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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff – Appellee, v. TYLER G. WILLIAMS, Defendant – Appellant.	No. 21-5856

Appeal from the United States District Court
for the Eastern District of Kentucky
at Lexington.
No. 5:20-cr-00107-1—Danny C. Reeves, Chief District Judge.

Argued: June 7, 2022

Decided and Filed: July 6, 2022

Before: GIBBONS, WHITE, and NALBANDIAN, Circuit Judges.

COUNSEL

ARGUED: Elizabeth A. Arrick, CASEY, BAILEY & MAINES, PLLC, Lexington, Kentucky, for Appellant. John Patrick Grant, UNITED STATES ATTORNEY'S OFFICE, Lexington, Kentucky, for Appellee. **ON BRIEF:** Elizabeth Anne Arrick, CASEY, BAILEY & MAINES, PLLC, Lexington, Kentucky, for Appellant. John Patrick Grant, Charles P. Wisdom, Jr.,

UNITED STATES ATTORNEY'S OFFICE, Lexington, Kentucky, for Appellee.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. Tyler Williams pled guilty to possession of a mixture or substance containing methamphetamine with intent to distribute and being a felon in possession of a firearm. Based on four previous Kentucky robbery convictions, the district court designated Williams as an armed career criminal under the Armed Career Criminal Act ("ACCA"). Williams appeals, arguing that this designation was improper. We affirm.

I.

In October 2020, Williams was indicted in the Eastern District of Kentucky for possession of a mixture or substance containing methamphetamine with intent to distribute and being a felon in possession of a firearm. Pursuant to a plea agreement, he pled guilty to both counts but reserved the right to challenge his designation as an armed career criminal under the ACCA at sentencing.

The district court determined that Williams was an armed career criminal based on his previous robbery convictions. When Williams was sixteen,[1] he pled guilty in Fayette County Circuit Court to one count of robbery in the first degree, in violation of Ky. Rev. Stat. Ann. § 515.020, and three counts of robbery in the second degree, in violation of Ky. Rev. Stat. Ann. § 515.030. All four robberies were charged in the same

[1] Williams was convicted as an adult for these offenses.

indictment. The robberies occurred on separate days but were committed by the same individuals. On January 15, 2004, Williams, Nicholas Shannon, and Christopher Wirick robbed a Thorntons gas station. On January 23, 2004, the same three individuals robbed Thorntons.[2] On January 29, 2004, the same three individuals robbed Shoppers Village Liquor, and on March 13, 2004, they robbed a BP gas station.

Williams objected to his designation as an armed career criminal. He argued that the second-degree robbery convictions were not predicate offenses under the ACCA because they were not violent and not separate offenses. The district court overruled the objection, finding the offenses were committed on separate occasions and were violent felonies under the ACCA. Due to the career-criminal designation, the guidelines range was 188 to 235 months' imprisonment. After considering the factors under 18 U.S.C. § 3553(a), the district court sentenced Williams to 200 months' imprisonment on both counts, to run concurrently.

Williams appeals, arguing that his designation as an armed career criminal was improper because second-degree robbery in Kentucky is not a violent felony under the ACCA and his predicate offenses were not committed on different occasions.

II.

We review de novo whether Williams's previous convictions qualify as predicate offenses under the ACCA. *See United States v. Malone*, 889 F.3d 310, 311

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[2] It is not clear from the record whether this was the same Thorntons location.

(6th Cir. 2018). We first discuss whether second-degree robbery in Kentucky is a violent felony under the ACCA, and then whether Williams's robbery offenses were committed on separate occasions under *Wooden v. United States*, 142 S. Ct. 1063 (2022).

A

Williams was convicted of three counts of second-degree robbery in violation of Ky. Rev. Stat. Ann. § 515.030. An issue of first impression in our court, Williams argues that this offense is not a violent felony under the ACCA because second-degree robbery does not require violent force, nor does it require purposeful or knowing conduct.

1

Under the ACCA's "elements clause," a violent felony includes an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i); *United States v. Wilson*, 978 F.3d 990, 993 (6th Cir. 2020). We apply a categorical approach to determine whether Kentucky second-degree robbery satisfies the elements clause. *Wilson*, 978 F.3d at 993. Under this approach, we look only to the statutory elements of section 515.030, rather than the particular facts of Williams's convictions. *Id.* Section 515.030(1) states, "A person is guilty of robbery in the second degree when, in the course of committing theft, he or she uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft." We must determine whether "physical force" under section 515.030 falls under the elements clause's definition of "physical force."

The Supreme Court has elaborated on what constitutes physical force under the elements clause. In *Johnson v. United States*, 559 U.S. 133 (2010), the Court determined that Florida's felony offense of battery was not a violent felony under the ACCA. A defendant could be convicted of battery in Florida if "he merely '[a]ctually and intentionally touche[d]' the victim." *Id.* at 137. The Court explained that physical force under the elements clause means "*violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140. Battery in Florida could be satisfied by nominal physical contact and, therefore, it did not constitute a violent felony under the ACCA. *Id.* at 138, 145.

In *Stokeling v. United States*, 139 S. Ct. 544 (2019), the Court considered whether a conviction under Florida's robbery statute, which defines robbery as "the taking of money or other property . . . from the person or custody of another, . . . when in the course of the taking there is the use of force, violence, assault, or putting in fear," Fla. Stat. § 812.13(1) (1995), qualifies as an ACCA predicate offense. 139 S. Ct. at 549. The Florida Supreme Court had "explained that the 'use of force' necessary to commit robbery requires 'resistance by the victim that is overcome by the physical force of the offender.'" *Id.* (citation omitted). The Supreme Court held "that the elements clause encompasses robbery offenses that require the criminal to overcome the victim's resistance." *Id.* at 550. Explaining the line between *Johnson* and *Stokeling*, the Supreme Court stated:

> [T]he force necessary to overcome a victim's physical resistance is inherently "violent" in

> the sense contemplated by *Johnson*, and "suggest[s] a degree of power that would not be satisfied by the merest touching." This is true because robbery that must overpower a victim's will—even a feeble or weak-willed victim—necessarily involves a physical confrontation and struggle. The altercation need not cause pain or injury or even be prolonged; it is the physical contest between the criminal and the victim that is itself "capable of causing physical pain or injury."

Id. at 553 (citations omitted). The Court emphasized that "*Johnson* did not purport to establish a force threshold so high as to exclude even robbery from ACCA's scope." *Id.* Nor did it "require any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality." *Id.* at 554.

Turning to the present case, there is limited caselaw in Kentucky discussing the degree of force required for second-degree robbery. Taking a bird's eye view, "[t]he basic robbery offense in Kentucky is second-degree robbery." *Hatton v. Commonwealth*, No. 2014-SC-000248-MR, 2016 WL 2604806, at *2 (Ky. May 5, 2016). It becomes first-degree robbery when accompanied by an aggravating circumstance, such as causing physical injury. *Id.* And it becomes theft when there is a lack of physical force. *Id.* at *3. In *Hatton*, the Kentucky Supreme Court distinguished the force necessary for robbery from theft:

> All of the evidence was that [the defendant] stole [the victim's] wallet by physically wresting it away when she resisted his efforts to

> take it from her hands. By using physical force against [the victim] to remove the wallet from her grasp, [the defendant's] theft became at least second-degree robbery. There was no evidence to the contrary. . . such as if the circumstances had been more of a pickpocket-type situation whereby the theft was accomplished without the victim's awareness.

2016 WL 2604806, at *4.

Physical force is defined by statute as "force used upon or directed toward the body of another person." Ky. Rev. Stat. Ann. § 515.010. In a series of cases from the early 1900s, before the adoption of Kentucky's current penal code, the Kentucky Court of Appeals[3] explained that the slightest use of force is sufficient for robbery so long as it is "sufficient to take the property against the owner's will." *Commonwealth v. Davis*, 66 S.W. 27, 27 (Ky. 1902); *see also Stockton v. Commonwealth*, 101 S.W. 298, 299 (Ky. 1907); *Jones v. Commonwealth*, 66 S.W. 633, 634 (Ky. 1902). In 2005, the Kentucky Court of Appeals relied in part on *Davis* in assessing the degree of force required for second-degree robbery under section 515.030. *See Boger v. Commonwealth*, 2005 WL 1704079, at *2 & n.7 (Ky. Ct. App. July 22, 2005).

A district court in the Western District of Kentucky found that the minimum level of force criminalized by section 515.030 was insufficient to constitute a violent felony under the ACCA after the Supreme

[3] This was the highest state court in Kentucky at the time.

Court's decision in Johnson. *See United States v. Bizor*, No. 3:17-CR-120-RGJ, 2018 WL 6515138 (W.D. Ky. Dec. 11, 2018) (Jennings, J.). The court explained,

> [T]he minimum level of force criminalized by KRS 515.030, robbery in the second-degree, appears to be *de minimis* as it can be as little as the force sufficient to take or snatch [the] personal possession of another against his will, such as snatching a pocketbook from the hand of the victim so quickly that the victim did not have the opportunity to resist. This is lower than the level of violent force required by *Johnson, i.e.* that force which is "capable of causing physical pain or injury to another person."

Id. at *5 (quoting *Johnson*, 559 U.S. at 140). After *Stokeling*, however, the same court changed course, noting that "force sufficient to snatch a personal possession of another against his will" was sufficiently violent under the new precedent. *United States v. Thomas*, No. 3:18-CR-165-RGJ, 2019 WL 5549206, at *1 (W.D. Ky. Oct. 25, 2019) (Jennings, J.).

While there is little state caselaw on the subject, the caselaw that does exist shows that second-degree robbery in Kentucky requires a level of force sufficient to satisfy the standard set forth in Stokeling. "Robbery is ordinarily thought of as theft combined with an assault." Hatton, 2016 WL 2604806, at *3. As the Kentucky Supreme Court has explained, it is not robbery to take another's property without their awareness, as a pickpocket does. Id. at *4. Rather, robbery requires that the defendant overcome the victim's will. Id. Stokeling established that any level of force

sufficient to overcome a victim's resistance is sufficiently violent for the ACCA.

Williams argues that the term "will," as used in the early Kentucky robbery cases, and the term "resistance," as used in *Stokeling*, are not synonymous, and that a second-degree robbery conviction could be sustained even where the defendant did not overcome the resistance of the victim. In *Stokeling*, the Supreme Court used the terms "will" and "resistance" somewhat interchangeably, appearing to equate "will" with physical resistance or aversion rather than other, more passive forms of non-physical resistance such as mere mental disagreement. It stated that "the force necessary to overcome a victim's *physical resistance* is inherently 'violent' . . . This is true because robbery that must overpower a victim's will—even a feeble or weak-willed victim—necessarily involves a physical confrontation and struggle." 139 S. Ct. at 553 (emphasis added). The Court rejected the idea that the force required to effectuate a robbery under Florida law was equivalent to "[t]he nominal contact that *Johnson* addressed," explaining that "[t]he force necessary for misdemeanor battery does not require resistance or even physical aversion on the part of the victim; the 'unwanted' nature of the physical contact itself suffices to render it unlawful." *Id.*

It is true that several of the early Kentucky robbery cases on which Williams relies did not involve physical resistance or aversion on the part of the victim. In *Stockton*, for example, the court upheld a robbery conviction where the victim testified, "I stretched out my hand with the $10 bill, holding the bill in my hand. Whereupon [the defendant], who was standing

at my right, snatched the bill from me, and [the two defendants] ran." 101 S.W. at 299. And in Jones, the court sustained a robbery conviction where the victim testified that the defendant "got behind me and wrenched the pocketbook out of this [left] hand; and, of course, he being stronger than I, I had to give way to him, and let him have it." 66 S.W. at 633. However, the court observed that the victim apparently had not "tried to hold onto the pocketbook," and that "the snatching or grabbing and jerking of [the] pocketbook out of the witness' hand was probably done so quickly that he had no chance to actively resist." *Id.* at 634.

These cases are similar to the Florida cases cited by the Court in *Stokeling* to illustrate, by way of negative example, the principle that under Florida law, robbery requires "resistance by the victim that is overcome by the physical force of the offender." 139 S. Ct. at 554–55 (quoting *Robinson v. State*, 692 So.2d 883, 886 (1997)). In one case, the Florida Court of Appeals held that "a defendant who merely snatches money from the victim's hand and runs away has not committed robbery." *Id.* at 555 (citing *Goldsmith v. State*, 573 So.2d 445 (Fla. Ct. App. 1991)). And in another case, the Florida Court of Appeals held that "a defendant who steals a gold chain does not use force within the meaning of the robbery statute, simply because the victim feels his fingers on the back of her neck." *Id.* (quoting *Walker v. State*, 546 So.2d 1165, 1166–67 (Fla. Ct, App. 1989)) (internal quotation marks and alteration omitted).

Although these early Kentucky cases give us pause, Williams cites no recent Kentucky cases holding or implying that second-degree robbery can be

committed with a level of force less than that identified in *Stokeling*. To be sure, the Kentucky Court of Appeals in its 2005 opinion in Boger relied in part on Davis to uphold a second-degree robbery conviction. 2005 WL 1704079, at *2 & n.7. But in both *Davis* and *Boger*, the facts showed that the victim physically resisted the attacker. *See id.* at *2 (observing that "the victim's purse was wrenched from her as she resisted her attacker. Indeed, the victim was drug from the front of her car into the traffic aisle of the parking lot"); *see also Davis*, 66 S.W. at 27 (noting the victim testified that the defendant "grabbed a purse which she was carrying in her hand [and] that she resisted with all her force, but that he slipped one of his hands over her wrist, and wrenched her pocketbook out of her hand with his other hand"). We therefore cannot conclude that the Kentucky second-degree robbery statute encompasses a degree of force less than that identified in *Stokeling*.

Separately, Williams notes that, unlike Florida, Kentucky does not have a "sudden snatching" statute under which a conviction can be obtained without showing that the defendant used force beyond that necessary to obtain possession of the victim's property or that the victim resisted the defendant. *See Stokeling*, 139 S. Ct. at 555. This, argues Williams, is a "key distinction" in determining whether Kentucky's second-degree robbery statute meets the definition of force set forth in *Stokeling*. CA6 R. 27, Reply Br. at 3 (quoting *United States v. Smith*, 928 F.3d 714, 716 (8th Cir. 2019)). But Kentucky has a "theft by unlawful taking or disposition" statute that makes it unlaw-

ful to "[t]ake[] or exercise[] control over movable property of another with intent to deprive him or her thereof." Ky. Rev. Stat. Ann. § 514.030(1). Although, unlike Florida's sudden-snatching statute, section 514.030 makes no reference to the victim's resistance, *Hatton* made clear that a conviction under this statute does not require a showing that the defendant used any physical force. 2016 WL 2604806, at *3; *see also Oakes v. Commonwealth*, 320 S.W.3d 50, 58 (Ky. 2010) (stating that the defendant would be entitled to instruction under § 514.030(1)(a) "only if the jury could reasonably conclude that he committed theft without any physical force"). Looking at Kentucky law as a whole, then, robbery occurs when the defendant steals using force sufficient to overcome the victim's will and does not encompass taking without the victim's awareness or without physical force. Therefore, second-degree robbery in Kentucky requires a sufficient level of force to satisfy the elements clause of the ACCA.

2

Williams also argues that second-degree robbery in Kentucky lacks the mens rea required for a violent felony under the ACCA.

In *Borden v. United States*, 141 S. Ct. 1817 (2021), the Supreme Court held that a criminal offense could not count as a violent felony under the ACCA if it requires only a mens rea of recklessness. Looking to the relevant offense here: "A person is guilty of robbery in the second degree when, in the course of committing theft, he or she uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft." Ky. Rev. Stat. Ann. § 515.030.

Williams argues that the specific intent requirement only applies to the theft and not to the use of force, which he claims can be done recklessly.

The statute's commentary notes, "[t]o be convicted under KRS 515.030, an offender must have intended, with his use or threatened use of physical force, to accomplish a theft." Ky. Rev. Stat. Ann. § 515.020, cmt. (1974). And, as discussed above, Kentucky law defines "physical force" as "force used upon or directed toward the body of another person," Ky. Rev. Stat. Ann. § 515.010; thus, the force criminalized by section 515.030 satisfies *Borden*'s requirement that "the perpetrator direct his action at, or target, another individual." 141 S. Ct. at 1825.

In *Hobson v. Commonwealth*, 306 S.W.3d 478 (Ky. 2010), the Kentucky Supreme Court elaborated on the intent required for robbery. Hobson tried to use a stolen credit card at a Wal-Mart, but the cashier recognized it as stolen and reported the situation. *Id.* at 478–79. When Hobson was confronted, he bolted out of the store into the parking lot while the items he planned to steal remained at the checkout counter. *Id.* at 479. An officer caught Hobson in the parking lot and a scuffle ensued, during which the officer's ankle broke. *Id.* Hobson was arrested and convicted of first-degree robbery. *Id.* The Kentucky Supreme Court reversed Hobson's conviction, explaining that "[i]f, at the time a defendant first uses or threatens force, he has abandoned his intention to accomplish a theft, the plain language of the robbery statutes constrains us to conclude that the elements of robbery are not met." *Id.* at 482. "The language admits to no interpretation

other than that the force (or threat of force) be contemporaneous with an intent to accomplish the theft." *Id.* As Hobson's "use of force against [the officer] was not 'with intent to accomplish the theft,' the altercation cannot satisfy the physical force element of the statute, and . . . the conviction for first-degree robbery cannot be sustained." *Id.* at 483. The court further noted that while an instruction was given for second-degree robbery, the statutory definition was the same as first-degree robbery, except for the aggravating factors. *Id.* Therefore, "[i]t follows by the same rationale, that a conviction under the second-degree robbery statute cannot be sustained under the facts of [Hobson's] case." *Id.* As shown in *Hobson*, the use of force in robbery must be done with the specific intent to commit a theft, not with mere recklessness.

Citing *Slaven v. Commonwealth*, 962 S.W.2d 845 (Ky. 1997), Williams argues that without the intent to commit a theft during robbery, all that is left is wanton assault or endangerment. Thus, he argues, the Kentucky second-degree robbery statute's physical force requirement is satisfied with, at worst, a wanton mental state. In *Slaven*, the Kentucky Supreme Court considered the effect of an intoxication defense on a robbery charge. The court explained that there are two elements to robbery: "(1) use of physical force with (2) the intent to commit a theft." *Id.* at 857. If an intoxication defense was successful and eliminated intent, then "the theft element of robbery evaporates[,] leaving only the element of physical force." *Id.* Therefore, "an instruction on first-degree wanton endangerment, as a lesser included offense," would be appropriate. *Id.* (citation omitted). The court explained,

"there is no offense of wanton robbery." *Id. Slaven* did not hold that second-degree robbery may be accomplished using force in a wanton manner. It simply made clear that if there is no intent to steal, there is no robbery. Robbery's intent element cannot be separated from its force element; otherwise it becomes a different crime altogether. Therefore, *Slaven* does not support the principle that one can use force recklessly and still commit robbery in Kentucky.

Williams also argues that because robbery is normally thought of as theft combined with assault, and assault can be accomplished wantonly or recklessly, section 515.030's physical force requirement can be satisfied by mere reckless conduct. We find this argument unavailing because Williams cites no cases upholding a second-degree robbery conviction where the defendant used physical force recklessly. *Hatton* does not help Williams; the evidence there indicated that the defendant "us[ed] physical force against [the victim] to remove the wallet from her grasp." 2016 WL 2604806, at *4. And the two other cases Williams cites, *Birdsong v. Commonwealth*, 347 S.W.3d 47 (Ky. 2011), and *Tunstull v. Commonwealth*, 337 S.W.3d 576 (Ky. 2011), are inapposite because they concern interpretations of what conduct constitutes a threatened use of physical force under Kentucky's second-degree robbery statute. *See Birdsong*, 347 S.W.3d at 49 ("[T]he question for this Court is whether aggression toward inanimate objects in the presence of others during a theft sufficiently 'threatens the use of physical force on another person.'"); *Tunstull*, 337

S.W.3d at 583 (considering whether "aggressively demanding money" constitutes a threat for purposes of Kentucky's second-degree robbery statute).

Given the statute's plain language, supported by the commentary and caselaw, Kentucky second-degree robbery requires that an individual use force with the specific intent to accomplish theft. Therefore, it is not a crime that can be committed with a mens rea of recklessness and is not precluded as an ACCA offense under Borden.

B

Under the ACCA, the three previous convictions that can result in a defendant's designation as an armed career criminal must be "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). Williams argued to the district court that his Kentucky robbery offenses were not committed on separate occasions because they were charged in a single indictment. The district court disagreed, finding that each robbery was committed on a different occasion. During the pendency of this appeal, the Supreme Court addressed this issue in *Wooden v. United States*, 142 S. Ct. 1063 (2022).

In one evening, Wooden burglarized ten units in a storage facility, proceeding from unit to unit by crushing the interior walls between them. *Wooden*, 142 S. Ct. at 1067. The Supreme Court held that these burglaries occurred on one occasion, not ten separate occasions. *Id.* at 1069. The Court explained that determining whether offenses occurred on separate occasions is a "multi-factored" inquiry. *Id.* at 1070. Relevant factors include timing, proximity of location, and

"the character and relationship of the offenses." *Id.* at 1071. We apply these factors to Williams's robbery offenses.

"Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events." *Id.* Williams's four robberies occurred on four separate dates, each separated by at least six days: January 15, 2004; January 23, 2004; January 29, 2004; and March 13, 2004. Therefore, this factor favors a conclusion that the offenses occurred on separate occasions.

As to proximity, "the further away crimes take place, the less likely they are components of the same criminal event." *Id.* Two of the robberies occurred at Thorntons, though it is not clear whether they occurred at the same location. The other two robberies occurred at Shoppers Village Liquor and a BP station. Given that the robberies occurred at different stores and on different days, this factor weighs in favor of finding that the offenses occurred on separate occasions.

As for the character of the offenses, "[t]he more similar or intertwined the conduct giving rise to the offenses—the more, for example, they share a common scheme or purpose—the more apt they are to compose one occasion." *Id.* The same three individuals committed all four robberies in Fayette County, Kentucky. Therefore, the four robberies are similar, but they do not share a common scheme in the same way as *Wooden*, in which the defendant burglarized each storage unit simultaneously in the exact same manner.

The Court explained that "[i]n many cases, a single factor—especially of time or place—can decisively differentiate occasions." *Id.* "Courts, for instance, have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart, or at a 'significant distance.'" *Id.* (citation omitted). Given the substantial gap in time between Williams's robbery offenses and some variety in locations, the offenses were committed on separate occasions under the ACCA.[4] *See United States v. Miles*, No. 21-5481, slip op., at 3 (6th Cir. Apr. 25, 2022) (finding offenses committed on separate days were separate offenses under the ACCA after *Wooden*); *United States v. Barrerra*, No. 20-10368, 2022 WL 1239052, at *2 (9th Cir. Apr. 27, 2022) (same); *United States v. Daniels*, No. 21-4171, 2022 WL 1135102, at *1 (4th Cir. Apr. 18, 2022) (same).

Williams raises a separate issue that he seemingly did not raise before the district court. He contends the

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[4] Williams argues the rule of lenity dictates that this court find that the ACCA does not apply. Concurring in *Wooden*, Justice Gorsuch raised concerns with the ability to consistently interpret what constitutes separate occasions under the ACCA, noting "[t]he statute contains little guidance, and reasonable doubts about its application will arise often." 142 S. Ct. at 1087 (Gorsuch, J., concurring). He emphasized that when these doubts arise, "they should be resolved in favor of liberty" per the rule of lenity. *Id.* Applying the rule of lenity may be appropriate in some future circumstances, such as in the example proposed by Justice Gorsuch of "a defendant who sells drugs to the same undercover police officer twice at the same street corner one hour apart." *Id.* at 1080. In Williams's case, however, the robberies were sufficiently separate in time and place that it is clear they occurred on separate occasions.

issue of whether his robbery offenses were committed on separate occasions under the ACCA is a jury issue. However, this court has already held that "consistent with *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)], a sentencing judge may answer the question of whether prior offenses were 'committed on occasions different from one another.'" *United States v. King*, 853 F.3d 267, 274 (6th Cir. 2017) (quoting *United States v. Burgin*, 388 F.3d 177, 183 (6th Cir. 2004)).

III.

The district court found that Williams was an armed career criminal under the ACCA based on four previous Kentucky robbery convictions. Second-degree robbery in Kentucky requires force sufficient to overcome the victim's will and not mere pickpocketing, which establishes it as a violent felony under Supreme Court precedent. And second-degree robbery in Kentucky cannot be conducted with a mens rea of recklessness, so it is not precluded as an ACCA offense under *Borden*. Further, Williams's robbery offenses occurred on separate occasions under *Wooden*. We affirm the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
Eastern District of Kentucky — Central Division at Lexington

UNITED STATES OF AMERICA v. TYLER G. WILLIAMS	**JUDGMENT IN A CRIMINAL CASE** Case Number: 5:20-CR-107-DCR-01 USM Number: 12324-509 Elizabeth Anne Arrick Defendant's Attorney

THE DEFENDANT:

■ pleaded guilty to count(s) 1 and 2 [DE# 1]

□ pleaded nolo contendere to count(s) _____ which was accepted by the court.

□ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:841(a)(1)	PWID Methamphetamine	February 12, 2020	1
18:922(g)(1)	Possession of a Firearm by Convicted Felon	February 12, 2020	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

□ The defendant has been found not guilty on count(s) _____

□ Count(s) _____ □ is □ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 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. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 31, 2021
Dates of Imposition of Judgment

/s/ Danny C. Reeves
Signature of Judge

Honorable Danny C. Reeves,
Chief U.S. District Judge
Name and Title of Judge

September 1, 2021
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

TWO HUNDRED (200) MONTHS ON COUNT 1 AND 2 TO RUN CONCURRENTLY FOR A TOTAL OF TWO HUNDRED (200) MONTHS

■ The court makes the following recommendations to the Bureau of Prisons:

That the defendant participate in a job skills and/or vocational training program.
That the defendant participate in a substance abuse treatment program.
That the defendant receive a mental health assessment and receive any necessary treatment.
That the defendant be designated to serve his sentence at an institution close to Lexington, Kentucky.

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

□ The defendant shall surrender to the United States Marshal for this district:

□ at _____ □ a.m. □ p.m. on _____,

□ as notified by the United States Marshal.

□ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

□ before 2 p.m. on _____.

□ as notified by the United States Marshal.

□ as notified by the Probation or Pretrial Services Office.

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 United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

FIVE(5) YEARS ON EACH COUNT 1 AND 2 TO RUN CONCURRENTLY FOR A TOTAL OF FIVE(5) YEARS

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not lawfully possess a controlled substance.
3. You must 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.

   □ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*

4. □ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(Check, if applicable.)*

5. ■ You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

6. □ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(Check, if applicable.)*

7. □ You must participate in an approved program for domestic violence. *(Check, if applicable.)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

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 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.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. You must submit your person as well as any offices, properties, homes, residences, vehicles, storage units, papers, computers, other electronic communications or data storage devices or media, to a search conducted by a United States probation officer. Failure to submit to a search will be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition.

2. You must participate in a substance abuse treatment program and must submit to periodic drug and alcohol testing at the direction and discretion

of the probation officer during the term of supervision. You must pay for the cost of treatment services to the extent you are able as determined by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments of Sheet 6.

	Assessment	**Restitution**
TOTALS	$200.00 ($100/ct)	$ Community Waived
Fine	**AVAA Assessment***	**JVTA Assessment****
$ Waived	$ N/A	$ N/A

□ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

□ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned

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* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	**Total Loss*** **	**Restitution Ordered**	**Priority or Percentage**

TOTALS $_____ $_____

□ Restitution amount ordered pursuant to plea agreement $ _____

□ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

□ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

  □ the interest requirement is waived for the □ fine □ restitution.

  □ the interest requirement for the □ fine □ restitution is modified as follows:

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Have assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ■ Lump sum payment of $200.00 due immediately balance due

□ not later than _____, or

■ In accordance with □ C, □ D, □ E, or ■ F below; or

B □ Payment to begin immediately (may be combined with □ C, □ D, or □ F below); or

C □ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $_____ over a period of _____ *(e.g. months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D □ Payment in equal _____ *(e.g. weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g. months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E □ Payment during the term of supervised release will commence within _____ *(e.g. 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F. ■ Special instructions regarding the payment of criminal monetary penalties:

Criminal monetary penalties are payable to:

Clerk, U.S. District Court, Eastern District of Kentucky
101 Barr Street, Room 206, Lexington, KY 40507

INCLUDE CASE NUMBER WITH ALL CORRESPONDENCE

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, arc made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

□ Joint and Several

Case Number

Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

□ The defendant shall pay the cost of prosecution.

□ The defendant shall pay the following court costs(s):

- The defendant shall forfeit the defendant's interest in the following property to the United States:
  a) Glock, Model 29, 10mm auto caliber pistol, bearing serial number WUS280, and
  b) Ammunition

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment; (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX C

No. 21-5856

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff – Appellee, v. TYLER G. WILLIAMS, Defendant – Appellant.	FILED Oct 26, 2022 DEBORAH S. HUNT, Clerk ORDER

BEFORE GIBBONS, WHITE, and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX D

RELEVANT STATUTORY PROVISION

18 U.S.C. § 924(e).

(e)(1) 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, committed on occasions different from one another, such person shall be fined under this title 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 section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.