

No. 23-_____

IN THE
SUPREME COURT OF THE UNITED STATES

CALVIN COGDILL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit**

APPENDIX

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NOT RECOMMENDED FOR PUBLICATION
File Name: 23a0277n.06

No. 22-5603

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CALVIN COGDILL,

Defendant-Appellant.

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

OPINION

FILED
Jun 15, 2023
DEBORAH S. HUNT, Clerk

Before: CLAY, GRIFFIN, and DAVIS, Circuit Judges.

CLAY, Circuit Judge. Defendant Calvin Cogdill pleaded guilty to being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). Based on Cogdill’s three prior drug-trafficking convictions, the district court sentenced Cogdill to a fifteen-year mandatory-minimum sentence under the Armed Career Criminal Act. Cogdill appeals this sentence, arguing that the district court erred in concluding that two of his prior drug-trafficking offenses occurred on different “occasions.” For the reasons that follow, we **AFFIRM** the district court’s judgment.

BACKGROUND

Cogdill pleaded guilty to being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). At the time Cogdill committed the offense, the offense carried a maximum penalty of ten years’ imprisonment. *See* 18 U.S.C. § 924(a)(2) (2018) (amended 2022).

No. 22-5603, *United States v. Cogdill*

Relevant to Cogdill’s sentencing, Cogdill had three prior drug-trafficking convictions: (1) a Georgia conviction for manufacturing methamphetamine, committed on December 18, 2003; (2) a Tennessee conviction for selling methamphetamine with co-defendant Jason Johns, committed on June 12, 2014; and (3) a Tennessee conviction for possessing methamphetamine with intent to sell or deliver, committed on September 15, 2014.

Based on these three drug-trafficking offenses, the presentence investigation report determined that the Armed Career Criminal Act’s (“ACCA”) fifteen-year mandatory minimum sentence applied. *See* 18 U.S.C. § 924(e)(1). Cogdill objected to the presentence investigation report on the ground that the two Tennessee drug-trafficking convictions did not occur on different “occasions” and therefore did not trigger the ACCA’s mandatory minimum sentence. *See id.* In the alternative, Cogdill objected that the Fifth and Sixth Amendments to the Constitution bar a sentencing judge from finding the facts needed to satisfy the occasions-different clause.

The district court overruled Cogdill’s objections and determined that the ACCA applied. The district court sentenced Cogdill to 180 months’ imprisonment.

DISCUSSION

On appeal, Cogdill argues that his Tennessee drug-trafficking offenses do not trigger the ACCA because they did not occur on “occasions different from one another.” *See* 18 U.S.C. § 924(e)(1). In the alternative, Cogdill argues that the Constitution bars the district court from finding the facts needed to make the occasions-different inquiry. We review both questions of law *de novo*. *United States v. Williams*, 39 F.4th 342, 344 (6th Cir. 2022) (“We review *de novo* whether [a defendant’s] previous convictions qualify as predicate offenses under the ACCA.”); *United States v. King*, 853 F.3d 267, 270 (6th Cir. 2017) (“We review *de novo* the issue of what

No. 22-5603, *United States v. Cogdill*

evidence a court may rely on when deciding whether prior offenses were ‘committed on occasions different from one another’ as that phrase is used in the ACCA.”).

I.

The ACCA’s mandatory minimum applies to a person who violates 18 U.S.C. § 922(g) and has “three previous convictions . . . for a serious drug offense . . . committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). Cogdill does not dispute that he has three previous convictions for serious drug offenses. Rather, Cogdill contends that the convictions based on the two Tennessee drug-trafficking offenses qualify as only one ACCA predicate offense because they were not committed on different occasions.

The Supreme Court addressed the issue of when the offenses underlying previous convictions were committed on the same “occasion” in *Wooden v. United States*, 142 S. Ct. 1063, 1069 (2022). In one evening, Wooden burglarized ten units in a storage facility, proceeding from unit to unit by crushing the interior walls between them. *Id.* at 1067. The Supreme Court held that these burglaries occurred on one occasion, not ten separate occasions. *Id.* at 1069. The Court defined an occasion as a single “event, occurrence, happening, or episode,” and explained that determining whether offenses occurred on separate occasions is a “multi-factored” inquiry. *Id.* at 1069–70. Relevant factors include timing, proximity of location, and “the character and relationship of the offenses.” *Id.* at 1071. To determine whether Cogdill’s Tennessee offenses occurred on different occasions, we apply the factors from *Wooden*.

“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.* Cogdill’s two Tennessee drug offenses occurred on two different dates, separated by more than three months: June 12, 2014, and September 15, 2014. We have held that

No. 22-5603, *United States v. Cogdill*

significantly smaller time gaps between offenses supported the conclusion that the offenses occurred on different occasions. *See Williams*, 39 F.4th at 344, 350 (holding that four robberies occurred on four separate occasions because the robberies were each separated by at least six days); *United States v. Miles*, 2022 U.S. App. LEXIS 11214, at *4–5 (6th Cir. Apr. 25, 2022) (order) (holding that three illicit drug transactions on three different days over the span of 23 days constituted three ACCA predicate offenses because the offenses were separated by substantial gaps in time). Accordingly, this factor weighs in favor of 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.” *Wooden*, 142 S. Ct. at 1071. In this case, the record shows that the Tennessee drug offenses both occurred in Bradley County, Tennessee. Because the exact locations are unknown, Cogdill argues that they could have been committed in the same location. The district court correctly determined that it could make no finding on this factor.

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.* Cogdill argues that the Tennessee offenses shared a “common purpose” of trafficking in methamphetamine. In support, Cogdill contends that these offenses meet the test for “relevant conduct” under the sentencing guidelines. *See* U.S.S.G. § 1B1.3(a)(2). But the inquiry under the sentencing guidelines is distinct from the inquiry under *Wooden*. *Compare* U.S.S.G. § 1B1.3 comment. (n.5(B)(ii)) (noting that offenses may be “relevant conduct” if they are “part of a single episode, spree, or ongoing series of offenses”), *with Wooden*, 142 S. Ct. at 1069 (defining an “occurrence” to mean an “event, occurrence, happening, or episode”). While Cogdill’s Tennessee offenses both involved the trafficking of methamphetamine, they do

No. 22-5603, *United States v. Cogdill*

not share a common scheme in the same way as in *Wooden*, wherein the defendant serially burglarized each storage unit in the exact same manner. We have held that drug transactions similar to the two at issue in this case may constitute multiple ACCA predicate offenses when separated by substantial gaps in time. *See Miles*, 2022 U.S. App. LEXIS 11214, at *4–5 (holding that two counts of first-degree trafficking in a controlled substance involving two sales of oxycodone tablets to the same cooperating witness, fourteen days apart, constituted two ACCA predicate offenses). Therefore, this factor weighs in favor of a conclusion that the offenses occurred on separate occasions.

The Supreme Court has explained that “[i]n many cases, a single factor—especially of time or place—can decisively differentiate occasions.” *Wooden*, 142 S. Ct. at 1071. “Courts, for instance, have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart.” *Id.* Given the substantial gap in time between Cogdill’s Tennessee drug offenses and the distinct conduct underlying the offenses, the offenses were committed on different occasions under the ACCA.

Resisting this conclusion, Cogdill looks to legislative history to claim that ACCA’s enhancement was only meant to apply to “recidivists,” and argues that the lack of an arrest or other significant intervening event between the Tennessee offenses supports a finding that the two offenses did not occur on different occasions. However, the occasions-different clause does not reference either recidivism or criminal-justice-system intervention. *See* 18 U.S.C. § 924(e)(1). Nor does *Wooden*’s “multi-factor” test include intervening arrests. Rather, *Wooden* directs courts to determine whether the convictions satisfy the ordinary meaning of a single “occasion” by looking to facts underlying the convictions like location, timing, and whether the offenses were

No. 22-5603, *United States v. Cogdill*

intertwined. *Wooden*, 142 S. Ct. at 1070–71. We cannot add a requirement to the statute based on legislative history.

II.

In the alternative, Cogdill argues that the Constitution bars the district court from finding the facts needed to conduct the occasions-different inquiry.

Under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), a judge may find the “fact of a prior conviction,” but all other “fact[s] that increase[] the penalty for a crime beyond the prescribed statutory maximum” must be included in the indictment and proved to a jury beyond a reasonable doubt. Cogdill argues that the factual findings necessary to the occasions-different inquiry fall under the *Apprendi* general rule, and therefore may only be found by a jury, and not by the sentencing judge.

Cogdill acknowledges, however, that circuit precedent forecloses the argument. We have previously held that the facts governing the occasions-different inquiry are included in “the fact of a prior conviction,” so they come within the *Apprendi* exception. *United States v. Burgin*, 388 F.3d 177, 186 (6th Cir. 2004). We have since reaffirmed this rule. *Williams*, 39 F.4th at 351; *see also United States v. Belcher*, 40 F.4th 430, 432 (6th Cir. 2022); *United States v. Jackson*, No. 22-5185, 2023 WL 2446139, at *2 (6th Cir. Mar. 10, 2023); *United States v. Hunley*, No. 20-6285, 2023 WL 2446762, at *3 (6th Cir. Mar. 10, 2023); *United States v. Lovell*, No. 20-6287, 2023 WL 1879530, at *3 (6th Cir. Feb. 10, 2023). The district court correctly applied this settled rule.

Cogdill challenges this precedent by arguing that those cases either came before or overlooked two Supreme Court cases that make clear that the occasions-different inquiry is for the jury: *United States v. Hayes*, 555 U.S. 415 (2009), and *Nijhawan v. Holder*, 557 U.S. 29 (2009). A panel may overrule a prior binding precedent if the “precedent overlooked earlier Supreme Court

No. 22-5603, *United States v. Cogdill*

authority.” *Ne. Ohio Coal. for the Homeless v. Husted*, 831 F.3d 686, 720 (6th Cir. 2016). However, the cases Cogdill identifies provide no authority to revisit our binding precedent because neither case involved the ACCA or the occasions-different inquiry. *See United States v. Cook*, No. 22-5056, 2022 WL 4684595, at *2 (6th Cir. Oct. 3, 2022). Nor does *Wooden* alter this precedent. *See Wooden*, 142 S. Ct. at 1068 n.3 (declining to address whether the Sixth Amendment requires that a jury, rather than a judge, resolve whether prior crimes occurred on a single occasion).

CONCLUSION

For the reasons stated above, we **AFFIRM** the district court’s judgment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE CHATTANOOGA DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

CALVIN COGDILL

USM#20598-509

Case Number: **1:20-CR-00087-CLC-CHS(1)**

J Damon Burk
 Defendant's Attorney

THE DEFENDANT:

- pleaded guilty to count(s): One of the Indictment.
- pleaded nolo contendere to count(s) which was accepted by the court.
- was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section and Nature of Offense	Date Violation	Concluded	Count
18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(e) Felon in Possession of Firearm and Ammunition (Armed Career Criminal)	01/12/2020		1

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 and 18 U.S.C. § 3553.

- The defendant has been found not guilty on count(s).
- All remaining count(s) as to this defendant are dismissed upon motion of the United States.

IT IS ORDERED that the defendant shall 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 shall notify the court and the United States attorney of any material change in the defendant's economic circumstances.

June 29, 2022

Date of Imposition of Judgment

/s/

Signature of Judicial Officer

Curtis L. Collier, United States District Judge

Name & Title of Judicial Officer

8a

DEFENDANT: CALVIN COGDILL
CASE NUMBER: 1:20-CR-00087-CLC-CHS(1)

IMPRISONMENT

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

180 months as to Count One. This sentence shall run concurrent with any sentence imposed in the defendant's pending Bradley County Circuit Court case, Docket Number 20-CR-162B.

The court makes the following recommendations to the Bureau of Prisons: The Court recommends that the defendant undergo a medical evaluation by the Bureau of Prisons. The Court further recommends that the defendant receive 500 hours of substance abuse treatment from the Bureau of Prisons' Institution Residential Drug Abuse Treatment Program. Lastly, the Court recommends that the defendant submit to a mental health evaluation and follow any treatment recommendations, while incarcerated.

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

9a

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five (5) years**.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully 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 sentencing 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 which 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 mandatory, standard, and any special 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. The defendant must participate in a program of testing and/or treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.
2. The defendant must participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.
3. The defendant must waive all rights to confidentiality regarding mental health and substance abuse treatment in order to allow release of information to the supervising United States Probation Officer and to authorize open communication between the probation officer and the treatment providers.
4. The defendant must submit his property, house, residence, vehicle, papers, computers, or office, to a search conducted by a United States Probation Officer or designee. Failure to submit to a search may be grounds for revocation of release.
The defendant must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when a reasonable suspicion exists that the defendant has violated a condition of his supervision, and the areas to be searched contain evidence of this violation.
Any search must be conducted at a reasonable time and in a reasonable manner.

DEFENDANT: CALVIN COGDILL
CASE NUMBER: 1:20-CR-00087-CLC-CHS(1)

Judgment - Page 6 of 7

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments sheet of this judgment.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment **</u>
TOTALS	\$100.00	\$0.00	\$0.00	\$0.00	\$0.00

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 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.

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 under the Schedule of Payments sheet of this judgment 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:

<input type="checkbox"/> the interest requirement is waived for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution
<input type="checkbox"/> the interest requirement for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution is modified as follows:

* 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.

*** 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

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

- A** Lump sum payment of \$ 100.00 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:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to **U.S. District Court, 900 Georgia Avenue, Joel W. Solomon Federal Building, United States Courthouse, Chattanooga, TN, 37402**. Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

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

- Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
 - Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
 - The defendant shall pay the cost of prosecution.
 - The defendant shall pay the following court cost(s):
 - The defendant shall forfeit the defendant's interest in the following property to the United States:

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.