

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

HENRY JOSEPH STEVENS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

/s/ Adam Nicholson

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INDEX TO APPENDICES

Appendix A Opinion of Fifth Circuit, CA No. 20-11264, dated December 21, 2022, *United States v. Stevens*, 2022 WL 17832291(5th Cir. Dec. 21, 2022) (unpublished).

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas, entered December 21, 2020. *United States v. Stevens*, Dist. Court 7:20-CR-24-O-1.

APPENDIX A

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

December 21, 2022

Lyle W. Cayce
Clerk

No. 20-11264

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

HENRY JOSEPH STEVENS,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 7:20-CR-24-1

Before JONES, SMITH, and GRAVES, *Circuit Judges.*

PER CURIAM:*

Henry Joseph Stevens appeals the 15-year sentence he received after pleading guilty to one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).¹ Stevens argues that the district court plainly erred by concluding that his prior convictions qualified

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

¹ Section 924(a)(2) has since been amended and recodified at § 924(a)(8).

No. 20-11264

him for an enhanced sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). We affirm.

For the first time on appeal, Stevens argues that he should not have received the enhanced sentence because the Government failed to show that he had three qualifying prior convictions. We review this unpreserved argument under the plain-error standard. *See Puckett v. United States*, 556 U.S. 129, 135, 129 S. Ct. 1423, 1429 (2009). If Stevens shows an error that is clear or obvious and affects his substantial rights, then this court may exercise its discretion to correct the error, but only if it “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (internal quotation and brackets omitted). The “burden of establishing entitlement to relief for plain error” is on the party claiming it. *United States v. Dominguez Benitez*, 542 U.S. 74, 82, 124 S. Ct. 2333, 2340 (2004).

The ACCA’s enhanced penalties apply to a defendant who has three previous convictions “for a violent felony or a serious drug offense, or both, committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). In *Wooden v. United States*, the Supreme Court stated that offenses “committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so for offenses separated by substantial gaps in time or significant intervening events.” 142 S. Ct. 1063, 1071 (2022). The Court endorsed a multi-factor inquiry over the timing-focused approach formerly applied by some lower courts, including the Fifth Circuit. *Id.* at 1068 (citing *United States v. Fuller*, 453 F.3d 274, 278–79 (5th Cir. 2006)). Still, the Court recognized that offenses committed “a day or more apart, or at a significant distance” are rightly treated “as occurring on separate occasions.” *Id.* at 1071 (internal quotation omitted). When making this

No. 20-11264

determination, a court may examine only “*Shepard*²-approved” material, comprising “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.” *Fuller*, 453 F.3d at 279 (internal quotation omitted), *abrogated on other grounds by Wooden*, 142 S. Ct. at 1068 n.1.

In Stevens’s presentence report (PSR), the probation officer applied the ACCA’s enhanced penalties due to Stevens’s three prior Texas convictions for aggravated robbery with a deadly weapon, which occurred on February 18, 2009; March 10, 2009; and March 11, 2009. The PSR included *Shepard*-approved documents supporting the convictions. Stevens argues that in light of *Wooden*, the government failed to carry its burden of establishing that the March 10 and March 11 robberies occurred on separate occasions because they could have occurred only minutes apart on either side of midnight.³

But we need not decide whether the district court erred, much less clearly or obviously erred, because Stevens has not shown that any alleged error affected his substantial rights. To satisfy the “substantial-rights” prong, Stevens must demonstrate “a reasonable probability that, but for the district court’s [error], he would have received a lesser sentence.” *United States v. Martinez-Rodriguez*, 821 F.3d 659, 663–64 (5th Cir. 2016) (internal quotation omitted). Here, *Shepard*-approved documents show that Stevens also had a 1995 California felony conviction for inflicting corporal injury on a

² *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254 (2005).

³ Stevens briefly posits that his February 18th and March 10th robberies may have been part of a common occasion, as they were both of the same victim and in the same county. But even under *Wooden*, the lengthy gap between those offenses shows that they occurred on separate occasions. *See Wooden*, 142 S. Ct. at 1071.

No. 20-11264

spouse, which qualifies for ACCA enhancement purposes. *See United States v. Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010); *see also United States v. Moore*, 635 F.3d 774, 776 (5th Cir. 2011). Thus, even if the two March 2009 robberies constitute only one qualifying conviction under the ACCA, the February 2009 robbery and the California conviction make up the other two needed to justify the 15-year sentence. Accordingly, Stevens has not shown reversible plain error.⁴

For the foregoing reasons, the district court's judgment is AFFIRMED.

⁴ Stevens also contends that the district court committed reversible plain error by finding that his prior aggravated robbery convictions qualified as violent felonies under the ACCA because the Texas offense of aggravated robbery may be committed by recklessly inflicting injury. The supporting documents show that his prior aggravated robbery convictions qualified as violent felonies. *See United States v. Garrett*, 24 F.4th 485, 489, 491 (5th Cir. 2022). He correctly concedes that this argument is foreclosed by *Garrett*, and he raises it solely to preserve it for potential further review.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
Wichita Falls Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

HENRY JOSEPH STEVENS

Case Number: 7:20-CR-00024-O(01)
U.S. Marshal's No.: 60316-177
Robert Boudreau, Assistant U.S. Attorney
James Harris, Attorney for the Defendant

On July 21, 2020 the defendant, HENRY JOSEPH STEVENS, entered a plea of guilty as to Count One of the Superseding Indictment filed on May 28, 2020. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	Possession of a Firearm by a Convicted Felon	12/21/2019	One

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 as to Count One of the Superseding Indictment filed on May 28, 2020.

Upon Motion of the government, all remaining Counts are dismissed, as to this defendant only.

The defendant shall notify the United States Attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Sentence imposed December 21, 2020.



REED O'CONNOR
U.S. DISTRICT JUDGE

Signed December 21, 2020.

Judgment in a Criminal Case
Defendant: HENRY JOSEPH STEVENS
Case Number: 7:20-CR-00024-O(1)

Page 2 of 4

IMPRISONMENT

The defendant, HENRY JOSEPH STEVENS, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **ONE HUNDRED EIGHTY (180) MONTHS** as to Count One of the Superseding Indictment filed on May 28, 2020. This sentence shall run concurrently with any future sentence which may be imposed in Case No. 12538, pending in the 46th Judicial District Court of Wilbarger County, as this case is related to the instant offense.

The Court recommends to the BOP that the defendant be allowed to participate in the Residential Drug Treatment Program, if eligible. The Court further recommends that the defendant be housed at an FCI facility within the Northern District of Texas area or as close to Oklahoma City, Oklahoma, if possible.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **THREE (3) YEARS** as to Count One of the Superseding Indictment filed on May 28, 2020.

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

- (1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
- (2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
- (3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
- (4) You must answer truthfully the questions asked by your probation officer.
- (5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- (6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
- (7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job

Judgment in a Criminal Case
Defendant: HENRY JOSEPH STEVENS
Case Number: 7:20-CR-00024-O(1)

Page 3 of 4

responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

- (8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- (9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
- (10) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- (11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- (12) If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
- (13) You must follow the instructions of the probation officer related to the conditions of supervision.

In addition the defendant shall:

not commit another federal, state, or local crime;

not illegally possess controlled substances;

cooperate in the collection of DNA as directed by the probation officer;

not possess a firearm, ammunition, destructive device, or any dangerous weapon;

report in person to the U.S. Probation Office in the district to which the defendant is released from the custody of the Federal Bureau of Prisons within 72 hours of release;

refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court;

notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments;

participate in an outpatient program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered (copayment) at the rate of at least \$25 per month; and,

Judgment in a Criminal Case
Defendant: HENRY JOSEPH STEVENS
Case Number: 7:20-CR-00024-O(1)

Page 4 of 4

participate in outpatient mental health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered (copayment) at a rate of at least \$25 per month.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

FORFEITURE

Pursuant to 18 U.S.C. §982(a)(1) and 28 U.S.C. § 2461(c), it is hereby ordered that the defendant's interest in the following property is condemned and forfeited to the United States: Smith and Wesson, model M&P Shield, 9mm caliber, pistol, bearing serial number HSW0970, including any ammunition, magazines, and/or accessories recovered with the firearm.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States Marshal

BY

Deputy Marshal