leeson was carrying a firearm.[23] The police department in turn contacted Sergeant Jeff McAtee of the Harrison County Sheriff's Department, an officer who was familiar with Leeson's prior convictions and the fact that these convictions prevented him from possessing a firearm.[24]

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[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 633.

Officers of several law enforcement agencies joined in pursuit of Leeson who led them on a high speed chase on U.S. Interstate 79.[25] After Leeson crossed into West Virginia, his car began to smoke causing him to exit off the interstate, bring his car to a stop, open the door, and exit the car.[26] Sergeant McAtee observed a .357 caliber revolver in a holster on Leeson's belt when Leeson got out of the car and when Leeson refused to put his hands on his car as ordered, the officers handcuffed him.[27] While being handcuffed, Leeson told the officers handcuffing him, "[E]asy, I could have made this bad for you".[28]

On September 4, 2003, a federal grand jury in the Northern District of West Virginia indicted Leeson on one count of being a convicted felon in possession of a firearm.[29] Following Leeson's arraignment, he was remanded to custody to await his trial where he filed notice of an insanity defense and moved for a psychiatric examination.[30] Leeson's motion for a psychiatric examination was granted by a U.S. Magistrate Judge so Leeson was transported to the Metropolitan Correctional Center (M.C.C. Chicago) for a psychiatric examination.[31] At M.C.C. Chicago, Dr. Dana examined and evaluated Leeson's mental health.[32] Following the evaluation, Dr. Dana found that "there is no indication that he was suffering from any form of cognitive impairment or mental illness impacting his ability to understand the nature and quality, or

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[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] 18 U.S.C. §§ 922(g)(1), 924 (a)(2) (2007).

[30] *See* United States v. Leeson, 453 F.3d 631 (4th Cir. 2006).

[31] *Id.* at 633.

[32] *Id.*

wrongfulness of his actions at the time of the instant offense".[33] Dr. Dana's report was partially based on the statements of two inmates at the M.C.C. which include a statement that Leeson "had approached them to recruit them in assisting him in looking crazy while he was on the unit" and another inmate "was asked by Mr. Leeson to go to the officer and tell him that an inmate in the back was acting crazy".[34] Dr. Dana's report diagnosed Leeson as being a malingerer and having opiate dependence but not being insane at the time of the offense.[35]

On September 16, 2004, Leeson's trial began where he continued to assert an insanity defense.[36] Leeson called Dr. Jonathan Himmelhoch, a psychiatrist, to provide expert testimony in support of his insanity defense.[37] The government called Dr. Dana in rebuttal who testified that Leeson was not suffering from any form of mental illness which impacted his ability to understand the nature of his actions on August 6, 2003.[38]

On September 22, 2004, the jury rejected Leeson's insanity defense and convicted him of being a felon in possession of a firearm.[39] At sentencing, the District Court determined that Leeson had three prior convictions for violent felonies in state courts which qualified him to be sentenced under the ACCA.[40] Leeson's earlier convictions included a 1988 conviction in a Texas State Court for burglary of a habitation with the intent to commit theft, a 1984 conviction in a

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[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at 633-634.

[39] *Id.* at 635.

[40] *Id.*

Texas State Court for aggravated robbery, and a 1984 conviction in a Texas State Court for attempted murder of a peace officer.[41] Both 1984 convictions occurred when Leeson entered a Food-a-Rama store at 8:30 PM where he robbed the store with a sawed off shotgun and then attempted to shoot a police officer as he was exiting the store.[42] The District Court ultimately sentenced Leeson to 230 months of imprisonment on September 22, 2004 and then an appeal to the U.S. Court of Appeals for the Fourth Circuit ensued.[43]

On appeal, the U.S. Court of Appeals held that the statement "[E]asy, I could have made this bad for you"[44] was admissible because the probative value outweighed the danger of unfair prejudice against Leeson, Dr. Dana's testimony incorporating statements by two of Leeson's fellow inmates at M.C.C. Chicago was admissible, and the District Court properly sentenced Leeson under the ACCA.[45]

BACKGROUND

A. FEDERAL RULE OF EVIDENCE 403

According to Federal Rule of Evidence 403, "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time": "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* at 633.

[45] *Id.* at 635.

confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence".[46]

Rule 403 puts a balancing test on evidence where the probative value against the danger of unfair prejudice is weighed.[47] According to *Gross v. Black & Decker, Inc.*,[48] " 'unfair prejudice' is defined as an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one".[49] According to *Christensen v. Economy Fire & Casualty Co.*,[50] "Unfair prejudice has also been defined as a tendency to influence the outcome of a trial by improper means".[51] The danger of unfair prejudice in the admission of evidence always exists where it is used for something other than its logical probative force,[52] that is, its tendency to make the existence of a material fact more or less probable.[53]

In the context of criminal cases, the term "unfair prejudice" speaks to the capacity of some relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged.[54] Evidence of prior bad acts is generally considered unfairly prejudicial if it induces the jury to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented.[55] According to *State v. Muckerheide*,[56]

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[46] FED. R. EVID. 403.

[47] *Id.*

[48] Gross v. Black & Decker, Inc., 695 F.2d 858 (5th Cir. 1983).

[49] *Id.* at 863.

[50] Christensen v. Economy Fire & Casualty Co., 252 N.W.2d 81 (Wis. 1977).

[51] *Id.* at 87.

[52] Empire Gas Corp. v. American Bakeries Co., 646 F. Supp 269 (N.D. Ill. 1986).

[53] United States v. Bailleaux, 685 F.2d 1105 (9th Cir. 1982).

[54] Old Chief v. United States, 117 S.Ct. 644 (1997).

[55] United States v. Puckett, 405 F.3d 589 (7th Cir. 2005).

evidence runs the risk of unfair prejudice when it tends to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, or provokes its instinct to punish.[57] In addition, under Federal Rule of Evidence 404(b), "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident..."[58] demonstrating that the probative value of evidence can be used to show certain plans or thoughts of a criminal defendant which may outweigh the prejudicial effect of the evidence in a criminal trial.[59]

B. FEDERAL RULE OF EVIDENCE 703

According to Federal Rule of Evidence 703, "Bases of Opinion Testimony by Experts":

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.[60]

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[56] State v. Muckerheide, 725 N.W.2d 930 (Wis. 2007).

[57] *Id.*

[58] FED. R. EVID. 404(B).

[59] FED. R. EVID. 403; FED. R. EVID. 404(B).

[60] FED. R. EVID. 703.

There is no requirement that facts necessary for the foundation of the expert's opinion be perceived by him at trial; an expert may testify to relevant matters based on facts in evidence or those made known to him prior to trial.[61] In fact, an expert may testify without giving opinion, leaving inferences to be drawn by a trier of fact.[62] Experts may also base their testimony upon the type of hearsay the expert would normally rely upon in the course of his or her work.[63] Under Rule 703, an expert is permitted to disclose hearsay for the limited purpose of explaining basis for expert opinion, but not as general proof of the underlying matter.[64]

Furthermore, it is clear that in many cases inmates in mental health facilities are reasonably relied upon by experts in the field.[65] In cases where a criminal defendant claims insanity, it is clear that trial courts should not keep information away from the jury in determining insanity,[66] experts should be allowed to rely upon statements of third parties in forming their expert opinion,[67] and all relevant evidence, lay and expert, should be admitted when an insanity defense is raised at trial.[68] In addition, in New York, under New York CLS CPL § 60.55, expert psychiatric witnesses are allowed to testify to extrajudicial facts and sources used in forming their professional opinion, subject to cross-examination.[69] In admitting expert

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[61] United States v. Hill, 655 F.2d 512 (3rd Cir. 1981).

[62] *Id.*

[63] United States v. Arias, 678 F.2d 1202 (4th Cir. 1982).

[64] Fox v. Taylor Diving & Salvage Co., 694 F.2d 1349 (5th Cir. 1983).

[65] Richard Neumeg, *What Information is of Type "Reasonably Relied Upon by Experts" within Rule 703, Federal Rules of Evidence, Permitting Expert Opinion Based on Information not Admissible in Evidence*, 49 A.L.R. FED. 363 (2007).

[66] State v. Meyers, 222 S.E.2d 300 (W.Va. 1976).

[67] State v. Duell, 332 S.E.2d 246 (W.Va. 1985).

[68] United States v. Milne, 487 F.2d 1232 (5th Cir. 1973); United States v. Sims, 637 F.2d 625 (9th Cir. 1980).

[69] McKinney's C.P.L. § 60.55 (2007).

testimony under Rule 703, some courts look to Rule 404(b) as well to determine if an expert's testimony can prove other acts by a defendant which include motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[70]

C. THE ARMED CAREER CRIMINAL ACT (ACCA) (18 U.S.C. § 924(E))

The ACCA (18 U.S.C. §924(e)) requires a minimum sentence of imprisonment of 15 years for a defendant who violates 18 U.S.C. §922(g) and has three previous convictions for a violent felony or serious drug offense.[71] A defendant who is subject to such an enhanced sentence is defined by the Sentencing Guidelines as an "armed career criminal".[72] For a defendant to qualify for enhanced sentencing as an armed career criminal, the three convictions must be distinct criminal episodes which are not part of a continuous course of conduct.[73] As stated in 18 U.S.C. §924(e)(1), the criminal episodes must be "committed on occasions different from one another"[74] while "a federal court is obliged to impose a sentence of fifteen years to life for the illegal possession of a firearm by anyone who has three prior convictions for violent felonies or serious drug offenses".[75] The Seventh Circuit Court of Appeals states that crimes are on separate occasions if the perpetrator can stop his actions at any time.[76] Other case examples

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[70] FED. R. EVID. 404(B).

[71] 18 U.S.C. §922(g) (2007).

[72] USSG §4B1.4(a) (2007).

[73] United States v. DeRoo, 13 Fed. Appx. 436 (8th Cir. 2001).

[74] 18 U.S.C. § 924(e)(1) (2007).

[75] *Id.*

[76] *See* United States v. Hudspeth, 42 F.3d 1015, 1020 (7th Cir. 1994).

show that acts over a prolonged period of time are considered separate offenses,[77] offenses committed on the same day are separate offenses,[78] and the critical inquiry if two offenses are separate is if the offenses occurred sequentially or not.[79]

In *United States v. Letterlough*,[80] the court used a factor test to determine if criminal offenses happened in the same occurrence.[81] These factors include (1) whether the offenses arose in different geographic locations, (2) whether the nature of each offense was substantively different, (3) whether each offense involved different victims, (4) whether each offense involved different criminal objectives, and (5) after the defendant committed the first in time offense, did the defendant have the opportunity to make a conscious and knowing decision to engage in the next in time offense.[82] Any one of the above factors can dispositively segregate an extended criminal enterprise into a series of separate and distinct episodes if its presence is apparent enough.[83] In *Letterlough*, the court explained that "occasions" are "those predicate offenses that can be isolated with a beginning and an end- ones that constitute an occurrence unto themselves"[84] where each offense "arose out of a separate and distinct criminal episode".[85] In

[77] *See* United States v. Griffin, 193 Fed. Appx. 211 (4th Cir. 2006).

[78] *See* United States v. James, 337 F.3d 387 (4th Cir. 2003).

[79] *See* United States v. Fuller, 453 F.3d 274 (5th Cir. 2006).

[80] *See* United States v. Letterlough, 63 F.3d 332, 335 (4th Cir. 1995).

[81] *Id.*

[82] *Id.* at 335-37.

[83] *Id.* at 336.

[84] *Id.* at 335.

[85] *Id.*

fact, many cases look further into the *Letterlough* factors to analyze whether two criminal offenses are "distinct episodes".[86]

Lastly, in applying the ACCA, past juvenile convictions may be used as a predicate felony,[87] felonies committed twenty three years ago may be used as predicate felonies, [88] and all past state convictions may be used for sentencing under the ACCA.[89]

ANAYLSIS

A. THE U.S. COURT OF APPEALS CORRECTLY APPLIED FEDERAL RULE OF EVIDENCE 403

The U.S. Court of Appeals for the Fourth Circuit analyzed the weight of Leeson's statement, "[E]asy, I could have made this bad for you"[90] by looking at the probative value of the evidence and weighing it against the danger of unfair prejudice.[91] Leeson argued that the admission of this statement would substantially persuade the jury to punish him for his bad character and harsh words while not allowing an objective determination of his guilt to be made.[92] In fact, Leeson conceded that his statement made while being handcuffed by law enforcement was relevant to the government's case that Leeson voluntarily and intentionally possessed the firearm charged in his indictment.[93] The court eventually concluded that Leeson's statement was only "mildly

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[86] *Id.*

[87] *See* United States v. Smalley, 294 F.3d 1030 (8th Cir. 2002).

[88] *See* United States v. Rush, 840 F.2d 580 (8th Cir. 1988).

[89] *See* Custis v. United States, 511 U.S. 485 (1994).

[90] *See* United States v. Leeson, 453 F.3d 631, 633 (4th Cir. 2006).

[91] *Id.*

[92] *Id.*

[93] *Id.*

menacing" and that the value of the evidence substantially outweighed the danger of unfair prejudice against Leeson.[94]

This statement was properly admitted because the evidence has high value since it demonstrates "proof of motive, opportunity, intent, preparation, plan, or knowledge" under Rule 404(b) as to Leeson's possible criminal conduct.[95] A statement such as "[E]asy, I could have made this bad for you"[96] can be shown to demonstrate motive, opportunity, intent, preparation, plan, or knowledge so the statement was admissible according to both the U.S. District Court and the U.S. Court of Appeals so it was not unfairly prejudicial to Leeson.[97]

B. THE U.S. COURT OF APPEALS PROPERLY APPLIED FEDERAL RULE OF EVIDENCE 703

In *United States v. Leeson*,[98] the court used the testimony of Dr. Dana as an expert witness to make comments about Leeson's mental state at the time of his 2003 offense.[99] Under Rule 703, Leeson argued that Dr. Dana did not establish that inmates in a federal mental health facility are reasonably relied upon by experts in the field, Dr. Dana was not in a position to determine whether the two fellow inmates were trustworthy sources of information, and the District Court failed to make a finding that the probative value of the inmates' statements

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[94] *Id.* at 636.

[95] FED. R. EVID. 404(B).

[96] *See* United States v. Leeson, 453 F.3d 631, 633 (4th Cir. 2006).

[97] *Id.* at 636.

[98] *Id.* at 637-638.

[99] *Id.*

substantially outweighed their prejudicial effect.[100] The U.S. Court of Appeals rejected Leeson's arguments and admitted Dr. Dana's testimony.[101]

In *United States v. Leeson*,[102] the inmates' statements were of a type reasonably, but admittedly cautiously, relied upon by experts in the mental health field.[103] The U.S. Court of Appeals also found that Leeson had a full opportunity at trial to cross examine Dr. Dana to show that Dr. Dana's testimony was one not reasonably relied upon by experts in Dr. Dana's field.[104] The U.S. Court of Appeals disagreed with Leeson and stated that the value of Dr. Dana's statements outweighed their prejudicial effect because the information Dr. Dana used was highly and directly relevant to the jury's task of evaluating Dr. Dana's opinion.[105]

Other cases and statutes support the position the court took in *United States v. Leeson* regarding the admissibility of expert testimony.[106] In other cases, inmates in a mental health facility have been reasonably relied upon by experts in the field.[107] In addition, in *State v. Meyers*,[108] the Supreme Court of Appeals of West Virginia held that when insanity is sought to be proved by expert medical testimony, the trial court should not keep information from the jury

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[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *See infra* notes 107-116 and accompanying text.

[107] Richard Neumeg, *What Information is of Type "Reasonably Relied Upon by Experts" within Rule 703, Federal Rules of Evidence, Permitting Expert Opinion Based on Information not Admissible in Evidence*, 49 A.L.R. FED. 363 (2007).

[108] State v. Meyers, 222 S.E.2d 300 (W.Va. 1976).

that may be essential to the diagnosis and then in a later case, S*tate v. Duell*,[109] the same court held that an expert witness testifying on the insanity issue is allowed to rely upon statements of third parties commenting on the defendant, specifically the defendant's interview with a doctor.[110]

The recognition of expert testimony based on statements of third parties is also recognized outside the Fourth Circuit, such as in New York under New York CLS CPL § 60.55 where expert psychiatric witnesses are allowed to testify to extrajudicial facts and sources used in forming their professional opinion, subject to cross-examination.[111] Furthermore, in *United States v. Sims*,[112] the U.S. Court of Appeals for the Ninth Circuit held that when insanity defenses are raised, a trial court should freely admit all possible relevant evidence which includes the testimony of an expert based upon the statements of mental institution inmates in a mental facility regarding another inmate.[113] In addition, in *United States v. Milne*,[114] the U.S. Court of Appeals for the Fifth Circuit held that when the issue of insanity was raised as a defense in a criminal case, all relevant evidence, both lay and expert, should be admitted.[115]

As a result, the statements of Leeson's fellow inmates as used by Dr. Dana are proper to be admitted at trial and used as the basis of Dr. Dana's testimony because they help prove "motive, opportunity, intent, preparation, plan, or knowledge", third party statements are essential to

[109] State v. Duell, 332 S.E.2d 246 (W.Va. 1985).

[110] State v. Meyers, 222 S.E.2d 300 (W.Va. 1976); State v. Duell, 332 S.E.2d 246 (W.Va. 1985).

[111] McKinney's C.P.L. § 60.55 (2007).

[112] United States v. Sims, 637 F.2d 625 (9th Cir. 1980).

[113] *Id.*

[114] United States v. Milne, 487 F.2d 1232 (5th Cir. 1973).

[115] *Id.*

assess Leeson's mental condition, and all relevant evidence in determining if an insanity defense is proper should be admitted at trial as ruled in other cases.[116]

C. THE U.S. COURT OF APPEALS CORRECTLY APPLIED THE ACCA LEAVING QUESTIONS

In *United States v. Leeson*,[117] the court did not err in sentencing Leeson under the ACCA because the event which led to the case resulted in Leeson's fourth felony conviction.[118] On appeal, the court determined that Leeson's last two offenses were offenses "committed on occasions different from one another"[119] in order to qualify Leeson for an increased sentence under the ACCA.[120] In reaching this decision, the *Leeson* court looked at the factors analyzed by *United States v. Letterlough* to determine that Leeson's earlier criminal episodes were separate offenses.[121]

After analyzing the *Letterlough* factors, the *Leeson* court stated that Leeson's conviction was consistent with case law because "criminals who commit separate crimes against different individuals while on a spree, within a short period of time, provided that the perpetrator had the opportunity to cease and desist from his criminal actions at any time"[122] commit crimes on separate occasions.[123] The 1984 robbery of the Food-a-Rama and subsequent attempt to murder a peace officer are properly considered separate events because the robbery and the shooting were

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[116] *See supra* notes 102-115 and accompanying text.

[117] United States v. Leeson, 453 F.3d 631 (4th Cir. 2006).

[118] *Id.*

[119] 18 U.S.C. § 924(e)(1) (2007).

[120] United States v. Leeson, 453 F.3d 631 (4th Cir. 2006).

[121] *Id.*

[122] United States v. Hudspeth, 42 F.3d 1015, 1020 (7th Cir. 1994).

[123] United States v. Leeson, 453 F.3d 631 (4th Cir. 2006).

events where "the perpetrator has the opportunity to cease and desist from his criminal actions at any time".[124] Although this logic is proper to use in looking at past criminal episodes, the *Leeson* holding leaves open two large questions about past felonies and the timing of separate criminal acts.[125]

1. When should past felonies not be used anymore to determine ACCA eligibility?

Many cases, including *United v. Leeson*, remain unclear about this issue but the issue was eventually cleared up by the *Custis v. United States* decision.[126] In *United States v. Smalley*,[127] the defendant's past juvenile adjudications as "prior convictions" under the ACCA were determined proper and did not violate the defendant's right not to be deprived of liberty without due process of law.[128] In *United States v. Rush*,[129] the court held that the defendant's 1965 robbery convictions were the product of distinct criminal episodes where one robbery was committed on July 9, 1965 and the second was committed on September 11, 1965 so each conviction could be considered a separate predicate conviction for the purpose of sentence enhancement under the ACCA.[130] These past felonies were used against the defendant where the current trial to determine ACCA eligibility occurred twenty three years later in 1988.[131]

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[124] United States v. Letterlough, 63 F.3d 332, 335 (4th Cir. 1995).

[125] *See supra* notes 126-146 and accompanying text.

[126] *See infra* notes 127-134 and accompanying text.

[127] United States v. Smalley, 294 F.3d 1030 (8th Cir. 2002).

[128] *Id.* at 1031.

[129] *See* United States v. Rush, 840 F.2d 580 (8th Cir. 1988).

[130] *Id.*

[131] *Id.*

The U.S. Court of Appeals found that Leeson's offenses nineteen years earlier were properly admitted as two separate felonies for sentence enhancement but did not state when earlier felonies are not eligible anymore to be used.[132] In fact, only *Custis v. United States* states that with sole exception of convictions obtained in violation of right to counsel, defendants in federal sentencing proceedings have no right to collaterally attack the validity of previous state convictions used to enhance sentences under the ACCA which demonstrates that all past state convictions can be used in ACCA sentencing.[133] Therefore, all past state criminal convictions may be used for sentencing under the ACCA although this is not clear from the *Leeson* decision.[134]

2. *How far apart in time do criminal acts need to be to be considered "separate episodes" under the ACCA?*

This question still remains unclear and many cases provide different answers to this question.[135] In *United States v. Antoine*,[136] the court found that two convictions for armed robberies committed against different victims, in different locations, on the same night, and approximately 40 minutes apart were separate predicate offenses for the purpose of sentence enhancement under the ACCA.[137] Furthermore, in *United States v. Griffin*,[138] a defendant who engaged in three separate sexual offenses against a minor victim over a prolonged, continuous

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[132] *Id.*

[133] United States v. Leeson, 453 F.3d 631 (4th Cir. 2006).

[134] Custis v. United States, 511 U.S. 485 (1994); United States v. Leeson, 453 F.3d 631 (4th Cir. 2006).

[135] *See infra* notes 136-144 and accompanying text.

[136] *See* United States v. Antonie, 953 F.2d 496 (9th Cir. 1991).

[137] *Id.*

[138] *See* United States v. Griffin, 193 Fed. Appx. 211 (4th Cir. 2006).

period of time was sentenced under the ACCA.[139] The court in *United States v. Griffin* stated that there was enough time between each completed act and the next act to permit a conscious decision to engage in further criminal conduct.[140] In *United States v. James*,[141] the defendant's prior two burglary offenses could be counted as separate convictions even though the two burglaries were on the same day, the stores were located across the street from one another, the first burglary was completed before the second started, and each burglary involved separate victims.[142]

In *United States v. Fuller*,[143] critical inquiry in determining if two offenses are separate is whether the offenses occurred sequentially and when courts are determining if two offenses occurred on different occasions, a court is permitted to examine only the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.[144]

These cases provide some basis to answer both questions since past felonies are always used to determine ACCA eligibility[145] while the exact amount of time between criminal acts in order to consider them "separate episodes" still remains unclear after *Leeson*, discretionary, and open to judicial interpretation.[146]

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[139] *Id.*

[140] *Id.*

[141] *See* United States v. James, 337 F.3d 387 (4th Cir. 2003).

[142] *Id.*

[143] *See* United States v. Fuller, 453 F.3d 274 (5th Cir. 2006).

[144] *Id.*

[145] Custis v. United States, 511 U.S. 485 (1994).

[146] *See supra* notes 136-144 and accompanying text.

CONCLUSION

In *United States v. Leeson*,[147] the U.S. Court of Appeals for the Fourth Circuit analyzed the criminal activity of Leeson, the admissibility of his statements, the admissibility of expert testimony, and Leeson's eligibility for an extended prison sentence under the ACCA.[148] After looking through these issues, the court concluded that Leeson was eligible for a longer term sentence under the ACCA.[149]

The U.S. Court of Appeals properly admitted Leeson's statement while being handcuffed by authorities, the testimony of Dr. Dana regarding Leeson's sanity, and the finding that Leeson committed three earlier separate felony offenses making Leeson eligible for an extended sentence under the ACCA. The *Leeson* decision will partially aid future courts when deciding to admit defendant statements or expert testimony to prosecute a past felon under the ACCA who claims to be insane. The main problem raised by the *Leeson* decision is that it does not explain when earlier felonies should be used or denied in the ACCA analysis or how disparate in time felonies need to occur to consider them "separate episodes" under the ACCA. Only other criminal decisions such as *Custis v. United States*, future legislation, or future criminal cases can explain the true sentencing procedure under the ACCA for past felon offenders.[150]

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[147] *See* United States v. Leeson, 453 F.3d 631 (4th Cir. 2006).

[148] *Id.*

[149] *Id.*

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