TABLE OF CONTENTS

Page

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 22-1926

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PAUL ERLINGER,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.
No. 2:18-CR-00013-JMS-CMM-1 – **Jane Magnus-Stinson**, *Judge*.

ARGUED JANUARY 18, 2023
DECIDED AUGUST 10, 2023

Before HAMILTON, JACKSON-AKIWUMI, and LEE, *Circuit Judges*.

JACKSON-AKIWUMI, *Circuit Judge*. Paul Erlinger received a prison term of 15 years for illegally possessing a firearm. The district court imposed this mandatory minimum sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), because Erlinger had three prior convictions for violent felonies—all three of them Indiana burglaries. Erlinger challenges his sentence on two grounds. First,

he argues that Indiana burglary is not a predicate offense under ACCA because the state's definition of burglary is broader than the federal statute. Second, he asserts that the three burglaries were not committed on separate occasions and, in any event, the Sixth Amendment requires a jury, not the judge, to decide this question. The law of our circuit says otherwise on both issues, so we affirm Erlinger's sentence.

I

In 2018, Erlinger was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He entered a guilty plea and was given an enhanced sentence of 15 years' imprisonment under ACCA, 18 U.S.C. § 924(e), based on his 1991 conviction for Illinois residential burglary, 1991 conviction for burglary in Pike County, Indiana, and two 2003 convictions for dealing in methamphetamine, also in Pike County. The district court subsequently vacated Erlinger's sentence because we later ruled in separate opinions that Illinois residential burglary is not a violent felony under ACCA, *United States v. Glispie*, 978 F.3d 502 (7th Cir. 2020), and Indiana methamphetamine convictions are not serious drug offenses under ACCA, *United States v. De La Torre*, 940 F.3d 938, 952 (7th Cir. 2019). This left Erlinger with only one qualifying prior conviction—or so it seemed—not three as required by ACCA.

At the resentencing hearing, the government argued that Erlinger still qualified for an ACCA-enhanced mandatory minimum sentence because he had other 1991 burglary convictions from Dubois

County, Indiana.[1] To prove these convictions, the government supplied a charging document—in this case, an information—for each of the burglaries. Each information charged a different burglary at a different business, and three of them on different dates: April 4, 1991 at Mazzio's Pizza, April 8, 1991 at The Great Outdoors, Inc., and April 11, 1991 at Druther's and Schnitzelbank.[2] The government also supplied the plea entered in those cases.

Erlinger objected. He argued, among other things: (1) the Indiana definition of a burglary is broader than the federal definition of a generic burglary, therefore Indiana burglary does not trigger ACCA; and (2) the Dubois County burglaries were not committed on separate occasions as ACCA requires, and a jury, not the judge, must make that factual determination. The district court overruled Erlinger's objections, found that he previously committed three burglaries on three separate occasions, and imposed an ACCA-enhanced sentence of 15 years. Erlinger appeals.

---

[1] The government also relied on the 1991 Pike County burglary to seek the ACCA enhancement again, but the district court disregarded that charge (despite having apparently accepted it as a predicate at the original sentencing) because the government did not present a judgment of conviction.

[2] Because the informations for Druther's and Schnitzelbank charged that the burglaries occurred on the same date, and an ACCA enhancement requires only three predicate offenses, the district court did not rely on the Druther's burglary.

II

We review questions of statutory interpretation and the district court's application of the ACCA enhancement to a defendant's sentence de novo. *United States v. Clay*, 50 F.4th 608, 611 (7th Cir. 2022); *Kirkland v. United States*, 687 F.3d 878, 882 (7th Cir. 2012). We review factual findings regarding prior convictions for clear error. *Kirkland*, 687 F.3d at 882.

We first address Erlinger's argument that his prior Indiana burglary offenses should not have been used to enhance his sentence under ACCA because Indiana's burglary statute covers more conduct than generic burglary. ACCA mandates a 15-year minimum prison sentence for anyone possessing a firearm after three prior convictions for serious drug offenses or violent felonies "committed on occasions different from one another." § 924(e)(1). ACCA defines a violent felony, as relevant here, as any offense that is a burglary. § 924(e)(2)(B). "The term burglary in § 924(e)(2)(B)(ii) does not encompass all burglaries, but only generic burglary." *United States v. Perry*, 862 F.3d 620, 623 (7th Cir. 2017) (cleaned). The Supreme Court defines a generic burglary "as an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990). The generic offense also includes "burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation." *United States v. Stitt*, 139 S. Ct. 399, 403–04 (2018).

Indiana's definition of burglary is "[a] person who breaks and enters the building or structure of another person, with intent to commit a felony in it." Ind. Code

§ 35-43-2-1 (1990). Our prior cases make clear that Indiana burglary is a generic burglary offense. In *United States v. Perry*, we rejected the defendant's argument that Indiana burglary is overly broad because it "may be committed in outdoor, fenced-in areas." 862 F.3d at 622–24. We held Indiana burglary is a valid predicate offense because it "requires that the defendant enter a *wholly* enclosed area." *Id.* In reaching this conclusion, we specifically considered the Indiana cases Erlinger cites here. Our opportunity to consider Indiana burglary did not end with *Perry*. Shortly after *Perry*, in *United States v. Foster*, we addressed the defendant's contention that "the word 'dwelling' in the Indiana code is broader than the generic 'building or structure' … because Indiana defines 'dwelling' to include 'other enclosed space[s], permanent or temporary, movable or fixed.'" 877 F.3d 343, 345 (7th Cir. 2017). We again rejected the argument and held Indiana "burglary requires that the location burglarized be both a 'building or structure' and a 'dwelling.'" *Id.*

Recognizing this precedent, Erlinger argues the Indiana statute is broader because it interprets "building or structure" to include boats, cars, and tents. But after we decided *Perry* and *Foster*, the Supreme Court broadened the generic definition of burglary to include "a structure or vehicle that has been adapted or is customarily used for overnight accommodation." *Stitt*, 139 S. Ct. at 403–04 (emphasis added). The Supreme Court explained that statutes which criminalize breaking and entering "any boat or vessel, or railroad car" are still beyond the scope of the generic definition if they "refer[] to ordinary boats and

vessels often at sea (and railroad cars often filled with cargo, not people), nowhere restricting its coverage, as here, to vehicles or structures customarily used or adapted for overnight accommodation." *Id.* at 407. The Indiana statute does not include the language the Supreme Court deems overly broad, and Erlinger has not cited any Indiana cases that interpret the statute in this manner. We therefore see no basis to hold that the Indiana burglary statute no longer qualifies for the enhanced sentence mandated by ACCA.

We now turn to Erlinger's argument that the district court violated his Sixth Amendment right to a jury trial when it ruled his Dubois County burglaries were committed on separate occasions. Before a district court can impose an ACCA enhancement, a factfinder must determine whether the defendant has at least three prior convictions for serious drug offenses or violent felonies. Those prior convictions must have been "committed on occasions different from one another." § 924(e)(1). We have held that a sentencing judge may make a "separate occasions" finding when deciding the ACCA enhancement. *United States v. Elliott*, 703 F.3d 378, 382 (7th Cir. 2012); *United States v. Hatley*, 61 F.4th 536, 542 (7th Cir. 2023). Erlinger argues, and the government agrees, that *Wooden v. United States*, 142 S.Ct. 1063 (2022), alters this precedent. We disagree.

In *Wooden*, the sentencing court imposed an ACCA sentencing enhancement on a defendant who had ten prior convictions for burglary—one for each storage unit he entered by "crushing the interior drywall" between the units in a single facility on the same evening. *Id.* at 1067. The Supreme Court reversed

Wooden's sentence, holding that a defendant can commit multiple sequential crimes as part of a *single* occasion. *Id.* at 1070–71. The Court conducted a "multi-factored" inquiry, examining the timing of the offenses, proximity of location, and "character and relationship of the offenses," to conclude that Wooden's ten burglaries were part of a single criminal act. *Id.* at 1071.

Here, both Erlinger and the government insist that the inquiry articulated in *Wooden* must be conducted by a jury because it requires proof of non-elemental facts about a defendant's prior conviction. *See, e.g., Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). According to the parties, the district court violated Erlinger's Sixth Amendment right to a trial by jury when it made the finding that Erlinger's Dubois County burglaries were committed on separate occasions. But *Wooden* explicitly did not address whether the "separate occasions" determination must be made by a jury rather than a judge, *see* 142 S.Ct. at 1068 n.3, and we are bound by our prior precedent.[3] In fact, earlier this year in *Hatley*, we likewise observed that *Wooden* expressly reserved the Sixth Amendment issue. 61 F.4th at 542. We affirmed an ACCA sentence

[3] We pause to note that the parties' position is foreclosed by current precedent, but the fact that the government has conceded there is a Sixth Amendment question here and urged that a jury should be deciding these questions demonstrates that this issue is by no means static. So does the Supreme Court's footnote in *Wooden* making it clear the Court was not addressing the Sixth Amendment question. We may one day be called upon to revisit our precedent permitting a judge to make these determinations.

enhancement in that case and held that we would continue to follow our precedent. *Id.* We do so again today. The government was not required to prove to a jury beyond a reasonable doubt that Erlinger committed the Indiana burglaries on separate occasions. The government could prove its position to the sentencing judge, and the applicable standard is preponderance of the evidence. *Kirkland*, 687 F.3d at 889.

Having settled that the district court was within its authority to decide the "separate offenses" question, we turn to the decision itself. As instructed by *Wooden*, we must consider timing, proximity of location, and "the character and relation-ship of the offenses" to determine whether a defendant's sentence should be enhanced under ACCA because the defendant committed qualifying offenses on separate occasions. 142 S. Ct. at 1071. In this case, three charging documents for Erlinger's Dubois County burglaries allege that the felonies took place on three different dates and at three different businesses—again, April 4, 1991 at Mazzio's Pizza, April 8, 1991 at The Great Outdoors, Inc., and April 11, 1991 at Schnitzelbank. *See id.*, 142 S. Ct. at 1071 ("In many cases, a single factor—especially of time or place—can decisively differentiate occasions. 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.'"). Erlinger pleaded guilty to each charge. With the *Wooden* criteria in mind, we agree with the district court's conclusion that Erlinger's Dubois County burglaries were committed on different occasions.

Erlinger supplied no argument or evidence that would cast doubt on this conclusion, and the resentencing hearing was his opportunity to do so. Erlinger did argue in the district court and here that Indiana's charging documents may not always be accurate or reliable. His point is well taken. But here, the unequivocal nature of the charging documents about the different dates of the offenses charged (there is no "on or about" language, as the district court noted), plus Erlinger's guilty plea to each charge, are sufficient to show by a preponderance of the evidence that the offenses were committed on separate occasions. *See, e.g., United States v. Cardenas*, 217 F.3d 491, 492 (7th Cir. 2000) (holding two sales of crack cocaine on the same day were "separate and distinct episodes" because "[w]hile Cardenas sold the crack cocaine to the same people, the sales were separated by forty-five minutes and a half a block."); *United States v. Godinez*, 998 F.2d 471, 473 (7th Cir. 1993) (a kidnapping and a robbery were not a "single occasion" where the defendant "committed his crimes against different victims, in different places, more than an hour apart" (internal quotation marks omitted)).

We **AFFIRM** Erlinger's sentence.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA TERRE HAUTE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. PAUL ERLINGER, Defendant.	CAUSE No. 2:18-cr-

INFORMATION

[18 U.S.C. § 922(g)(1) -
Felon in Possession of a Firearm]

The United States Attorney charges that:

On or about September 12, 2017, in Knox County, in the Southern District of Indiana, PAUL ERLINGER, defendant herein, did knowingly possess in commerce and affecting commerce a firearm, to wit: one Bushmaster .223 rifle bearing serial number BK1800665, after having been convicted of one or more crimes punishable by a term of imprisonment exceeding one (1) year, to wit: a felony Dealing in Cocaine in Pike County, Indiana under cause number 63C01-0303-FA-111 on or about June 27, 2005; a felony Burglary in Dubois County, Indiana under cause number 19C01-9109-CF-105 on December 11, 1992; and a felony Burglary in Dubois County, Indiana under cause number 19C01-9109-CF-106 on December 11, 1992.

All of which is in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e).

FORFEITURE

1. Pursuant to Federal Rule of Criminal Procedure 32.2, the United States hereby gives the defendant notice that the United States will seek forfeiture of property, criminally and/or civilly, pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c), as part of any sentence imposed.

2. Pursuant to Title 18, United States Code, Section 924(d), if convicted of the offense set forth in this Information, the defendant shall forfeit to the United States "any firearm or ammunition involved in or used in" the offense.

3. The property subject to forfeiture includes, but is not necessarily limited to:

A. One Bushmaster .223 rifle bearing serial number BK1800665;

B. One Mossberg 12 gauge shotgun, model 835 multi-mag, bearing serial number UM822687;

C. One Savage .223 caliber rifle, model Axis, bearing serial number H836370;

D. One Smith & Wesson 9mm handgun, model M&P 9 Shield, bearing serial number HLH4529;

E. One Rossi (Brazil) .38 Special revolver, model M951, bearing serial number ZA29085;

F. One Taurus (Brazil) 9mm pistol, model PT92C, bearing serial number TJJ7097;

G. One Smith & Wesson 40 caliber handgun, model SD40VE, bearing serial number FXC8228;

H. One Ruger 7mm rifle, model M77 Mark II, bearing serial number 784-90336;

I. One Remington .243 caliber rifle, model 770, bearing serial number M71657676;

J. One Ruger .22 caliber rifle, model 22, bearing serial number 253-74559;

K. One Smith & Wesson .223 caliber rifle, model M&P-15, bearing serial number 12597;

L. One Savage 30-06 caliber rifle, model 110, bearing serial number H816766;

M. One Savage .308 caliber rifle, model 12F/TR, bearing serial number G812974;

N. One DPMS multi caliber rifle, model A15, bearing serial number FFA010279;

O. One Smith & Wesson .308 caliber rifle, model M&P-10, bearing serial number KN08209;

P. One Safety Harbor Firearms (SHF) 50 BMG caliber rifle, model SHF/R50, bearing serial number 0226;

Q. One Savage .338 caliber rifle, model 110, bearing serial number H342434;

R. One American Tactical Imports (ATI) .556 caliber rifle, model Omni Hybrid, bearing serial number NS028657;

S. One ARMSCOR .22 caliber rifle, model AK22, bearing serial number RIA1544250;

T. One Taurus .22 caliber rifle, model Rossi S21280RS (M12/22), bearing serial number SP681003; and

U. All ammunition found with the firearms.

4. The United States shall be entitled to forfeiture of substitute property pursuant to Title 21, United States Code, Section 853(p), and as incorporated by Title 28, United States Code, Section 2461(c), if any of the property described above in paragraph 3, as a result of any act or omission of the defendant:

A. cannot be located upon the exercise of due diligence

B. has been transferred or sold to, or deposited with, a third party;

C. has been placed beyond the jurisdiction of the court;

D. has been substantially diminished in value; or

E. has been commingled with other property which cannot be divided without difficulty.

JOSH J. MINKLER
United States Attorney

[Notary information intentionally omitted]

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA TERRE HAUTE DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **PAUL ERLINGER,** **Defendant.**	**No. 2:18-cr-00013-JMS-CMM**

SENTENCING MEMORANDUM

Defendant Paul Erlinger, by his counsel, submits the following Sentencing Memorandum for the Court's consideration at his April 26, 2022 resentencing hearing.

I. Introduction.

Paul Erlinger (hereinafter, Erlinger) is scheduled to appear before this Court on April 26, 2022 for resentencing on a single count of being a Felon in Possession of a Firearm in violation of 18 U.S.C. §§922(g)(1) and 924(e)(1).

Erlinger was originally sentenced on October 26, 2018 to a term of 180 months in the custody of the Bureau of Prisons. [Dkt. 51] That sentence was vacated pursuant to 28 U.S.C. §2255 on July 12, 2021, subject to resentencing, based on the Court's determination that three of the predicate offenses relied

upon by the Court in 2018 no longer qualified as valid ACCA predicates.[1]

Erlinger has been incarcerated for this offense since September 12, 2017 and has a current outdate of June 24, 2030.

Erlinger objects to the proposed determination that he qualifies as an Armed Career Offender as set forth in the Revised Pre-Sentence Investigation Report. [Dkt. 94] His objections are set forth in the Addendum to the PSIR and, below, in Section II, Subsections A through C. [Dkt. 94, pp. 25-28]

Erlinger recognizes that, even if the Court accepts his argument(s) that he is not an Armed Career Offender, he will be resentenced herein. In that event, the Court will fashion a sentence that is sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. §3553(a)(2) and, in doing so, the Court will consider, among other factors, "the circumstances of the offense" and "the history and characteristics of the defendant". Therefore, he addresses these factors in Section III, below.

---

[1] Two Pike County, IN convictions for dealing in methamphetamine did not qualify as ACCA predicates under *U.S. v. De La Torre*, 940 F.3d 938 (7th Cir. 2019) and an Illinois residential burglary did not qualify as an ACCA predicate under *U.S. v. Glispie*, 978 F.3d 502 (7th Cir. 2020). [Dkt. , p. 4]

II. Objections to the ACCA Determination in the Pre-Sentence Investigation Report.

The Armed Career Criminal Act (ACCA) imposes a fifteen-year minimum sentence on persons convicted under 18 U.S.C. § 924(g) who at the time of their offense had at least three prior convictions for a "violent felony". 18 U.S.C. § 924(e)(1). The ACCA defines "violent felony" in relevant part as any felony "that ….is burglary". §924(e)(2)(B)(ii). In determining whether Erlinger's prior burglary convictions qualify as ACCA predicates, the Court will focus exclusively on Indiana's statutory definition of burglary and must answer the questions of whether Indiana's definition sweeps more broadly than the generic definition, whether the burglaries alleged were committed on occasions different from one another and whether those questions can be answered by the *Shepard* documents, if any, provided by the government.

Erlinger's objections are set forth in the Addendum to the Pre-Sentence Investigation Report at Docket 94 and fleshed out herein.

A. Objection to the Use of Alleged Predicate Offenses Not Included in the Charging Information.

Erlinger was charged by Information on April 20, 2018. [Dkt. 23] The Information alleged three predicate offenses, including Dealing in Cocaine [63C01-0303-FA-111], Burglary [19C01-9109-CF-105] and Burglary [19C01-9109-CF-106]. This Court previously held that the Dealing in Cocaine conviction

does not qualify as a serious drug offense under the ACCA, but that Indiana burglaries may qualify and, therefore, at resentencing the parties would be permitted to argue regarding whether those convictions represent valid ACCA predicates when the Court did not rely on them at the original sentencing hearing. [2:19-cv-00518 at Dkt. 23, pp. 4-5]

Prior to resentencing, no Amended Information was filed and no additional notice given Erlinger by the government. In recommending the Chapter Four enhancement, probation relied upon both of the previously included burglary cases, as well as on three previously unlisted burglary cases [19C01-9105-CF-116, 19C01-9105-CF-117 and 63C01-9112-CF-00404], to which Erlinger objected. [Dkt. 94, ¶ 23, p. 26]

Erlinger acknowledges that, in *Almendarez-Torres v. United States*, the Supreme Court held that the government need not allege a prior conviction in the indictment nor prove it beyond a reasonable doubt to a jury in order to use that conviction for purposes of enhancing a sentence. 523 U.S. 224, 226-27 (1998). However, in this case he argues both that the burglary convictions, not previously included and considered by the Court, do not constitute valid ACCA predicates based on the overbreadth of Indiana's burglary statute and on the inability of the Court to establish that they were committed on separate occasions as required by ACCA.

In *United States v. Shepard* the Supreme Court noted the difference between the "fact of a prior conviction" and a "fact about a prior conviction", for purposes of enhancing a sentence under the ACCA.

544 U.S. 13, 24-26 (2005). While the simple fact of a prior conviction is governed by the rule in *Almendarez-Torres* and may be determined by the sentencing judge, a relevant fact about a prior conviction may only be found by the sentencing judge if it is based on a limited set of documents specified in *Shepard*. 544 U.S. 13, 26. *Shepard* concerned an appeal from an ACCA determination based on three prior burglary offenses. The Court noted that only "generic burglaries", those committed in a building or enclosed space, qualify as "violent crimes" under the ACCA and, in states with broader definitions of burglary, the Court may have to look to documents such as the statutory elements, charging documents, plea agreements and jury instructions, to see whether the specific conviction qualifies. In cases where the conviction is established by a plea, as Erlinger's 1991 convictions were, the applicable documents would be "the statement of factual basis for the charge shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea" from which another Court could generally tell whether the prior plea had "necessarily" rested on the fact identifying the burglary as generic. 14. (*Taylor v. United States*, 495 U. S. 575, 602 (1990). The Fourth Circuit in *United States v. Thompson*, 421 F.3d 278 (2005), held that sentencing courts may rely on prior convictions to invoke the enhancement provided by § 924(e)(1), even if the prior convictions were not charged in the indictment or found by a jury, but only so long as no facts extraneous to the fact of conviction need be decided. 282-83.

Erlinger contends that in this case facts extraneous to the mere fact of conviction are required but the requisite documents for the fact finding necessitated herein no longer exist, are not available to the Court and/or do not satisfy the *Shepard* requirements.

B. Indiana's Definition of "Burglary" is Overbroad as Interpreted and Does Not Qualify as a Generic Burglary for Purposes of ACCA.

Indiana's definition of "burglary" does not control the word's meaning under 18 U.S.C. §924(e). "Burglary" as used in § 924(e) must have some uniform definition independent of the labels used by the various States' criminal codes. *United States v. Nardello*, 393 U.S. 286, 293-294 (1969); *Taylor v. United States*, 495 U.S. 575, 576 (1990). The *Taylor* Court held that "an offense constitutes 'burglary' for purposes of a § 924(e) sentence enhancement if either its statutory definition substantially corresponds to 'generic' burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." 495 U.S. at 602. In some instances the Court may need to look behind the statutory definition if the definition is overly broad or the statute has been interpreted so as to encompass more than the generic burglary. Erlinger contends that Indiana's 1991-1992 burglary statute presents such an instance.

Erlinger asserts that Indiana's former burglary statute is overly broad in that it interprets the statutory "building or structure" to include boats, cars

and even tents – all excluded from the generic definition in the U.S. Supreme Court's 2016 decision in *Mathis v. United States*- and because established Indiana precedent permits a burglary conviction upon proof of breaking into a fenced in area which does not constitute a structure as the latter would commonly be understood. [*McCovens v. State*, 539 N.E.2d 26 (Ind. Ct. App. 1989) (fence surrounding business considered to be a "structure"; *Gray v State*, 797 N.E.2d 333 (Ind. Ct. App 2003) (fence does not need to adjoin a building or completely surround a business in order to be a structure); *Joy v State*, 460 N.E. 2d 551 (Ind. Ct. App. 1984) (fence surrounding lumber company is a structure).]

I.C. 35-43-2-1 lists alternative means for commission of the crime of burglary – as opposed to alternative elements – and, therefore, the categorical approach applies in determining whether a specific conviction under I.C. 35-43-2-1 qualifies as a predicate offense for purposes of the ACCA. *United States v. Handshoe*, N.D. IN. 2016. The government has submitted no records with respect to Erlinger's 1991 burglaries sufficient to enable the Court to determine whether the burglaries consist of entering into structures through an unlocked door during regular business hours (not a burglary under *Wilburn v. State*, 2021 WL 4258828 at *6 (Ind. Ct. App. 2021), trespassing into a partially fenced in or partially enclosed common area surrounding the building or committing a generic burglary by breaking into a building or residence proper during nonbusiness hours.

Erlinger acknowledges the adverse Opinions of the Seventh Circuit in *United States v. Perry*, 862 F.3d 620 (7th Cir. 2017) (class C burglary qualifies as an ACCA predicate) and *United States v. Foster*, 877 F.3d 343 (7thCir. 2017) (class B burglary qualifies as an ACCA predicate) and urges the Court to find that Indiana's burglary statute as it existed in 1991 and 1992 swept more broadly than a generic burglary and, therefore, the Court's prior decisions to the contrary are in error and convictions obtained under Indiana's burglary statutes should not be included as predicate offenses for an ACCA enhancement.

C. There is No Evidence that Four of Erlinger's Five Prior Burglary Convictions Were Committed on Separate Occasions.

In 1991, at the age of 18, Erlinger committed a series of four burglaries in DuBois County, Indiana which U.S. Probation proposes as separate predicate offenses for the ACCA enhancement. [Dkt. 94, ¶¶ 23, 41-44]

Each of the four burglaries was charged or "referred" on the same date - May 8, 1991. Erlinger was convicted of each burglary on the same date, September 30, 1991, and he received concurrent sentences on each case. Each burglary is alleged to have occurred within the City of Jasper at different addresses, although no information is provided as to the proximity of one address to another. The burglaries are alleged to have occurred on April 4, April 8, April 11 and April 11 of 1991 with no intervening arrests. [Dkt. 94, ¶¶ 41-44]

Erlinger objected to the use of the four convictions as predicate offenses for the ACCA and contends that "because his DuBois County burglary cases are not separated by an intervening arrest, were joined for sentencing and resulted in wholly concurrent sentences, they were not 'committed on occasions different from one another' and do not constitute more than one 'occasion' for purposes of the §924(e) enhancement." [Dkt. 94, Addendum at p. 27]

The United States Supreme Court in its recent Opinion in *Wooden v. United States* noted that the history of the so-called "occasions clause" of §924(e) "aligns with what this Court has always recognized as ACCA's purpose: to address the 'special danger' posed by the eponymous 'armed career criminal'. 595 U.S. _____(2022) at 13. The Court clarified that multiple criminal convictions arising from a single criminal "episode" can count only once for purposes of the ACCA and that an "occasion" may include any number of non-simultaneous activities. 595 U.S. ____, p. 6. The defendant in *Wooden* burglarized ten separate storage units under a single roof on the same night – each entry into a different unit resulting in a separate conviction but, according to the Supreme Court, collectively comprising one "occasion" for ACCA purposes.

The majority Opinion in *Wooden* distinguishes between its three-offense requirement and its three occasion requirement to parse out true recidivists who commit three truly unrelated qualifying offenses. 11-12. The Court's decision turns on issues such as location and timing of the various offenses

– issues which Justice Gorsuch finds to be frequently ambiguous. In his Concurring Opinion, he recognizes that reasonable doubts about the statute's application are likely to arise again in the future and he urges reliance on the rule of lenity to resolve those doubts in favor of liberty. Concurring Opinion at 13-15.

Erlinger urges this Court to find that the four 1991 DuBois County burglary convictions, all committed during his 18th year, all "referred" on May 8, 1991 with no intervening arrests, and all with concurrent judgments entered on September 30, 1991 constitute a single occasion of criminal conduct for purposes of the ACCA.

In order for the Court to find that these burglaries were committed on *occasions* different from one another, the Court will have to engage in judicial factfinding regarding the circumstances of each predicate conviction as the simple fact that three of the burglaries appear to have been committed on separate dates does not answer the "separate occasions" question. *Mathis v. United States*, 136 S. Ct. 2243 (2016) makes clear that the Court cannot engage in such fact finding when the end result will change the available sentence as in an ACCA determination. 2247.

III. Objections to the Advisory Guideline Computation in the Pre-Sentence Investigation Report.

A. Objection to the Base Offense Level.[2]

Erlinger objects to the application of a base offense level of 22 and contends that his base offense level should be 20 as provided in U.S.S.G. §2K2.1(a)(4)(B)(1). The base offense level of 22 is based on Erlinger's possession of a semiautomatic firearm that is capable of accepting a large capacity magazine (which he does not contest) and the commission of the instant offense subsequent to a felony conviction for a "controlled substance offense" as defined in U.S.S.G. §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1) as required by Application Note 1 of the Commentary to §2K2.1 (Definitions of Terms Used in Section 2K2.1.)

While Erlinger does not dispute the conviction in 63C01-0303-FA-00111, he contends that the conviction does not qualify as a "controlled substance offense" for purposes of U.S.S.G. §4B1.2(b) and, therefore, does not qualify as a "controlled substance offense" for purposes of U.S.S.G. §2K2.1(a)(3)(A)(i) and (B). Erlinger asserts that his conviction for dealing in methamphetamine is not a qualifying controlled substance offense and cannot qualify as a predicate offense for a sentencing enhancement because the elements contained in the Indiana defini-

[2] This objection is set forth in Dkt. 94 at page 25.

tion of methamphetamine are broader than the elements contained in the definition of methamphetamine in the Controlled Substance Act.

Erlinger relies on the holdings in *Mathis v. United States*, ___U.S. ____, 136 S. Ct. 25 (2016) and *United States v. De la Torre*, 940 F.3d 938, 951 (7th Cir. 2019) (holding that an Indiana conviction for dealing in methamphetamine cannot support an §851 enhancement for that reason). He acknowledges the Seventh Circuit's decision in *United States v. Ruth*, 966 F.3d. 642 (7th Cir. 2020), wherein the Court held that the over-breadth of an Illinois statute disqualified it as a predicate felony drug offense for ACCA, but not for purposes of the U.S.S.G.'s career offender determination. Erlinger believes that the appellate court's conclusion that a state court conviction based on an overly-broad state statute can provide a basis for a career offender enhancement was wrongly decided and that the issue was correctly decided by those circuit courts holding that convictions based on overly-broad state statutes and disqualified as predicate felonies for the §851 and ACCA enhancements should also be disqualified for purposes of the career offender enhancement and, therefore, for purposes of §2K2.1.

For the reasons set forth above, Erlinger also argues that his Adjusted Offense Level should be 24.

IV. The 18 U.S.C. §3553 (a) Factors Justify a Below Guidelines' Sentence.

A. The Offense Conduct.

Erlinger was arrested by state authorities on September 12, 2017 and charged with being a Felon in Possession of Firearms following a search of his Knox County residence. The initial inquiry was motivated by a report made by Kelly Camp, a woman with whom Erlinger had a brief and ill-advised relationship during a period of separation from his long time partner, Laura Riggs. Camp told officers that Erlinger had recently purchased a firearm at Rural King for her and that he was in possession of weapons and ammunition at his residence. During a traffic stop that followed the initial report, Erlinger cooperated with authorities and admitted that multiple firearms were stored at the Vincennes home he shared with Riggs.

During the search of a garage near the home, officers found a recently purchased gun safe containing sixteen long guns and four pistols, together with ammunition and paperwork. The gun safe had been moved from Rural King and installed in the garage after the home had been damaged by fire and was in the process of being rebuilt. The safe contained firearms and ammunition previously stored elsewhere. Only Riggs had the new combination to the safe. However, it was in an area of the home equally accessible to all occupants.

There was no allegation that any of the firearms were stolen or that Erlinger had ever used, or intended to use, any of the firearms for criminal purposes.

Erlinger cooperated with investigating state authorities prior to his September 12, 2017 arrest. Following his arrest by federal authorities on September 15, 2017, he consented to detention and pled to an Information on April 20, 2018.

B. The History and Characteristics of the Defendant.

Erlinger adopts by reference the historical information and argument presented in his Sentencing Memorandum, pages 4- 7 at Docket 49.

* * *

1. *The Post-Prison Years.*

Following a difficult youth and adolescence, Erlinger turned his life around in the years preceding his 2017 arrest. He was last released from prison in 2009 to a work release program which he successfully completed. He then successfully completed a brief period of home detention, followed by approximately two years of probation from which he was discharged early. [Dkt. 94, ¶¶ 48, 49]

After his release from incarceration, Erlinger remained drug-free and embarked on a productive period in the community. He entered into a committed relationship with Laura Riggs, raised her three daughters as his own, as well as raising his own son, Paul, Jr. He was employed by Sunrise Coal Company and earned $27.00 an hour at the time of his

arrest. Erlinger recalls that he loved his job and was proud of his ability to support himself and his family and maintain a middle-class lifestyle. He surrounded himself with friends who were similarly employed and not involved in criminal activities or lifestyles.

The presence of firearms in Erlinger's home were not an indication of a return to criminal activity. Rather, his friends and his partner, Laura, were heavily involved in the rural Indiana culture of hunting, fishing and gun ownership. Laura and her older daughters enjoyed target shooting and hunting. Erlinger, who had long enjoyed the same hobbies, did not appreciate the risk he was taking by his proximity to firearmas [sic] and the dire consequences he faced if found to be in possession or constructive possession of firearms, even without any attendant criminal activity.

2. *Erlinger's Impressive Institutional Adjustment*.

Erlinger has been incarcerated since September 12, 2017. He is currently incarcerated at the Federal Correctional Institution in Ashland, Kentucky. He is considered a "low risk" inmate.

During his years of incarceration, Erlinger has received only a single write-up. He was playing dominos in the unit library which, during COVID, was temporarily out-of-bounds. No good time was taken and the sanction was minimal.

Since his commitment, Erlinger completed a 4,000 hour Department of Labor apprenticeship in office management. For the past three years, he has

been employed at UNICOR as the purchasing agent.. He purchases all materials, posts finished goods and processes staff credit card orders for UNICOR's $15,000,000 a year business. [Dkt. 94, ¶ 91]

Erlinger receives the BOP's top pay of $1.50 per hour and he sends money home each month for the care and support of his minor son.

In addition to his exemplary work record, Erlinger has completed programs including drug education, computer navigation, business classes and studies in Arabic language, cinema and wellness. [Dkt. 94, ¶¶ 86, 90]

Some of Erlinger's Certificates are attached hereto as Exhibit A.

3. *Erlinger's Family Has Suffered in His Absence.*

Erlinger is extremely attached to his now eight year old son, Paul, Jr. He speaks to Paul on the telephone every day and writes a letter to him every week. However, due to the pandemic, Erlinger has not had a visit in two years and has no ability to see his son.

Erlinger's long-time partner and Paul's mother, Laura Riggs, became addicted to methamphetamine during the pandemic. Her addiction was totally unanticipated as she was not a drug user previously. Erlinger became aware of her addiction through telephone conversations with her and with his son. During the past two years, he has received seven

letters from the Department of Child Services expressing their concern about Laura's ability to parent and, eventually, notifying him that Paul was being removed from Laura's care due to her addiction and dangerous behavior. Erlinger had no ability to intervene and take custody of his child. Paul was placed with Kalee Perez, Laura's adult daughter who was raised by Erlinger.

Paul's placement with his adult sister is tenuous. While she is a good mother and concerned about Paul, she has three children of her own and is raising her sister Amanda's 4 year old daughter, in addition to Paul. Erlinger sends money when he can, talks to his son daily and read books with him daily during the many months that Paul was homeschooled due to the pandemic.

Erlinger is a hard worker and has confirmed employment if and when he is released.

Erlinger's letter to the Court is attached hereto as Exhibit B.

4. *The Risk of Recidivism is Extremely Low*.

Erlinger will be almost 59 years old if released in 2030 as currently scheduled. The category of offenders released after age 60 are those least likely to recidivate according to the United States Sentencing Commission Report on "The Effects of Aging on Recidivism Among Federal Offenders" (2017) and "Recidivism Among Federal Offenders" (2016). Offenders in the 51-60 age group have a rate of recidivism of only 24.7%.

Erlinger's lengthy period of law-abiding residence in his community prior to his 2017 arrest, his demonstrated ability to secure and maintain gainful and fulfilling employment, his devotion to his family and his exemplary institutional adjustment and performance under the most difficult circumstances, all bode well for a successful and productive return to his community.

This Court previously noted that a five year sentence would be "a fair sentence" in Erlinger's case[3] and, since Erlinger has continued to improve himself, and comply with this Court's request that he work and study hard during his incarceration, even during the most difficult times, this Court is urged to impose a sentence of no more than sixty months.

WHEREFORE, for all of the reasons set forth herein and in Erlinger's objections to the Pre-Sentence Investigation Report and based on the arguments herein and previously made, defendant Erlinger urges the Court to find that Indiana's 1991 burglary statute is overly broad in application and a conviction under the statute does not constitute a crime of violence for purposes of the ACCA and/or that the government has failed to prove that his 1991 burglary convictions occurred on separate "occasions" as required by the ACCA and impose a reasonable sentence herein without application of ACCA's enhancement.

---

[3] Dkt. 73-3, Exhibit C, Excerpt of Sentencing Hearing at pages 29-30.

Respectfully Submitted,

Date: April 26, 2022

/s/ Jessie A. Cook

Jessie A. Cook, #3715-84
Attorney at Law
1512 North Delaware St.
Indianapolis, IN 46202
(812)232-4634 Office
(812) 239-4575 Alternate telephone
jessieacook@icloud.com

[Certificate of Service intentionally omitted]

APPENDIX D

EXCERPT OF SENTENCING TRANSCRIPT

* * * *

[19] MS. COOK: Does the Court want us to address the issue of Indiana's definition of burglary before we get to the ACCA issue?

THE COURT: I will note your objection to Indiana's definition of burglary but once again find Circuit precedent forecloses that argument. So I consider the issue preserved. Does the Government agree?

MR. McGRATH: Yes, the issue is preserved.

THE COURT: Thank you, but the objection is overruled.

MS. COOK: All right. I understand.

THE COURT: Okay.

MS. COOK: So may I start with *Wooden*?

THE COURT: Yes.

MS. COOK: Okay. And so I think we all know what the underlying facts here are that back in 1991, Mr. Erlinger, who was just 18 years old, is alleged to have committed a series of four burglaries in Dubois County and one in Pike County. With respect to the four burglaries in Dubois County, they all were charged or referred on the same date, May 8, 1991. There was no intervening arrest between those burglaries or between the **[20]** Dubois burglaries and the Pike County burglary. He was convicted of all the Dubois burglaries on the same date,

which was September 30th of '91 and received concurrent sentences on each case.

And according to the presentence investigation report, each burglary was alleged to have occurred within the city of Jasper at different addresses, but there is no information as to the proximity of one address to the other. And the burglaries are at least alleged to have occurred, two of them on April 11th, one on the 4th, and one on the 8.

And we objected to the use of those four convictions as predicate offenses because they -- there is no proof that they were separated by an intervening arrest, and because they were joined for sentencing and resulted in wholly concurrent sentences, it is our allegation that the Government can't prove that they were committed on occasions different from one another; and therefore, they don't constitute more than one occasion for purposes of the ACCA enhancement.

So in the recent *Wooden* case, the Court noted that this history of what they are now calling the occasions clause aligns with what the Court had already recognized, always recognized as ACCA's purpose, which was addressing what they called the special danger posed by the ACCA statute.

But the Court clarified in *Wooden* that multiple criminal convictions arising from one or a single criminal **[21]** episode can only count once for purposes of ACCA and that what is new about the *Wooden* holding is that what they are calling an occasion may include any number of nonsimultaneous activities. And I won't go into the facts underlying

the *Wooden* case, but the majority opinion in *Wooden* distinguishes between this requirement of three offenses in ACCA and three occasions and tries to really parse out the true recidivist who commit three completely unrelated qualifying offenses.

And I think it is important that each of the justices during the oral argument indicated that they were having trouble with the definition of occasion. And in fact, Justice Gorsuch repeatedly said that it was ambiguous. So they kind of punted the issue back to sentencing court to determine that the predicate offenses alleged by the Government qualify as prior convictions for ACCA, first of all; and second, that they were each committed on three separate occasions.

That factor, that they be committed on separate occasions requires proof of facts that are not elements of the offense, and that is the problem that has created so much dispute or controversy among the Circuit courts for more than a decade. We acknowledge that before the *Wooden* decision, the Seventh Circuit had held that even when a Defendant has committed a multi crime spree over a very short period of time, every offense comprising a part of that spree is considered by the Government to have occurred on a separate occasion so long **[22]** as the Defendant had the opportunity to stop after each, after each offense. And that was the *Elliott* decision in 2012.

So in practice, what the -- in this Circuit, was that we were looking at whether the crimes occurred sequentially rather than simultaneously. And if

they occurred sequentially rather than simultaneously, they were considered to have occurred on occasions different from one another. Well, Justice Kagan rejected that test entirely in the majority opinion in the *Wooden* case.

She held that the natural meaning -- she was joined by the other justices who drove separately in concurring opinions, but she held that the natural meaning of occasion can't have the meaning that the Seventh Circuit assigned to it in *Elliott* because it cannot be sequential rather than simultaneous. And what the *Wooden* court, you know, focused on, was that an occasion could encompass a number of non-simultaneous activity, didn't have to be confined to a single one.

And the Court very squarely rejected the Government's contention that an occasion ends at the discrete moment when an offense's elements are established. So after *Wooden*, what constitutes a single occasion is a multi-facetted inquiry into timing, although not in a split second way that the Government argued in *Wooden*, proximity of location, character of the offense, relationship between the offenses, and all of that requires a highly fact specific inquiry for which, in truth, **[23]** the *Wooden* Court provided very little guidance. I think Justice Gorsuch in his concurring opinion recognized the fact that this is a very difficult analysis for the District Court, and it raises constitutional question such as whether the occasions clause can be squared with the Defendant's Fifth and Sixth Amendment rights to be sentenced only on the facts that were proven

beyond a reasonable doubt by juries and not by sentencing judges.

So I think our first position with respect to Mr. Erlinger's resentencing, is that this Court is prohibited by the Sixth Amendment and by *Apprendi* in this progeny from engaging in judicial fact finding other than finding a simple fact of a prior conviction and the elements of that prior conviction.

So I, I think this line of argument begins with *Apprendi*, which clearly states that only a jury and not a judge may find facts that increase a maximum penalty as ACCA does, except for the simple fact of a prior conviction. So *Apprendi* actually relied on an earlier case which was *Taylor v. United States* where the Supreme Court recognized that judicial fact finding could only encompass the elements essential to the prior conviction.

So this carve-out by the Supreme Court for the simple facts of the prior conviction is an exception to a general rule of those facts that increase the potential penalty for an **[24]** offense enjoy Sixth Amendment and due process procedural safeguards and have to be submitted to a jury. So I, I think that not only -- I think it was Justice Kagan's majority opinion in *Mathis*, echoed by Justice Gorsuch's concurring opinion in *Wooden* that recognized that there is a really simple fact underlying the necessity for this rule. And that simple fact is that the statements of fact which don't go to the elements of the offense in the records of prior convictions are prone to error, and they are prone to error precisely because as they are nonelemental facts, their proof is not necessary.

So a Defendant like Mr. Erlinger may have absolutely no incentive to contest facts that don't matter under the law where he might even be precluded from contesting those facts. That was the holding, Justice Kagan's holding in *Mathis*. And I would -- I would argue that Mr. Erlinger's burglary convictions present that very problem which concerned the *Mathis* court and Justice Gorsuch in the *Wooden* case.

Each was a burglary conviction that the Government is urging this Court to base an ACCA enhancement on were held in Indiana. They were obtained in Indiana, and they -- now, I am only talking about the Dubois County convictions because we don't even know whether there was a conviction in Pike County.

THE COURT: Well, the Government did attach, at least it -- I guess it was just the charging information.

MS. COOK: That's correct. They only attached the **[25]** charging information.

THE COURT: Okay.

MS. COOK: It doesn't even show if there was a conviction, it would be for burglary instead of theft. There is no documentation of any judgment of conviction.

THE COURT: Do you agree with that, Mr. McGrath?

MR. McGRATH: As far as the lack of documentation?

THE COURT: Correct.

MR. McGRATH: Yes. We don't have a judgment from Pike County.

THE COURT: Okay. And I am just confirming that probation still does not have any documentation.

PROBATION OFFICER HOOD: I do not have an actual judgment, no, Judge.

THE COURT: Okay. So the Court will disregard the Pike County allegation based on the record before it. So we --

MS. COOK: So --

THE COURT: -- focus on Dubois County.

MS. COOK: If we look at the Dubois County, all of those convictions were obtained in Indiana. In Indiana, the time and the place at which a prior crime occurred are not essential elements of the crime, and I have cited some case law in my brief. In Indiana, charging authorities are only required to allege the date of the offense with sufficient particularity to show that it falls within the statute of **[26]** limitation. So it doesn't matter if the date that is in the charging information is accurate or not accurate.

And I cited some cases to show that an information for the crime of burglary doesn't have to state the exact time of the offense, and they are referring to date and time, because it is not of the essence. And in fact, where there are mistakes in the charging information, misstating the year of the of-

fense, for example, it is not reversible error in Indiana for there to be that type of an error because the date is not of the essence.

So unless the Defendant in an Indiana case has a constitutional objection, such as I am being tried, or I am being accused of a crime which occurred outside the statute of limitation, there is no error for the date in the charging information, even the year to be incorrect. And there is no relief for a Defendant who complains that it may be incorrect.

The location of the offense is also not an element of the crime in Indiana, and in Indiana, charging authorities are only required to allege the location with enough particularity to show that it happened within the jurisdiction of the court.

So if there is a variance between the location at -- in the charging information and the proof at trial, for example, no problem with that either. It is not fatal to the state's case.

The Defendant doesn't benefit from that kind of an **[27]** error unless it places him in double jeopardy because it is outside the jurisdiction of the Court. So where the charging information -- the bottom line is where the charging information has an incorrect date or an incorrect location, Indiana says that error is an immaterial defect unless – an element of the offense, and that is not the situation in a burglary case such as those Mr. Erlinger is alleged to have committed, provided only the kind that run afoul of the statute of limitations and the location is within the court's jurisdiction. So all of the Dubois

County offenses were established by a plea. There was no jury that determined the date or location.

Mr. Erlinger's plea was to the elements of the offense and not to the material allegations in the charging information, and the documents available to this Court do not contain a specific factual basis for any of the plea. So -- and I am happy to talk a little bit further about how the Supreme Court, beginning with Justice Souter's opinion in *Shepard* and then progressing through Justice Kagan's opinions in *Descamps*, *Mathis*, and finally, *Wooden*, all of those Supreme Court decisions talk about a concern with what the – going beyond the elemental fact and why it is so dangerous for district courts to do so because defendants have no incentive; and in fact, they have a disincentive to challenge those nonelemental facts.

[28] So the Government in this case is urging the Court -- well, and let me just back up for one second and say that I think that it was put very succinctly in the *Mathis* case where the Court in *Mathis*, in the majority opinion, talks first of all about allowing a district court judge to go beyond the elemental facts raises serious Sixth Amendment concerns. But beyond that Sixth Amendment concern, *Mathis* also says that these statements of nonelemental facts like location and timing that I have just been talking about, those kinds of statements are prone to error.

And they are prone to error because their proof is unnecessary, and the Court in *Mathis* goes on to say that at trial and still more at plea hearings, which is what Mr. Erlinger had, a defendant may

have no incentive to contest what does not matter under the law. And to the contrary, he may have good reason not to contest it or even be precluded from contesting it by the court.

And I think that is exactly what we are concerned with here. So the Government is urging this Court to rely on the so-called *Shepard* documents, but it would be our position -- well supported by the decision in *Shepard* and its progeny in the Supreme Court that the Court can only use the *Shepard* documents to determine the fact of a prior conviction and the elements of a prior conviction.

THE COURT: Let me stop you there and ask Mr. McGrath [29] to respond. First of all, Mr. McGrath, can you respond on whether you, the Government contends and what is the Government's authority for the proposition that you can look to what we will call *Shepard* documents for facts other than what *Shepard* authorized, which is, a determination of the elements of the crime, authority that supports that.

MR. McGRATH: So *Wooden* -- the *Wooden* case, and I was going to talk about this in my response. It is sort of muddled, this kind of issue. There is a case that *United States v. Kirkland -- Kirkland v. United States*. It was actually cited by probation in its response to Defendant's objection, and I don't know. I mean, the validity of the overall scope of *Kirkland* may be questionable in light of *Wooden*, which I was going to talk about in a little bit. But let's see*, Kirkland* is 687 F.3d 878. I just had this up. Forgive me, Judge. May I have one moment?

THE COURT: Yeah. 687 F.3d. Tell me again.

MR. McGRATH: 878.

THE COURT: I will look in probation's response. Here it is. 687 F.3d 878.

MR. McGRATH: Part of the holding in *Kirkland* was --

THE COURT: Did you find that? Did you find it at that cite because I am not finding it at that cite.

THE CLERK: It looks like we lost Mr. Erlinger.

THE COURT: 687.

* * * *

[32] THE COURT: Just so you know, Mr. Erlinger, we have not been -- we have been sending a case by e-mail back and forth, a prior case, and nobody has made any further argument in your absence. It has taken us that long to just get our collective e-mailing capabilities together, and I am as poor at it or poorer than anybody else. So the case we are looking at now, for your information, is *Kirkland v. United States*, 687 F.3d 878. I am looking at that case.

The Court did hold affirmatively -- and whether you -- I recognize you disagree with it, Ms. Cook, but the Court did hold affirmatively that separate documents could be considered on the different occasions. If I read -- at the very beginning of the discussion, under it says *Shepard* source restriction, and the Court holds we agree with the district court that *Shepard* does apply, and we have indicated as much in prior opinions.

So wait a minute. So now I need to read -- sorry.

MS. COOK: It severely limits what it considers a *Shepard* document for one thing. Then it says, if there is any ambiguity they can't be used.

[33] THE COURT: I am still reading. Sorry.

Have either of you found any cases, given *Wooden* and the sort of the new *Wooden* factors which were discussed somewhat vaguely, I guess I would say, with all respect to Justice Kagan. Hold on. I have to focus on the rest of this case.

MR. McGRATH: Your Honor, may I step away briefly?

THE COURT: Yes.

MR. McGRATH: Thank you.

(Mr. McGrath leaves the Zoom video.)

(Mr. McGrath is back on the Zoom video.)

THE COURT: Okay. There is language on -- it looks like it is on 891. It is on 891, the paragraph beginning with requiring. The second sentence is: Thus, if *Shepard* approved documents show that the offenses occurred on different days or in other words were committed sequentially rather than simultaneously, the Government presumably will meet its burden. Or if the documents show the offense occurred on the same day but the nature is such that they could not have occurred without giving the Defendant an opportunity to reconsider his or her conduct and refuse to commit the second crime, the Government will likely meet its burden.

The rub, I guess, if you want to call it that, is that in *Wooden*, the Court acknowledged these sort of -- there was more nuance to sequential and came up with three factors that **[34]** the Court was required to consider: Date, proximity of location, and similarity or interrelatedness of the conduct. Factually, I guess I need to ask you, so the Government is relying on the charging document to show the date and location; is that correct, Mr. McGrath?

MR. McGRATH: Yes. That is what the charging documents unequivocally show.

THE COURT: And so I guess what I would have to ask is whether there is a factual challenge to the information contained in those charging documents by Mr. Erlinger.

MS. COOK: Well, let me preface saying that the location -- in order for the Court to make a determination that two addresses that are set forth in the charging documents are not adjacent to one another requires judicial fact finding, which is absolutely barred by the Sixth Amendment.

THE COURT: Okay. To cure this you would say we should have a jury trial on the issue of location?

MS. COOK: I think it is too late for that, but I would say that particular -- the case that we just looked at, *Kirkland*, is an Illinois case, coming out of Illinois. I have no idea whether the Illinois statute makes location or time an element of the offense, but in Indiana it is not an element of the offense. And the problem with it not being an element of the offense -- and, let me just address for a minute the fact that two of these offenses are alleged to

have occurred on the **[35]** same date. So we have two burglaries on one date, according to the Government's own arguments, and first of all, there is no time affixed to that. The Court would have to do its own investigation to make a determination about the proximity of those two offenses, which is barred by the Sixth Amendment.

But there is another additional problem with that, and that other additional problem also relates to Indiana's specific law. So in Indiana, an individual can be charged by indictment or by information with being either a principal or an aider or abettor, and that does not have to appear in the charging information.

So if Mr. Erlinger, just as an example, was charged as an aider and abettor, it is absolutely possible that he could be convicted of two separate offenses that occurred on the same date in two separate locations simultaneously. I am not alleging that that happened, but I am just saying that that is one of the reasons why the justices, including Gorsuch, in the *Wooden* opinion, are so concerned with district judges wandering into judicial fact finding.

You know, in the oral argument, Justice Barrett talked about the fact that a factual inquiry by the district court is in serious tension with the Supreme Court's Sixth Amendment jurisprudence, and we can go back to *Descamps* where Justice Kagan recognizes the fact that the only thing we can look at are the elements of the generic offense.

* * * *

[39] First of all, per *Kirkland*, these documents are unequivocal. They don't, they don't show any -- what is the best way to word this? They don't show any indecision as to what is being alleged, Mr. Erlinger, to have committed in that month on those specific dates. So *Kirkland* is satisfied as far as the equivocal nature of the documents is concerned. There is no equivocal nature. Those are the dates of conviction. He pled guilty to them, and he was sentenced to them.

So when we do our *Wooden* analysis, now, we see that these crimes occurred -- even if you were to consider the April 11th on the same occasion, you still have three predicates: April 4, April 8, and April 11th.

The *Wooden* court talked about proximity of location, offense was committed close in time in an uninterrupted course of conduct, but between April 4th and April 8th you have April 5th, 6th, and 7th, which interrupts the course of conduct. Between April 8th and April 11th, you have the 9th and 10th. These are not uninterrupted courses of conduct. These are, at the very minimum, three separate instances of ACCA burglaries, and that is simply what the documents show.

And we have established that by a preponderance of the evidence, and the only challenge to these documents is the conjecture that he was possibly an accomplice in one, which is [40] certainly a level of fact finding the Court cannot do, and maybe it is something the Court would like to entertain. But there is no mechanism for it under the *Shepard* line of cases and now the *Wooden* case, which doesn't

even really seem to mention *Shepard* or *Mathis* or any of the -- it just sort of is an outlier on its own in talking about the occasions clause.

And we have our own precedent, even though the validity is cast in doubt a little bit by *Wooden* as to what sort of analysis we should be doing as to whether it occurred on a single occasion. Miss Cook mentioned the *Elliott* case, factors relevant, the nature of crimes, identity of victims, locations, simultaneous versus sequential, opportunity, perpetrator, determining wrongdoings.

So we have a lot of factors that we consider in this Circuit that sort of line up with *Wooden* that the Court can consider here in Mr. Erlinger's case because we have different victims. We have different dates. We have different locations. They are simply different crimes. They are committed on occasions different from each other, and I make some valid ACCA predicates, and that makes Mr. Erlinger subject to the ACCA sentencing.

THE COURT: Thank you. Any brief reply, Ms. Cook?

MS. COOK: Yes, maybe not quite that brief.

THE COURT: Okay.

MS. COOK: What I would say is the Government is **[41]** arguing the same thing the Government argued in *Wooden*, which is that offenses that occur at different locations or at different times are separate offenses, and *Wooden* clearly found against that line and the reason. What *Wooden* says is, the fact that

there is some temporal difference or spatial difference doesn't answer the question of whether these occurred on separate occasions. That requires something more, and the reliance on the *Kirkland* case is encouraged in the court, asking the court to accept this Seventh Circuit opinion and disregard Supreme Court precedent.

I think we have to take a step back and look at what the *Shepard* documents are for because *Shepard* was very clear about what those documents were to be used for. They weren't to be used to determine nonelemental fact. What Souter said in the *Shepard* case was that we hold that inquiry under the ACCA to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense is limited to, and then he describes the ACCA – the *Shepard* documents.

He is not talking about determining nonelemental facts. He is talking about determining the elements of the offense. The date and the time are not elements of the offense. In the *Descamps* case in 2013, there the court is again focusing on the narrow scope of review. That is in Justice Kagan's words. It was not to determine whether, what **[42]** the defendant and the state judge must have understood as to the factual basis of the prior plea but only to assess whether the plea was to the version of the crime corresponding to the generic offense.

So when *Descamps* reviews *Shepard*, the Supreme Court is very clearly saying the *Shepard* documents can be looked at, can be reviewed for the purpose of determining whether the elements of the

offense were the same as the generic elements or as the elements in the generic offense. So *Descamps* specifically commented on *Shepard*, and in its commentary on *Shepard*, the Supreme Court said, we began authorizing sentencing courts to scrutinize the restrictive set of materials -- here they are referring to the *Shepard* documents -- to determine if the defendant had pled guilty to entering a building, or in that case a car or both.

We underscore the narrow scope of that review. It was not to determine whether the defendant and the state judge must have understood as the factual basis of the prior plea, but only to determine, only to assess whether the plea was a version of the crime in the Massachusetts statute corresponding to the generic offense. So again, the Supreme Court is saying lower courts, you are misconstruing what we said in *Shepard*. What we are telling you is that you can use the *Shepard* documents for the very limited purpose of determining whether the elements of the offense correspond to the generic offense.

[43] And in *Descamps*, the Court goes on to say, applied in that way, referring to applying the *Shepard* documents to allow the district court to determine the elements of the offense; applied in that way, which is the only way we, referring to the Supreme Court, have ever allowed. This acts as an exception, not as an exception but as a tool, it retains the categorical approach's central feature, which is a focus on the elements rather than the facts that apply.

And the court in *Descamps* talked about that elements centric approach to using the *Shepard* materials and goes back to what I began the argument with as saying, by doing that, by allowing the court only to use the *Shepard* documents for the elements and not on the facts, it avoids the Sixth Amendment concern that would arise from a sentencing court making findings of fact that properly belong to juries, and it averts the practical difficulties and potential unfairness of a factual approach.

And that, that concern with the potential unfairness of a factual approach is what Gorsuch's concurring opinion in *Wooden* is all about. It is all about the fact that the state court may not require that there be proof of separate occasions contained in what are the *Shepard* documents, and now we are going to go outside those documents, such as the Government is encouraging the state to look at, encouraging the court to look at Google maps to try to make some determination about **[44]** differences. That is clearly not what the Supreme Court has envisioned.

In *Descamps*, the court goes on to say, that allowing the district courts to wander outside this narrow elements examination would quote, at the least, raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction. And those concerns we, the Supreme Court, recognize in *Shepard*. Counsel is against allowing a sentencing court to make a disputed determination about what the Defendant and state judge must have understood as a factual basis of a plea.

And in her opinion in *Descamps*, Justice Kagan looks ahead to what Justice Gorsuch was so concerned about in *Wooden* when she says, the meaning of those documents, those are the *Shepard* documents, will often be uncertain, and the statement of fact in them may be downright wrong. The defendant, after all, will have little incentive to contest facts that are not elements of the charged offense and may have good reason not to.

And during plea hearings, the Defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations. That, that is the *Descamps* opinion from 2013, but that is not the end of the Supreme Court jurisprudence on this issue. It comes up again in *Mathis*, three years later, where the court is again concerned about the **[45]** same encroachments on a defendant's Sixth Amendment rights.

And in that majority opinion, the Court says: There, they are trying to distinguish between using the *Shepard* documents' elements and using them for a factual determination. And the Court in that case, as fact, are mere real-world things -- extraneous to the crime's legal requirements.

We distinguish them from elements. They are circumstances or events having no legal effect or consequence. In particular, they need neither be found by a jury nor admitted by a defendant. And ACCA, as we have always understood it, cares not a wit about them.

So the conclusion in *Mathis* was a construction of ACCA, allowing a sentencing judge to go any further. The court cannot go beyond identifying the crime of conviction to explore the manner in which the Defendant committed that offense.

So now we have Supreme Court precedence in *Shepard*, *Descamps*, and *Mathis*, all saying that the court cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. And doing so, Justice Thomas -- I mean, not one of our more liberal justices, Justice Thomas himself says in the *Mathis* case that such an approach allowing a judge to look at facts would amount to constitutional error.

I mean, I think that we have -- and he also, in his, his concurring opinion, talks about the fact that these [46] nonelemental facts in the records of prior convictions are prone to error precisely because they -- I mean, I think that the Supreme Court's law on this topic is very clear, and what is very clear is the Court can use the Shepard documents to make a determination about whether prior convictions, whether the elements of those prior convictions are broader or not as broad as the generic offense in this case, burglary, but cannot wander outside that to make any factual determinations. And yes, that creates a quandary for the district courts, but you know, to do otherwise is to violate the Sixth – Defendant's Sixth Amendment rights.

In this case, you know, we have 30-year-old convictions with charging informations that contain information that is extraneous to the elements. We have the Court recognizing the fact that a defendant

who pleads guilty has no reason whatsoever to contest those elements.

They have an incentive not to contest those elements, and the, the plea agreement that is submitted by the Government in this case in the Dubois County cases, one plea agreement in all of them is absolutely replete with errors, beginning with the very first paragraph, which indicates that he is appearing in person and by his attorney, Mr. Webster, when the signature on Exhibit A for the attorney is not that of Steve Webster, where the abstract judgment is yet another attorney.

We have a paragraph in here that -- this is obviously **[47]** a form, and it is obviously a boilerplate form because it provides that he should cooperate in providing information and testifying against all codefendants. There are no codefendants in these cases. If we look at the advice of rights on Exhibit A, the last page of Exhibit A, we have the Defendant being informed that the maximum possible sentence is blank, and the minimum sentence is blank. He has been informed that if there is a plea agreement, which is what this exhibit is attached to.

So you know, a Defendant signing a boilerplate form that contains no specifics whatsoever with no written factual basis signed by the Defendant is not a sufficient, wouldn't be a sufficient *Shepard* document if the Court could rely on the *Shepard* document. So it, it is our position that any fact finding flies in the face of what the Supreme Court has very clearly said in all of the *Shepard* progeny.

THE COURT: Thank you. Here are the issues as I see them. I would say this. I think it is pretty clear to me that Shepard would allow me to look at the locations of the crimes because those are essential to determining the elements. What type of structure was burglarized is an elemental issue, so there is that. So the one issue that is in play in terms of fact finding, in my view, is the date.

I note in each of the *Shepard* documents that the Government considered or submitted, it does not say on or about. It says on the exact date. So what we have, as the **[48]** Government noted, were four locations on three different dates: The first two -- so let me say this, too. I believe that *Kirkland*, to the extent it permits me to look at the charging documents as a *Shepard* document, I also have to take into account long-standing precedent that when a defendant pleads guilty he admits the information. So, or at least that is what I am relying on. I think you have to include the ACCA finding in this case because I don't think reviewing the charging informations -- I am not going to consider the Google maps. I agree with you, that goes afoul of the limited authority I have right now.

I would note in *Wooden* the Supreme Court made its own finding that there were separate occasions and reversed the ACCA determination in that case. I do think it is authority proposition the way *Wooden* sets things up, and maybe we will, as we had to do after *Apprendi* in state court, we had to have separate trials on certain sentencing enhancements until the Indiana General Assembly changed Indiana Code.

So I don't believe the Government is asking for more than what the law currently allows in terms of judicial fact finding, which is to say the Court can look at the charging document to say, to find that on April 4th, Mr. Erlinger burglarized Mazzio's. That on April 8th, he burglarized The Great Outdoors. Those are separated in time by three days, which the Court indicates there is no possible way could be the **[49]** same occasion.

And then, on April 11th, pick your restaurant, pick your location but either one. I won't count both, but I will certainly count one. I will count the Schnitzelbank just because I like the name of it better, but the Schnitzelbank, that is separated in time from April 8th by an additional two days. And what I believe different occasions means is, does, as the Circuit has said, and I think this is consistent with *Wooden*.

Do you have an opportunity to stop, and in this particular case, and as we look at the, the purpose behind the ACCA law to stop recidivists, I know as he sits here today, Mr. Erlinger doesn't appear to be the dangerous recidivist that ACCA might want to punish. And I wish Congress would, as the Indiana General Assembly used to do or maybe it still does for the habitual offender enhancement, require a conviction between the commission of each of the crimes to make it clear about the timing. But that is not how Congress has established the Armed Career Offender enhancement.

So I don't believe that Mr. Erlinger's Sixth Amendment rights are violated by me finding that these occurred on separate occasions. I think you

have done a tremendous job preserving this issue for appellate review, and I look forward to further guidance from the Circuit Court of Appeals about what type of information, whether it considers *Kirkland* still **[50]** good law. I am finding that it hasn't told me otherwise, so it is in terms of my ability to look at the charging documents.

I don't think the plea agreement adds anything in this case because the facts of the conviction are established, and so I am just relying on what I consider to be quintessential *Shepard* documents. And in doing so I don't think I am violating Mr. Erlinger's Sixth Amendment rights. I believe the record is clearly established, and I believe that based on the facts that -- and they are facts. The date of the offense is a fact. The location is a fact, but I believe it, based on his guilty plea to those crimes, it is something that I can consider established.

So I believe the Government has met its burden. I will note as editorial comment, I think it is unfortunate because I think it is excessive punishment in Mr. Erlinger's case. But I do find that they have met their burden of showing that he is an Armed Career Offender, and so we will overrule the objection to Paragraph 23, find that his offense level is 33.

He has accepted, or that is the adjusted offense level further adjusted for that enhancement, two levels of reduction for acceptance of responsibility, and is the Government making the motion for the third level?

MR. McGRATH: Yes, Judge.

* * * *

[56] THE COURT: Thank you.

So Mr. Erlinger, I am -- this law that you are being sentenced under today gives me no discretion, and it does a couple of other things that I just want to note for the record that I think result in an unjust punishment for you. And that is, it enhances your offense level. It artificially inflates your guidelines, in my view.

I mean, technically, it is correct, but if we took away any consideration of the Armed Career Offender enhancement, I think your guideline range would be a 23, 26 minus three, and then, you would be in criminal history category II, and that is where I came up with the 60 months I got before.

But as it stands and where things are under the law, it is much higher, and it is the mandatory minimum 15 years. So this law that I am sentencing you under does not allow for me to consider everything that you said.

I find it to be true. I know you are doing -- you had done well. I know you care very much about your family. One **[57]** big difference between when you were originally sentenced and now is the situation with your wife and your children, and if I had the discretion, that would certainly be able to take that into account. As it stands now, though, with the, where we sit today, and with my sentencing decision today, I can't take it into account.

You can talk with your lawyer about other ways it might be taken into account, but it can't be today. So I am compelled to impose a judgment that is con-

sistent with what I believe the law requires, although your attorney has done a wonderful job preparing your appeal, and the -- I am required to impose this following sentence:

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the Defendant, Paul Erlinger, is hereby committed to the custody of the Bureau of Prisons for 180 months. The Court is not imposing a fine.

There is the same list of firearms that was forfeited before in the earlier judgment are being included in this judgment. I won't go through the recitation, and as I ordered before, because of your excellent rehabilitation, I am only going to impose a one-year term of supervised release just to ensure your transition and to make sure you're in stable housing. But I will impose the conditions that are contained in your presentence report for which you waived formal reading, and that is Paragraphs 104 and 105.

[58] The Court is also -- you probably already paid the mandatory special assessment, I am sure. We can show it imposed, which I think the law requires, but then also make sure there is a note that that amount has been satisfied so that it appears that way in the judgment.

So there are, there are substantial objections to the Court's judgment, I know, Ms. Cook, but they are well preserved both with the arguments today and those that you raised in your sentencing memoranda. Are there any additional objections to the

Court's proposed sentence, or would you require any further elaboration of my reasons?

MS. COOK: No, Your Honor.

THE COURT: Thank you. Anything for the Government, Mr. McGrath?

MR. McGRATH: No, Your Honor.

THE COURT: Okay. So with that the Court will impose the sentence as stated.

Where are you today? Where are you located, Mr. Erlinger?

THE DEFENDANT: Ashland, Kentucky.

THE COURT: Thank you. The Court will recommend continued placement in Ashland, Kentucky. I just want that to be in the judgment as well.

Sir, you can appeal your conviction if you believe that your guilty plea was somehow unlawful or involuntary or if **[59]** there is some other fundamental problem in the proceedings that was not waived by your guilty plea; do you understand?

THE DEFENDANT: Yes.

THE COURT: You also would have the statutory right to appeal your sentence under certain circumstances. Is there a waiver?

MR. McGRATH: No.

THE COURT: No? That's right. He pled straight up. Very good.

You have the right to appeal your sentence, particularly if you believe it is contrary to law; do you understand?

THE DEFENDANT: Yes, ma'am.

THE COURT: To begin an appeal you must file a notice of appeal within 14 days of the entry of judgment. Upon request, the Clerk of Court can prepare and file a notice of appeal.

If you cannot afford the filing fee or cannot afford to pay a lawyer to appeal for you, the Court will appoint a lawyer to represent you on appeal. Do you have any questions about your appellate rights or the time limit for filing a notice of appeal?

THE DEFENDANT: No.

* * * *

APPENDIX E

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.