IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 5396

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

KEVIN S. ABNEY, Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF KENTUCKY

BRIEF OF APPELLANT IN PRO SE

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STATEMENT OF ISSUES

Whether the Government used documents not approved by Shepard or Taylor in deciding whether Abney's offenses were committed on different occasions.

Whether the legislative history supports the courts' rulings concerning offenses committed on different occasions.

Whether three robberies planned at once and executed in a series within hours supports three different predicates.

Whether Congress' language of "over a course of time committs three or more felonies" applies to robberies committed one after another in the same time frame.

Whether the courts disregarded the Rules of Statutory Construction, Cannons, and stare decisis when deciding on the language of "offenses committed on occasions different from one another."

Whether Sections 924(e)(1) and 4B1.4 are direct products of 28 USC § 994(i) and therefore subject to the Guidelines.

Whether the language from §924(e)(1) (occasions different) was derived from § 994(i) (different occasions) and therefore a product of § 994(i) and subject to the Guidelines.

Whether § 994(i) is the enabling statute for § 4B1.4.

Whether the language (occasions different) of § 924(e)(1) is ambiguous in relation to the language (different occasions) of § 994(i).

Whether a defendant has a substantive due process right to all the sections of the U.S. Sentencing Guidelines when being sentenced as an armed career criminal.

Whether a defendant has a procedural due process right to all the sections of the U.S. Sentencing Guidelines when being sentenced as an armed career criminal.

Whether the rule of lenity applies in relation to Sections 924(e)(1) and 4B1.4 in light of the language in Section 994(i).

ARGUMENT

I. IN ORDER TO SHOW THAT ABNEY'S PRIOR SENTENCES WERE COMMITTED ON DIFFERENT OCCASIONS, THE GOVERNMENT USED EVIDENCE NOT APPROVED BY TAYLOR OR SHEPARD

According to Abney's pretrial counsel, Mr. Hayworth, there is only one document that can be found pertaining to Abney's Kentucky State charges (Case # 98-CR-00051-001), which is the case the Government used for the three predicates to sustain the enhancement. See Exhibit A (Copy of said document). In an attempt to seek the veracity of Hayworth's claim, Abney sent letters to both him and Mr. Schuster requesting this information, other information, and documents extant pertaining to the case sub judice. Mr. Hayworth did respond with one document that he had filed, but he failed to answer Abney's questions. Mr. Schuster did not have the etiquette to respond. However, if Exhibit A is in fact the only document that could be found and was used to enhance Abney, he contends that the ACCA conviction cannot stand.

In order to convict under the ACCA, two separate inquires must be met: "(1) whether prior convictions qualify as ACCA predicates, and (2) whether such offenses were committed on different occasions." -1- Abney contends that the Government's different-occasions analysis will not sustain his conviction if it relied on said document or any other documents not considered "charging documents" or "comparable judicial sources" as outlined in Shepard. -2- "[T]here are no transcripts of [Abney's] plea colloquies or copies of written plea agreements

reflecting any" kind of admission by Abney stating "the when and where" of his Kentucky offenses, and it would be "improper to infer" it. -3- Again, in King the Sixth Circuit established that "a sentencing court may only rely on the evidentiary sources and information approved by the Supreme Court in Taylor and Shepard." -4

In Hennessee, supra, the Sixth Circuit held that "a sentencing court may consider non-elemental facts such as times, locations, and victims in Shepard documents when conducting the different-occasions analysis . . . ." -5- In coming to this conclusion, it employed the Paige test. -6- Under this three prong test, no document, especially Exhibit A, supra, the Government used provides enough information to suffice one of these prongs.

II. ROBBERIES PLANNED AT THE SAME TIME AND EXECUTED ONE AFTER ANOTHER DO NOT COUNT AS THREE PREDICATES

A. Legislative History Does not Support Such A Ruling

The legislative history of 18 USC § 924(e)(1) began with the Omnibus Control and Safe Streets Act of 1968. Pub. L. No. 90-351 (18 USC app. § 1202(a)), which read in part: "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 and not more than $25,000 and imprisoned not less than fifteen years." It was amended by the Armed Career Act of 1984. Pub. L. No. 98-473 § 1802, 98 Stat. 1976, 1837,

2185, which was repealed by the Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, § 104(a)(4), 100 Stat. 449, 458-59, which also changed the codification of it to 18 USC § 924(e). It was subsequently amended again by the Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 924(e)(1), 100 Stat. 3207-39 to 3207-40, and by the Minor and Technical Criminal Law Amendment Act of 1988, Pub. L. No. 100-690, § 7056, 102 Stat. 4181, 4395, 4402.

Section 7056 of the Anti-Drug Abuse Act of 1988 amended § 924(e)(1), adding the phrase "committed on occasions different from one another." All the circuit courts--whether by following a sister circuit or interpreting legislative history, inter alia--have generally come to the same conclussion, viz: "two offenses are 'committed on occasions different from one another' under the ACCA 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"; "if it would have been possible for the offender to cease his criminal conduct after the first offense, and withdraw without committing the second offense"/ or "if the offenses are committed in different residences or business locations." -7- While Abney asks this Court to again review "whether [three] violent felonies, perpetrated in temporal and physical proximity to each other, were committed on different occasions, as opposed to being part of a single criminal episode, id., he asks that it do so with the "rationale which Congress had in establishing the ACCA." -8- In Brady, Judge Jones' dissent (with whom Judge Martin joined) states it as it is: "Unfortunately,

in their otherwise laudable zeal to implement these stiff penalties the courts, including the Sixth Circuit, have gone well beyond the underlying rationale which Congress had in establishing the ACCA. In this case, as our fellow circuits have previously done, the majority has expanded the scope of the ACCA to treat as separate and distinct criminal episodes those actions which are part of one continuous criminal episode or crime spree. Because this expansive interpretation and implementation of the ACCA is at odds with the language and underlying policy of the ACCA, I respectfully dissent." Judge Jones' and Judge Martin's interpretations are not unlike other circuit judges' reasoning on how the ACCA should be applied. -9

Many cases adduce the legislative history behind the ACCA, and it just seems both that the intent of Congress is lucid and that the circuits have blatantly looked the other way in order to be tougher on crime. The history bears to be repeated. Prior to the 1984 amendments to Section 1202(a), Senator Spector of Pennsylvania drafted a bill that was revised several times; however, the general policy of it was stated in a report, stating that "the bill is very narrowly aimed at the hard core of criminals with long records for robbery and burglary offense . . . [and] focuses on the very worst robberies by the very worst offenders with the worst records." -10- "The legislative history also states: [There] . . . are people who have demonstrated, by virtue of their definition, that locking them up and letting them go doesn't do any good, they are back a third time. At that juncture, we should say, "That's it' it is all over. We, as a responsible people, will never give you the

opportunity to do this again." -11- This language appears to indicate that the enhanced penalty provision was aimed at individuals who fail to profit from the rehabilitative opportunities afforded them after their convictions," (Herbert at 622) "not [to] individuals who happen to acquire three convictions as a result of a single criminal episode." Towne, supra, at 891.

It appears the multiple episodes approach line of reasoning began shortly after the enactment of § 1202(a) and the ruling in U.S. v. Petty, -12- when the court choked the ruling from both the legislative history and the clear, strong statutory language that fundamentally supported a much less stringent decision. Because the circuit upheld Petty's ACCA sentence where his prior convictions spawned from a robbery of six victims, whom he robbed simultaneously in a restaurant, the Solicitor General filed a brief in the Supreme Court arguing that the Act's legislative history--perhaps better phrased as "Congress' intent"--better served the interpretation "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." (828 F.2d at 3).

What is more alarming, troubling, and equally as obvious as Congress' intent from the legislative history is the fact that Congress added the phrase "committed on occasions different from one another" to the Act in 1988 as a result of the stringent reading of the statute in Petty. See the Sectional analysis of the Minor and Technical Criminal Law Amendments Act, supra. The phrase, referenced as "Section 151," would--Congress believed--

clarify the ACCA statute, even pointing to the Solicitor General's brief in Petty, in which it stated that "the armed criminal statute lacked descriptive language found in other similar statutes to the effect that the convictions be for 'offenses committed on occasions different from one another,' see 18 USC § 3575(e)(1), 21 USC § 849(e)(1), [and that] the legislative history nevertheless made clear that similar interpretation was intended here." See also Towne, supra, at 891 ("Finally, apart from the purposes of the Act, we also agree with the Solicitor General that Congress did not intend § 924's enhancement provisions to be any broader than other, similar federal enhanced penalty provisions which do require courts to focus on the number of prior criminal episodes in which a defendant was involved. See, e.g., § 3575(e)(1) and § 849(e)(1).

> The proposed amendment would clarify the armed career criminal statute to reflect the Solicitor General's construction and to bring the statute in conformity with the other enhanced penalty provisions cited above. Under the amendment, the three previous convictions would have to be for offenses "committed on occasions different from one another." Thus, a single multi-count conviction could still qualify where the counts related to the crimes committed on different occasions, but a robbery of multiple victims simultaneously (as in Petty) would count as one conviction. This interpretation plainly expresses the concept of what is meant by a "career criminal," that is, a person who over the course of time commits three or more of the enumerated kinds of felonies and is convicted therefor. (emphasis added).

It appears that there is no other area of criminal law where Congress' intent is more salient, screaming aloud like ten thousand horns in the dead of night, shining brighter than the mid-day sun off a blanket of snow, yet the majority of all the wisemen of the judicial branch are wearing earplugs and dark sun glasses, impervious in their apathy to not interpret the language as it has been since 1970 in § 3575 and § 894, as well as as introduced in 1975 in 994(i).[-13-] "To bring the statute in conformity with

the other enhanced penalty provisions cited above." "Under a [§ 849] sentence, a prior conviction can only support enhancement if 'less than five years have elapsed between the commission of [the] felonious violation [the defendant is now charged with] and either the defendant's release, or parole or otherwise from imprisonment." -14- Section 3575(e)(1) provided that a defendant was special offender if the defendant has previously been convicted . . . for two or more offenses committed on occasions different from one another and from such felony and punishable . . . in excess of one year, for one or more such convictions the defendant has been imprisoned prior to he commission of such felony, and less than five years have elapsed between such felony . . . ." Sections 849 and 3575 were "virtually identical" in all relevant respects. -15

Moreover, "over a course of time commits three or more . . . felonies . . .," supra, vis a vis to several robberies, planned together and executed within hours, as Abney carried out, clearly denotes a different standard or rationale. They should not equate. "The legislative history clearly indicates t hat this section, as part of the Armed Career Criminal Act, was not intended to apply to individuals like Wicks who received two out of three convictions for two acts of burglary occuring on the same night." Wick, supra, at 195. "Plaintiff had multiple surgeries on both shoulders, and sought treatment for pain over a course of time." -16- "McCoy cites no relevant authority in his submissions, and the court is aware of none, supporting his proposition that a § 924(c) charge that does not specify the date or dates on which the firearms were possessed with greater particularity . . . .

Of course, a Section 924(c) charge may factually be predicted upon the continued possession of a firearm over a course of time in furtherance of a crime." -17- "There was evidence from several persons that they placed bets with appellant over a course of time ranging from one to ten years." -18- ". . . because it is not based on an individual charge, but rather on evidence gathered over a course of time showing a pattern of harassment against many individuals. -19- "Moreover, the defendant's possession of illegal firearms over a course of time coupled with his claims that he dealt in firearms, demonstrates that the offenses constitute parts of a common scheme or plan." -20

Again, "[r]eferences through out the legislative reports and floor debates to 'career criminals,' 'repeat offenders,' 'habitual offenders,' 'recidivists,' 'revolving door' offenders, 'three-time loser,' 'third-time offender,' '[defendants] convicted three times,' and to defendants committing a 'third or subsequent robbery,' are inconsistent with the notion that Congress intended [the statute], unlike other federal enhanced penalty provisions, to count previous convictions on multiple felony counts arising from a single criminal episode as multiple previous convictions." Schieman, supra, at 914 (quoting Solicitor General's brief at 7). This is more in line with "occasions different from one another" and "over a course of time," and far from "[a]n episode is an incident that is part of a series, but forms a separate unit within the whole." -21 "There is no policy justification supporting that type of artificial line-drawing. In fact, the legislative history of the ACCA, explored earlier, refutes t hat type of simplistic line-drawing." Brady dissent at 675.

B. Not Only Did The Courts Ignore Legislative History But Also The Rules of Statutory Construction and Canons and The Rule of Stare Decisis

On October 12, 1984, Reagan signed into law the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1976, 2017 (CCA). Chapter II of it is the Sentencing Reform Act (SRA) of 1984 (codified as 28 USC § 991-998). Pursuant to an amendment of the Act passed on December 7, 1987, the Act's effective date was expressly moved to November 7, 1987. Pub. L. No-99-217 §2 and 4, 99 Stat. 1728, and Pub. S. No. 99-646, § 35, 100 Stat. 3599. The statute (28 USC § 991, et seq), known as the enabling statutes, created the Commission, which is part of the judicial branch, with the duties, inter alia, "to provide stiff sentences for 1) violent offenses, 28 USC § 994(h); 2) drug offenses, Id.; and 3) recidivists 28 USC § 994(i)." -22- The guidelines legislation also has a long complex history. -23- In fact, LaBonte shows us that "the legislation enacted in 1984 traces its roots to a sentencing reform measure originally introduced by Senator Kennedy in 1975," where § 994(i) appeared first. Id. (citing S. 1437, (5th Cong., 3d Sess. § 124 (1978) (proposed tit. 28 § 994(h); 124 Cong. Rec. 1463 (1978)). While §994(i) appeared long before § 994(h), both were enacted in 1984 and went into effect in 1987.

The special offender statutes (§ 3575 and § 849, supra) were enacted in 1970. "Section 849 was modelled on [] 3575, which was passed shortly before §§ 849 and 851 as part of the Organized Crime Control Act of 1970, Pub. L. 91-452, Title X, § 1001(a), 84 Stat. 948." -24- Again, both 3575 and 849 contained "two or more offenses committed on occasions different from one another." Section 994(i) contains the language "has a history of two or more prior . . .

convictions for offenses committed on different occasions." Clearly, § 994(i) adopted the same language from the special offender statutes. "For legislative history explicitly linking [] 994(i) to these old statutes, see S. Rep. No. 225, 98th Cong., 2d Sess. 120, 176, reprinted in 1984 U.S. Code Cong. Admin. News 3182, 3303, 3359." -25

As originally enacted in 1984, the ACCA listed two predicates (Pub. L. 98-473, § 1802, 98 Stat. 2185, 18 USC § 1202(a)), exactly as 994(i) (98-473, § 217, 98 Stat. 2021-22). Both were part of Pub. L. 98-473 along with the SRA of 1984, which, again, repealed both § 849 and § 3575. The SRA went into effect in 1987 (Pub. L. No. 99-217, 99 Stat. 1728). In 1986, the ACCA was codified as § 924(e) (99-308, 100 Stat. 449, 458-59). In short, Congress enacted all these statutes, inter alia, approximately at the same time.

Again, Congress first used the language "occasions different" in 1970 (849 and 3575); then it used "different occasions" in 1975 (994(i)), which was enacted in 1984 and went into effect in 1987. In 1988 Congress amended § 924(e)(1) with this indentical language (Section 151, that is, the specific language, supra). Three statutes used this language before 924(e). While the phrase has a slight variance, "Congress sometimes uses slightly different language to convey the same message." #26- Even the use of subsection (e)(1) bears a striking resemblance. More importantly, § 994(i) was also enacted right before § 924(e)(1). In U.S. v. Poupart, supra, at LEXIS 9, the court stated that 849(a), 851, and 3575 "all address sentence enhancement and were passed at or near the same time, we construe these statutes . . . in pari

materia," (emphasis added) citing 2B Sutherland Statutory Construction § 51.03 (1992) ("the rule that statutes in pari materia should be construed together has the greatest probative force, in the case of statutes relating to the same subject matter . . . .") Furthermore, "that different statutes should be construed together when the statutes relate to the same person or thing, to the same class of persons or things or have the same purpose or object." Id., but at § 51:1 (7th ed). Sections 994(i) and 924(e)(1) share these same factors; moreover, 924(e)(1) is a product of 994(i). "And typically 'only the most compelling evidence' will persuade this court that Congress intended 'nearly identical language' in provisions dealing with related subjects to bear different meanings.'" -27

All the circuit courts have abandoned the rationale and rules applicable to the use of legislative history, statutory construction and cannons, and stare decisis, failing to conserve the judicial threads that bind the fiber of balance between legislative intent and judicial interpretation, and conservation of our U.S. Constitution and fundamental rules should be held to the utmost. c.f.:

> That inference gains strength in light of the order in which Congress adopted the statutes. Congress adopted §§ 921(a)(33)(A)(iii) and 922(g)(9) over a decade after it codified the "use of physical force" provisions in §§ 16(a) and 924(e)(2)(B)(i), and, as we explained above, Congress used nearly identical language. We consider a statute with language modelled on that of an earlier statute to function as a legislative interpretation of the statute in question, and give the earlier statute 'great weight in resolving any ambiguities and doubts' in the later one. -28

As is apparent, part of this argument also relies "on the prior-construction canon: the rule that, when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute' is

presumed to incorporate that interpretation." -29- The similarities appear "to be more than a coincidence. We cannot state with certainty that Congress used [849, 3575, and 994(i)] as a template for [924(e)(1)] but we cannot ignore the parallel, particularly because the [language] in [these statutes] were in place when Congress amended the statute [924(e)(1)] to add [the same language]."-30 Therefore, the statute's (924(e)(1)) context--both textual and historical--does not make clear that Congress intended the words "different occasions" to have a stricter or different meaning that § 994(i).

C. Both Sections 924(e)(1) and 4B1.4 Are The Offspring of Section 994(i) and Both Should be Construed In Accordance with The Enabling Statute and Guidelines

Section 994(h) is the enabling statute for § 4B1.1, which implements Congress' policy. -31- Section 4B1.3 is adopted from virtually identical language in the Dangerous Special Offenders provisions. -32- "In fact, Congress used the same language when it passed the statute authorizing promulgation of the Guidelines: 'The Commission shall assure that the Guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant . . . (2) committed the offense as part of a pattern of criminal . . . .'" -33- "In the Sentencing Reform Act, Congress expressly directed the Sentencing Commission to increase sentences for recidivist offenders. See 18 USC 924(e)(1); 28 USC § 994(i)." -34- Cook shows that both subsections (h) and (i) of § 994 enabled § 924(e) and § 4B1.4, that "4B1.4 implements that congressional directive." Id. (citing U.S. Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties

to apply there must be a "grievous ambiguity or uncertainty in the language and structure" of the statute. -55 Abney contends that § 924(e)(1) and § 4B1.4 are ambiguous in light of § 994(i), and, therefore, his predicates should be considered in light of § 4A1.2, inter alia.

CONCLUSSION

In light of the foregoing arguments, Abney requests this Court to answer his presented questions and the law that rightfully applies to those questions.

Respectfully submitted,

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(pro se Brief)

F O O T N O T E S

1. U.S. v. Hennessee, 932 F.3d 437, 446 (6th Cir.2019).

2. Shepard v. U.S., 544 U.S. 13, 26 (2005).

3. U.S. v. King, 853 F.3d 267, 276 (6th Cir.2016).

4. Id. at 275; Taylor v. U.S., 495 U.S. 575 (1990); Shepard, supra.

5. Id. at 439.

6. U.S. v. Paige, 634 F.3d 871, 873 (6th Cir.2011).

7. U.S. v. Hill, 440 F.3d 292, 297-98 (6th Cir.2005); see also U.S. v. Martin, 526 F.3d 926, 940 (6th Cir.2008) (Nor does it make a difference if multiple offenses were prosecuted under one case number or indictment or consolidated for plea purposes or if multiple offenses ran concurrently.)

8. U.S. v. Brady, 988 F.2d 664, 667 (6th Cir.1993).

9. U.S. v. Balascsak, 873 F.2d 673, 681 (3d Cir.1989) (en banc) (where plurality concluded that a defendant must have been convicted twice before he committed his third predicate offense in order to be eligible for the enhancement); U.S. v. Wick, 833 F.2d 192 (9th Cir.1987) (Honorable Judge Pregerson dissented stating that he believed the ACCA's "requirement of 'three convictions' is not satisfied because two out of Wick's three convictions were for burglaries occurring on the same night."); U.S. v. Schieman, 894 F.2d 909 (7th Cir.1989) (Judge Ripple dissenting defining the majority's two episodes as one episode).

10. See Brady dissent at 671-72 (citing Balascsak, supra, at 680, quoting S. Rep. No. 585; 97th Cong., 2d Sess. 62-63 (1982) (emphasis added in dissent).

11. U.S. v. Herbert, 820 F.2d 620, 622 (5th Cir.1998) (quoting Testimoney of Stephen S. Trott, Assistant Attorney General, Armed Career Criminal Act Hearing before the subcomm. on crime of the House comm. on the Judiciary, 98th Cong., 2d Sess. 47, 64 (1984); See also Balascsak at 682; U.S. v. Towne, 870 F.2d 880, 891 (2d Cir.1988).

12. U.S. v. Petty, 798 F.2d 1157 (8th Cir.1986), vacated and remanded, 481 U.S. 1034 (1987), rev'd and remanded, 828 F.2d 2 (1987).

13. Watkins v. U.S., 564 F.2d 201, 205 (6th Cir.1977).

14. U.S. v. Cirillo, 566 F. Supp. 1340, 1342 (S.D.N.Y 1983).

15. U.S. v. Darby, 744 F.2d 1508, 1536 (11th Cir.1984).

16. Serder v. Astrue, 2012 U.S. Dist. LEXIS 25076.

17. U.S. v. McCoy, 2016 U.S. Dist. LEXIS 130603 (W.D.N.Y).

18. Stone v. U.S., 357 F.2d 257, 360 (9th Cir.1966).

19. EEOC v. Dial Corp., 156 F.Supp.2d 926, 967 (N.D.Ill.2001).

20. U.S. v. Artz, 2007 U.S. Dist. 57287 (D.Ut).

21. U.S. v. Graves, 60 F.3d 1183, 1185 (6th Cir.1995) (quoting U.S. v. Hughes, 924 F.2d 1354, 1361 (6th Cir.1991).

22. U.S. v. Myers, 687 F.Supp. 1403, 1407 (N.D.Cal.1988).

23. U.S. v. LaBonte, 70 F.3d 1396, 1418 n.2 (1st Cir.1995) (citing Kate Stith & Steve Koh, A Decade of Sentencing Guidelines: Revising the Role of the Legislature, 28 Wake Forest L. Rev. 223 (1993).

24. See U.S. v. Poupart, 1992 U.S. App. LEXIS 4426 (1st Cir.) at LEXIS 8.

25. U.S. v. Cianscewski, 894 F.2d 74, 77 (3d Cir.1989).

26. Deal v. U.S., 508 U.S. 129, 134 (1993).

27. Yates v. U.S., 574 U.S. 528, 557 (2015) (quoting Communication

Workers v. Beck, 487 U.S. 735, 754 (1988). See also Tex. Dep't & Comty. Affairs v. Inclusive Cmty's Project, Inc, 135 S.Ct. 2507, 2546 (2015) ("Because identical language in two statutes having similar purposes should be presumed to have the same meaning."); U.S. v. Davis, 139 S.Ct. 2319, 2329 (2019) ("We normally presume the same language in related statutes carries a consistent meaning.").

28. U.S. v. Castleman, 695 F.3d 582, 586 (6th Cir.2012).

29. Armstrong v. Exceptional Child Ctr., Inc, 574 U.S. 1138, 135 S.Ct. 1378, 1386 (2015) (citing Bragdon v. Abbot, 524 U.S. 624, 645 (1998).

30. Lockhart v. U.S., 138 S.Ct. 958, 964 (2015).

31. U.S. v. Funk, 477 F.3d 421, 428 (6th Cir.2006).

32. U.S. v. Felder, 706 F.2d 135, 140 n.5 (3d Cir.1983).

33. U.S. v. Irwin, 906 F.2d 1424, 1428 (10th Cir.1990) (citing 994(i) (Supp. IV 1986)).

34. U.S. v. Cook, 2009 U.S. Dist. LEXIS 26107 (D.Neb.).

35. U.S. v. Brewer, 853 F.2d 1319, 1322 (6th Cir.1987).

36. Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134 (1936) (cited in U.S. v. Larionoff, 431 U.S. 864, 873 n.12 (1977)).

37. U.S. v. McCarthy, 54 F.3d 51, 53 (2nd Cir.1994).

38. U.S. v. Verwiebe, 874 F.3d 258, 262 (6th Cir.2017). See also, U.S. v. Bell, 966 F.2d 703, 705 (1st Cir.1992) ("Although this appeal involves a sentence enhanced under § 4B1.1 rather than § 4B1.4, we believe that the two guidelines provisions must be construed in pari passu.").

39. U.S. v. Landers, 690 F.Supp. 615, 617 (W.D.Tenn.1988) (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 38).

40 See § 4A1.2 Commentary Application Note 3(A) (emphasis added).

41. Sessions v. Dimaya, 138 S.Ct. 1204, 1240 n.3 (2017) (quoting Kolender v. Lawson, 461 U.S. 352, 374 (1983).

42. See, e.g., U.S. v. McMurray, 653 F.3d 367, 370-71 (6th Cir. 2011).

43. U.S. v. Kiefer, 20 F.3d 874, 876 (8th Cir.1993).

44. Peugh v. U.S., 569 U.S. 530, 541 (2013).

45. Gall v. U.S., 552 U.S. 38, 50 n.6 (2007).

46. Johnson v. U.S., 135 S.Ct. 2551, 2556 (2015).

47. Kolender v. Lawson, supra, at U.S. 358.

48. St. Paul Mercury Ins, Co. v. FDIC, 774 F.3d 702, 709 (11th Cir.2014).

49. Sierra Club v. Korleski, 681 F.3d 342, 346 (6th Cir.2011). (quoting Hadden v. U.S., 661 F.3d 298, 303 (6th Cir.2011).

50. Molina-Martinez v. U.S., 136 S.Ct. 1338, 1346 (2016) (quoting Gall v. U.S., 552 U.S. 38, 51 (2007).

51. Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 758 n.2 (1989).

52. Robinson v. Shell Oil Co, 519 U.S. 337, 340 (1997) (holding that a statute is ambiguous where it "could just easily be read to" have one meaning as another).

53. U.S. v. Bedford, 914 F.3d 422, 427 (6th Cir.2018).

54. Lewis v. U.S., 445 U.S. 55, 65 (1980).

55. Huddleston v. U.S., 415 U.S. 814, 831 (1974).

A P P E N D I X B

C O P Y O F S I X T H C I R C U I T ' S R E S P O N S E

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0354n.06

No. 19-5396

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 16, 2020
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

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KEVIN S. ABNEY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Before: GIBBONS, McKEAGUE, and STRANCH, Circuit Judges.

JULIA SMITH GIBBONS, Circuit Judge. Kevin Abney pled guilty to possession with intent to distribute fentanyl, possession of firearms in furtherance of drug trafficking, and possession of a firearm as a convicted felon. Because Abney had three convictions in Kentucky for complicity in first-degree robbery, the district court found Abney to be an armed career criminal and sentenced him to 240 months' imprisonment. On appeal, Abney argues that the first-degree robbery convictions cannot render him an armed career criminal because those convictions arise from a single offense. Because the robberies were of three separate business locations, we disagree and affirm the district court's judgment.

I.

In December 2018, Abney pled guilty to possession with intent to distribute fentanyl, in violation of 21 U.S.C. § 841(a)(1); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C § 924(c)(1)(A), and possession of a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Abney's presentence report designated him an armed career

criminal based on three[1] prior convictions for complicity in first-degree robbery in Kentucky. Those convictions arose from robberies of three convenience stores on August 8, 1998.

Abney objected to the armed career criminal designation, arguing that because the conviction was for complicity, it is possible that a single offense gave rise to the three complicity convictions. The district court overruled Abney's objection, finding that "under Kentucky law the complicity itself is one manner in which the person can commit the robbery offense," and that the court could "determine when the first offense . . . ended and the second began" as well as "the different residences or business locations" where the robberies occurred. DE 38, Sentencing Tr., Page ID 252–54. Accordingly, the district court sentenced Abney to 240 months' imprisonment. Abney timely appealed.

II.

We review the district court's conclusion that Abney qualified as an armed career criminal *de novo*. *United States v. Hennessee*, 932 F.3d 437, 441 (6th Cir. 2019).

The Armed Career Criminal Act ("ACCA") requires district courts to impose a mandatory fifteen-year term of imprisonment on a defendant who "has three previous convictions . . . for a violent felony." 18 U.S.C. § 924(e)(1). We have previously held that Kentucky first-degree robbery is an ACCA-predicate offense. *United States v. Ingram*, 733 F. App'x 812, 816 (6th Cir. 2018); *United States v. Elliott*, 757 F.3d 492, 495–96 (6th Cir. 2014) (facilitation to commit first-degree robbery). Because a complicity conviction in Kentucky requires proof of each element of the underlying offense, *Parks v. Commonwealth*, 192 S.W.3d 318, 326–27 (Ky. 2006), Abney's conviction for complicity in first-degree robbery also constitutes an ACCA-predicate offense.

[1] Abney was also convicted of complicity in first degree robbery of Russell A. Anderson, a customer at one of the convenience stores Abney robbed on August 8, 1998. For purposes of determining whether Abney is an armed career criminal, the government disclaims any reliance on the conviction arising from the robbery of Anderson. For that reason, this opinion references three convictions for complicity in first-degree robbery, not four.

United States v. Johnson, 933 F.3d 540, 547 (6th Cir. 2019) ("If the underlying crime has the necessary physical force element and a conviction for complicity requires proof of the underlying crime, then the complicity conviction necessarily includes the physical force element.")

Abney does not argue that complicity in first-degree robbery in Kentucky is not an ACCA-predicate offense; instead, he argues that the district court erred by concluding that his three convictions were for three distinct offenses. The government must demonstrate by a preponderance of the evidence that Abney's convictions represent different offenses. *United States v. Barbour*, 750 F.3d 535, 546 (6th Cir. 2014). And the government must do so through *Shepard* documents—that is, charging documents, plea agreements, judgments, and other judicial records of the predicate offenses. *Hennessee*, 932 F.3d at 444.

When determining whether offenses were committed on different occasions, we look to the following so-called *Hill* guideposts: (1) "Is it possible to discern the point at which the first offense is completed and the subsequent point at which the second offense begins?" (2) "Would it have been possible for the offender to cease his criminal conduct after the first offense and withdraw without committing the second offense?" or (3) "Were the offenses committed in different residences or business locations?" *United States v. Wooden*, 945 F.3d 498, 504 (6th Cir. 2019) (citing *United States v. Hill*, 440 F.3d 292, 297–98 (6th Cir. 2006)). We have repeatedly stated that "[o]ffenses are separate if they meet any of these three tests." *United States v. Jones*, 673 F.3d 497, 503 (6th Cir. 2012) (emphasis omitted); *see also Hennessee*, 932 F.3d at 444. Moreover, where "the judgments and indictments establish that the robberies occurred at . . . different business locations," a district court does not err in concluding the robberies are distinct predicate offenses, other *Hill* guideposts notwithstanding. *United States v. Southers*, 866 F.3d 364, 369 (6th Cir. 2017).

Southers alone defeats Abney's appeal. The *Shepard* documents show that the robberies occurred in separate geographic locations. *Wooden*, 945 F.3d at 504. The indictment reveals that Abney participated in the robbery of "Discount Tobacco," "Redi-Mart," and the "Chevron Station." DE 22-1, Indictment, Page ID 103–04. Although no *Shepard* document provides the addresses of those convenience stores, they are indisputably different places. Abney does not attempt to argue otherwise. Nor should he; we have found offenses occurred at different locations even where the offenses occurred in storage units that were "adjoined 'at the same business location.'" *Wooden*, 945 F.3d at 505 (citation omitted). Abney's robberies at three *separate* business locations, then, easily passes the distinct locations test. Accordingly, the district court did not err in concluding that his three convictions were for distinct offenses.

Common sense bolsters this conclusion. Abney was charged with and pled guilty to three counts of first-degree robbery. Complicity under Kentucky law is not a separate offense, but instead a theory of liability requiring proof of each element of the underlying offense. *Parks*, 192 S.W.3d at 326–27. Abney must have thrice participated in a robbery accomplished by the "use[] or threat[of] immediate use of physical force upon another person," Ky. Rev. Stat. § 515.020(1), the very element that renders a conviction of first-degree robbery in Kentucky an ACCA-predicate offense. *Elliot*, 757 F.3d at 496. The *Shepard* documents confirm as much. The indictment provides that Abney "threaten[ed] the use of physical force while armed with a dangerous instrument and in the course of committing a theft" at "Discount Tobacco," "Redi-Mart," and a "Chevron Station." DE 22-1, Indictment, Page ID 103–04.

Abney's attempts to avoid this conclusion are unconvincing. First, he argues that the government cannot meet each of the *Hill* guideposts because his conviction under a complicity theory of liability renders the government unable to prove that he could have ceased his criminal

conduct after the first offense and before committing the second offense. The government concedes as much. But the government need not satisfy each of the *Hill* guideposts. *Jones*, 673 F.3d at 503. That is especially true where the convictions are for robbery. *Southers*, 866 F.3d at 369. In *Southers*, we affirmed the district court's determination that the defendant's robbery convictions were distinct offenses without even addressing the other two *Hill* guideposts after determining that the robberies occurred at separate business locations. *Id.*

Second, Abney attempts to undermine the *Shepard* documents. Abney asserts that, because the Final Judgment "referenced one sole and single 'said crime,'" the *Shepard* documents evidence only one offense. CA6 R. 52, Appellant Br., at 17 (quoting DE 22-2, Final J. and Sentence, Page ID 110). That is misleading; evidence of multiple crimes abounds in the *Shepard* documents. In addition to the examples discussed elsewhere, the Final Judgment that Abney quotes itself notes that Abney pled guilty to "the *crime(s)* of Four Counts of Complicity to Robbery First Degree" and that the Commonwealth recommended a sentence of "[t]en years on *each count*." DE 22-2, Final J. and Sentence, Page ID 110 (emphasis added). Abney also notes that his ultimate sentence—twenty years' imprisonment—was the same as the maximum sentence for one count of complicity in first-degree robbery. But, again, Abney ignores overwhelming evidence in the judgment showing that he received a sentence for each count. For example, the Final Judgment explains that, for "the crime(s) of Four Counts of Complicity to First Degree Robbery" Abney was to be sentenced to "[t]en years on each count, two counts to run consecutive, the remainder to run concurrent." DE 22-2, Final J. and Sentence, Page ID 112.

III.

Because Abney's three convictions for complicity in first-degree robbery involved robbery of three different business locations, the convictions constitute distinct offenses. Each conviction,

therefore, counts as an ACCA-predicate offense. And, because Abney has three predicate-offenses, he must face an ACCA-enhanced sentence. The judgment of the district court is affirmed.

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