No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2023

RICHARD SCHOROVSKY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

MOTION FOR LEAVE TO FILE *IN FORMA PAUPERIS*

The Petitioner, Richard Schorovsky, requests leave, pursuant to Rule 39.1 of the Supreme Court Rules, to file the attached Petition for a Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis.*

Petitioner has previously sought and been granted leave to proceed *in forma pauperis* in the following court: The United States District Court for the Western District of Texas.

Undersigned counsel was admitted to practice before the U.S. Supreme Court June 23rd, 2014. Additionally, undersigned counsel has

been appointed under the Criminal Justice Act of 1964, 18 USC § 3006A.

Respectfully submitted,

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Attorney for Petitioner

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2023

RICHARD SCHOROVSKY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. In light of *Erlinger v. United States,* No. 23-370, 602 U.S. ___ (June 21, 2024), was Petitioner Schorovsky properly sentenced as an armed career criminal based on a finding by the district court (not a jury) that Petitioner's two prior robbery convictions were committed on separate occasions?

2. In light of *Erlinger v. United States,* No. 23-370, 602 U.S. ___ (June 21, 2024), was it proper for the sentencing court to rely on *Shepard* approved documents to determine whether Petitioner's prior robbery convictions occurred on separate occasions?

3. In light of *United States v. Stitt*, 139 S.Ct. 399 (2018), can the Texas burglary statute – which the Fifth Circuit has held to be indivisible – properly be the basis for an enhanced sentence under the Armed Career Criminal Act, given that a person can be convicted under the statute for doing nothing more than entering a storage building with the intent to commit theft?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Richard Schorovsky respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Schorovsky's sentence is styled: *United States v. Schorovsky,* 95 F.3d 945, (5th Cir. 2024).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Schorovsky's sentence was announced on March 15, 2024 and is attached hereto as Appendix A. Schorovsky's petition for rehearing en banc was denied April 5, 2024. The order denying rehearing is attached hereto as Appendix B. Pursuant to Supreme Court Rule 13.3, this Petition has been filed within 90 days of the date the petition for rehearing was denied. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Federal Statutes:

18 U.S.C. § 922(g)(1):

> It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(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).

18 U.S.C. § 924(e)(2)(B):

> [T]he 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 – has an element the use, attempted use, or threatened use of physical force against the person of another; or is burglary, arson, or extortion, involves use of explosives, or otherwise

involves conduct that presents a serious potential risk of physical injury to another[.]

Texas Statutes

Tex. Penal Code Ann. § 30.02(a):

(a) A person commits an offense if, without the effective consent of the owner, the person:

(1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or

(2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or

(3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

Tex. Penal Code Ann. § 30.01:

(1) "Habitation" means a structure or vehicle that is adapted for the overnight accommodation of persons, and includes:

(A) each separately secured or occupied portion of the structure or vehicle; and

(B) each structure appurtenant to or connected with the structure or vehicle.

(2) "Building" means any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.

Statement of the Case

Schorovsky has two prior Texas robbery convictions and a prior Texas burglary conviction. These three convictions were the predicates for applying the Armed Career Criminal Act (ACCA) in determining his sentence.

As to the robbery convictions, Schorovsky objected in writing to the robberies being characterized as ACCA predicates:

> Mr. Schorovsky objects to the Chapter Four Enhancement and being labeled an armed career criminal. Mr. Schorovsky's 2012 offenses should be considered part of the same criminal episode as they occurred in short succession, resulting in the same arrest and conviction date.

The district court, in overruling Schorovsky's objection, specifically relied upon the charging instruments and judgments in determining that the offenses had been committed on occasions separate from one another.

Schorovsky argued on appeal (1) that it was improper for the district court to find a fact (that the robberies had been committed on separate occasions) that resulted in an increase in Schrovsky's statutory range of punishment from zero to fifteen years, to fifteen years to life, and (2) that indictments and judgments from the prior convictions were not reliable in establishing whether the offenses were committed on

separate occasions. More specifically, under Texas law the date alleged in an indictment establishes only that the offense conduct occurred prior to the presentment of the indictment, and that the offense conduct occurred within the statutory limitations period. And statements of non-elemental facts – like dates – set forth in judgments are prone to error "precisely because their proof is unnecessary."

The Fifth Circuit, relying upon circuit precedent, rejected both arguments:

> *Shepard*-approved[1] documents are conclusive as to whether the predicate ACCA offense occurred on separate occasions.

United States v. Schorovsky, 95 F. 4th 945, 947 (5th Cir. 2024).

> Consistent with *Apprendi*, we have held that because [Section] 924(e)(1) does not create a separate offense but is merely a sentence enhancement provision, neither the statute nor the Constitution requires a jury finding on the existence of the three previous felony convictions required for the enhancement. (Cleaned up.)

Id. at 948.

As to the burglary predicate, Schorovsky noted that (1) Fifth Circuit precedent has determined the Texas burglary statute to be indivisible, and (2) in *United States v. Stitt*, 139 S.Ct. 399 (2018), the Supreme Court

[1] *Shepard v. United States*, 544 U.S. 13 (2005).

held that generic "burglary" for purposes of the ACCA must include burglarizing "a structure or vehicle that has been adapted or is customarily used for overnight accommodation."

Schorovsky argued that because Texas case law is replete with burglary convictions where the structure at issue was used only for storage, Texas burglary – in light of *Stitt* – does not necessarily constitute generic burglary. The Fifth Circuit's response was again to rely on binding circuit precedent:

> Binding circuit precedent forecloses this argument. Burglary is an enumerated "violent felony" under the ACCA. We previously held *en banc* that Penal Code § 30.02(a) fits within the generic definition of burglary and thus qualifies as an ACCA violent felony. Since that decision in *Herrold II*, we have reiterated that § 30.02(a) constitutes generic burglary in its entirety, and thus *any* § 30.02(a) conviction qualifies as a predicate under the ACCA. (Cleaned up.)

Schorovsky, 95 F.4th at 949.

First Reason for Granting the Writ: *The Fifth Circuit's holding that a judge, by himself, can find the fact that prior offenses were committed on separate occasions is inconsistent with the Supreme Court's recent opinion in Erlinger v. United States,* No. 23-370, 602 U.S. ___ (June 21, 2024).

In *Erlinger,* wherein the petitioner was sentenced as an armed career criminal based on prior burglary convictions and argued that it was improper for a district judge to find the fact that the burglaries had taken place on separate occasions, this Court held that a judge cannot so find:

> Judges may not assume the jury's factfinding function for themselves, let alone purport to perform it using a mere preponderance-of-the-evidence standard.

Erlinger, 602 U.S. at ____, (slip op., at 11).

> Presented with evidence about the times, locations, purpose, and character of [the burglaries], a jury might have concluded that some or all occurred on different occasions. Or it might not have done so. All we can say for certain is that the sentencing court erred in taking that decision from a jury of Mr. Erlinger's peers.

Erlinger, 602 U.S. at ____, (slip op., at 12).

Second Reason for Granting the Writ: *The Fifth Circuit's holding that a judge can consult Shepard-approved documents to determine whether prior offenses were committed on separate occasions is inconsistent with the Supreme Court's recent opinion in Erlinger v. United States,* No. 23-370, 602 U.S. ___ (June 21, 2024).

Erlinger holds that a sentencing judge can consult *Shepard* documents to determine if a defendant has prior convictions – but not determine therefrom whether those prior convictions resulted from acts committed on separate occasions:

> To conduct the narrow inquiry *Almendarez-Torres* authorizes, a court may need to know the jurisdiction in which the defendant's crime occurred and its date in order to ascertain what legal elements the government had to prove to secure a conviction in that place at that time. And to answer those questions, a sentencing court may sometimes consult a restricted set of materials, often called *Shepard* documents, that include judicial records, plea agreements, and colloquies between a judge and the defendant.
> . . .
>
> None of that, however, means that a court may use *Shepard* documents or any other materials for any other purpose. To ensure compliance with the Fifth and Sixth Amendments, a sentencing judge may use the information he gleans from *Shepard* documents for the limited function of determining the fact of a prior conviction and the then-existing elements of that offense. . . . No more is allowed. . . . In particular, a judge may not use information in *Shepard* documents to decide what the defendant . . . actually did, or the means or manner in which he committed

> his offense in order to increase the punishment to which he might be exposed. (Cleaned up.)

Erlinger, 602 U.S. at ____, (slip op., at 15-16).

Third Reason for Granting the Writ: *Because the Texas burglary statute allows for conviction based upon burglarizing structures used only for storage, burglary in Texas cannot be generic burglary in light of the Supreme Court's decision in United States v. Stitt, 586 U.S. __, 139 S.Ct. 399 (2018).*

In *United States v. Stitt*, 586 U.S. __, 139 S.Ct. 399 (2018), the Supreme Court held that "burglary" for purposes of 18 U.S.C. § 924(e)(2)(B)(ii) must include burglarizing "a structure or vehicle that has been adapted or is customarily used for overnight accommodation." *Stitt,* 139 S.Ct. at 403-04. At issue therein were two statutes, a Tennessee burglary statute and an Arkansas burglary statute, both of which criminalized burglarizing a structure or vehicle that has been adapted or is customarily used for overnight accommodation. *Id.* at 404. The Court held that generic "burglary" for purposes of 18 U.S.C. § 924(e)(2)(B)(ii) includes such conduct. *Id.* at 403-04, 407. The Court noted the inherent

danger in burglarizing a structure that is customarily used for overnight accommodation:

> [A]t the time the [Armed Career Criminal] Act was passed. *Ibid.* In 1986, a majority of state burglary statutes covered vehicles *adapted or customarily used for lodging*[.] (Emphasis added.)

Id. at 406.

> For another thing, Congress, as we said in *Taylor* [*v. United States*], viewed burglary as an inherently dangerous crime because burglary "creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate.". . . An offender who breaks into a mobile home, an RV, a camping tent, a vehicle, or another structure that is adapted for or customarily *used for lodging* runs a similar or greater risk of violent confrontation. (Emphasis added.)

Id.

> Although, as respondents point out, the risk of violence is diminished if, for example, a vehicle is only *used for lodging* part of the time, we have no reason to believe that Congress intended to make a part-time/full-time distinction. After all, a burglary is no less a burglary because it took place at a summer home during the winter, or a commercial building during a holiday. (Emphasis added.)

Id.

The *Stitt* Court went on to distinguish its holding from its previous holdings in *Taylor v. United States,* 495 U.S. 575 (1990) and *Mathis v.*

United States, 136 S.Ct. 2243 (2016) having to do with structures used only for storage:

> In *Taylor* . . . we referred to a Missouri breaking and entering statute that among other things criminalized breaking and entering "*any* boat or vessel, or railroad car." . . . We did say that that particular provision was *beyond the scope* of the federal Act. But the statute used the word "any"; it referred 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.* (Emphasis added.)

Stitt, 139 S.Ct. at 407.

> In *Mathis*, we considered an Iowa statute that covered "any building, structure, . . . land, water or air vehicle, or similar place adapted for overnight accommodation of persons [or used] for the storage or safekeeping of anything of value." Courts have construed that statute to cover ordinary vehicles *because they can be used for storage or safekeeping*. . . . That is presumably why, as we wrote in our opinion, "all parties agree[d]" that Iowa's burglary statute "covers more conduct than generic burglary does."
> . . .
> [T]he Court in *Mathis did not decide the question* now before us—that is, whether coverage of vehicles designed or *adapted for overnight use* takes the statute outside the generic burglary definition. (Emphasis added.)

Stitt, 139 S.Ct. at 407.

Texas courts however have upheld burglary convictions in each of the following cases, *none of which involved a structure adapted or is customarily used for overnight accommodation*: *Warren v. State*, 2020

Tex. App. LEXIS 2473, at *6-7, 9 (Tex. App.—Tyler 2020, pet. ref'd) (unpublished) (defendant stole the victim's lawn mower from the victim's backyard storage shed); *Ellett v. State*, 607 S.W.2d 545, 548-49 (Tex. Crim. App. 1980) (defendant entered former hotel that had been closed for years and was being used for storage, and had broken-out and boarded windows; Court stated, "We hold that 'storage' constitutes a 'use' within the scope of Sec. 30.01[.]"); *Wilson v. State*, 1998 Tex. App. LEXIS 6044, at *4-5 (Tex. App.—Dallas 1998) (unpublished) (Defendant took show horse bridles from tack room in victim's barn); *Ysassi v. State*, 1998 Tex. App. LEXIS 3459, at *5-6 (Tex. App.—Dallas 1998, no pet.) (unpublished) (Defendant stole gardening tools from a structure attached to a nursery used for storing fertilizer, chemicals and tools); *Batiste v. State*, 1993 Tex. App. LEXIS 3020, at *1, 6 (Tex. App.—Houston [1st Dist.] 1993, no pet.) (Defendant stole lawn mower from detached garage at the end of a long driveway, the garage being used to park the family's cars and to store tools); *In re J.T.*, 824 S.W.2d 671, 673 (Tex. App.—Fort Worth 1992, no pet.) (Defendant stole fireworks from a fireworks stand, "a small little house built on a trailer."); *Frizzell v. State*, 1987 Tex. App. LEXIS 8318, at *3 (Tex. App.—Houston [14th Dist.] 1987, no pet.) (unpublished)

(Defendant attempted to take a welding machine inside a storage building); *Allen v. State*, 719 S.W.2d 258, 259 (Tex. App.—Waco 1986, no pet.) (Defendant stole tires from a trailer used to store auto supplies and tires); *Lopez v. State*, 660 S.W.2d 592, 594 (Tex. App.—Corpus Christi 1983, pet. ref'd) (Defendant stole tools from locked office in a radiator shop); *See also Kemp v. State*, 2020 Tex. App. LEXIS 2506, at *5-9 (Tex. App.—Fort Worth Mar. 26, 2020, no pet.) (unpublished) (Defendant on trial for burglary of a habitation was entitled an instruction on the lesser included offense of burglary of a building, given that the structure appeared to be used only for storage; "brimming with trash bags, boxes, and bins full of goods."); *Bryan v. State*, No. 04-22-00757-CR, 2023 Tex. App. LEXIS 8609, at *1 (Tex. App.—San Antonio Nov. 15, 2023, no pet. h.) (unpublished) ("Skipper Jerome Bryan, Jr. entered an open plea of guilty to burglary of a building, and the evidence established that he entered a storage unit that did not belong to him and stole items."); *Gomez v. State*, No. 11-21-00236-CR, 2023 Tex. App. LEXIS 3582, at *1-2 (Tex. App.—Eastland May 25, 2023, pet. ref'd) (unpublished) (Defendant entered a storage building and was preparing to steal comic books and vinyl records when caught); *Davidson v. State*, Nos. 03-20-

00146-CR, 03-20-00147-CR, 2021 Tex. App. LEXIS 5033, at *19 (Tex. App.—Austin June 24, 2021, no pet.) (unpublished) (Defendant stealing clothes from laundry facility); *Deanda v. State*, No. 13-20-00022-CR, 2021 Tex. App. LEXIS 1833, at *3 (Tex. App.—Corpus Christi Mar. 11, 2021, no pet.) (unpublished) (Water heater stolen from utility building).

According to *Stitt*, generic burglary requires evidence that the structure under consideration has "been adapted or is customarily used for overnight accommodation." *Stitt,* 139 S.Ct. at 403-04. If the statute at issue criminalizes burglarizing a structure that is only used for storage, safekeeping, or cargo, the statute criminalizes conduct outside the generic definition of burglary. *Id.* at 407.

Conclusion

For the foregoing reasons, Petitioner Schorovsky respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Certificate of Service

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 26th day of June, 2024.

/s/ John A. Kuchera
John A. Kuchera,
Attorney for Petitioner Richard Schorovsky

Appendix A

United States v. Schorovsky

United States Court of Appeals for the Fifth Circuit

March 15, 2024, Filed

No. 23-50040

Reporter
95 F.4th 945 *; 2024 U.S. App. LEXIS 6319 **

UNITED STATES OF AMERICA, Plaintiff—Appellee, versus RICHARD SCHOROVSKY, Defendant—Appellant.

Subsequent History: Rehearing denied by, Rehearing denied by, En banc United States v. Schorovsky, 2024 U.S. App. LEXIS 8299 (5th Cir. Tex., Apr. 5, 2024)

Prior History: **[**1]** Appeal from the United States District Court for the Western District of Texas. USDC No. 7:22-CR-173-1.

Core Terms

sentence, district court, burglary, enhancement, occasions, maximum, argues, prior conviction, offenses, indictments, violent felony, guilty plea, plain error, documents, judgments, mandatory, predicate

Counsel: For United States of America, Plaintiff - Appellee: Joseph H. Gay Jr., Assistant U.S. Attorney, Matthew P. Lathrop, Angela Sandoval Raba, Assistant U.S. Attorney, Plaintiff - Appellee, U.S. Attorney's Office, San Antonio, TX.

Judges: Before ELROD, WILLETT, and DUNCAN, Circuit Judges.

Opinion by: DON R. WILLETT

Opinion

[*946] DON R. WILLETT, *Circuit Judge*:

In 2022, Richard Schorovsky pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He had previously been convicted in Texas of felony robbery, aggravated robbery, and burglary of a habitation. The district court found that these prior convictions were "violent felon[ies] . . . committed on occasions different from one another" and thus qualified Schorovsky for sentence enhancement under the Armed Career Criminal Act (ACCA).[1] The district court sentenced Schorovsky to the ACCA's mandatory minimum of 15 years of imprisonment and five years of supervised release.[2]

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[1] *See* 18 U.S.C. § 924(e)(1).

[2] *Id.*

Schorovsky appealed, raising four challenges to his enhanced sentence and one challenge to his guilty plea. We AFFIRM.

[*947] I

Schorovsky first argues that no *Shepard*-approved documents proved that his robbery and aggravated **[**2]** robbery offenses were "committed on occasions different from one another," as required by § 924(e). To determine whether offenses were "committed on occasions different from one another," a court may examine only *Shepard*-approved material: "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented."[3] "Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so for offenses separated by substantial gaps in time or significant intervening events."[4] Offenses committed "a day or more apart" are rightly treated "as occurring on separate occasions."[5]

Schorovsky did not argue below that the district court relied on non-*Shepard*-approved documents to determine that his offenses were committed on different occasions—rather, he objected only that the ACCA should not apply because his prior convictions constituted a single criminal episode. Accordingly, we review the former argument for plain error and the latter de novo.[6] Under plain-error review, Schorovsky must establish (1) an error (2) that is "clear or obvious" and that (3) **[**3]** affected his "substantial rights."[7] If he makes this showing, then we have discretion to remedy the error—discretion we should exercise only if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[8]

Even if the district court erred in relying on the presentence investigation report (PSR),[9] the error did not affect Schorovsky's substantial rights because "*Shepard*-approved documents are conclusive as to whether the predicate ACCA offenses occurred on separate occasions."[10] The Government provided the district court with *Shepard*-approved documents: the indictments and judgments for Schorovsky's prior convictions. Schorovsky did not object.

Schorovsky now argues that (1) his prior indictments cannot be used to prove the dates of his prior offense conduct because Texas law does not require an indictment to allege a specific date, and (2) the dates listed

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[3] *Shepard v. United States*, 544 U.S. 13, 16, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005).

[4] *Wooden v. United States*, 595 U.S. 360, 369, 142 S. Ct. 1063, 212 L. Ed. 2d 187 (2022).

[5] *Id.* at 370.

[6] *See United States v. Alkheqani*, 78 F.4th 707, 723 (5th Cir. 2023).

[7] *See Puckett v. United States*, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009).

[8] *Id.* (alteration in original) (quoting *United States v. Olano*, 507 U.S. 725, 736, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)).

[9] *See United States v. Garza-Lopez*, 410 F.3d 268, 274 (5th Cir. 2005) ("[A] district court is not permitted to rely on a PSR's characterization of a defendant's prior offense for enhancement purposes.")

[10] *See Alkheqani*, 78 F.4th at 726 (quoting *United States v. Wright*, No. 21-60877, 2022 U.S. App. LEXIS 22760, 2022 WL 3369131, at *1 (5th Cir. Aug. 16, 2022) (per curiam)).

in the judgments are not factual findings for purposes of the ACCA.[11] However, our precedent makes clear that **[*948]** judgments and indictments are *Shepard*-approved documents that can be used to determine that Texas offenses occurred on different dates and thus on separate occasions.[12] Even if the cases Schorovsky **[**4]** cites cast doubt on the use of indictments and judgments under some circumstances, as Schorovsky argues, it is not "clear or obvious" that the district court erred in relying on them here.

Because Schorovsky's prior indictments and judgments indicate that the offenses were committed two days apart,[13] the district court properly treated them as occurring on different occasions.[14] Accordingly, the district court did not plainly err under *Shepard* and properly treated Schorovsky's prior convictions as ACCA predicates.

II

Schorovsky next argues that the district court violated *Apprendi v. New Jersey* by finding that his prior convictions occurred on different occasions for the ACCA enhancement.[15] He argues that the jury should have found that fact beyond a reasonable doubt. Because Schorovsky did not raise an *Apprendi* objection below, we review for plain error.[16]

Supreme Court and circuit precedent squarely foreclose Schorovsky's argument. In *Apprendi*, the Supreme Court said, "*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, **[**5]** and proved beyond a reasonable doubt."[17] Consistent with *Apprendi*, we have held that "'because [Section] 924(e)(1) does not create a separate offense but is merely a sentence enhancement provision,' neither the statute nor the Constitution requires a jury finding on the existence of the three previous felony convictions required for the enhancement."[18] The Supreme Court's 2002 decision in *Wooden v. United States* does not demand a

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[11] Schorovsky cites *Sledge v. State*, 953 S.W.2d 253 (Tex. Crim. App. 1997), and *United States v. Solano-Hernandez*, 761 F. App'x 276 (5th Cir. 2019). *See Sledge*, 953 S.W.2d at 255 (stating that "the State need not allege a specific date in an indictment"); *Solano-Hernandez*, 761 F. App'x at 281-82 (holding that the district court clearly and obviously erred in relying on the "Statement of Reasons" in the judgment "to narrow the statute of conviction"); *see also United States v. Fuller*, 453 F.3d 274, 279-80 (5th Cir. 2006) (holding that the indictments could not establish that the burglaries occurred on different occasions because the indictments need not identify whether the defendant aided and abetted or committed the robbery himself), *abrogated on other grounds by Wooden*, 595 U.S. 360.

[12] *See, e.g., Alkheqani*, 78 F.4th at 727 (stating approvingly that the indictments listed the dates of the offenses); *United States v. Bookman*, 263 F. App'x 398, 399-400 (5th Cir. 2008) (per curiam) (stating that the indictments and judgments "show that the burglaries were committed on different dates"); *see also United States v. White*, 465 F.3d 250, 254 (5th Cir. 2006) (noting that the indictments and judgments were among the "ample bases [in that case] to determine that White's drug offenses were separate"); *United States v. Martin*, 447 F. App'x 546, 548 (5th Cir. 2011) (per curiam) (same).

[13] His aggravated robbery occurred on January 26, 2012, and his robbery occurred on January 28, 2012.

[14] *See Wooden*, 595 U.S. at 370.

[15] *See* 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[16] *See United States v. Davis*, 487 F.3d 282, 287-88 (5th Cir. 2007).

[17] 530 U.S. at 490 (emphasis added).

[18] *See United States v. Stone*, 306 F.3d 241, 243 (5th Cir. 2002) (alteration in original) (quoting *United States v. Affleck*, 861 F.2d 97, 98-99 (5th Cir. 1988)); *see also White*, 465 F.3d at 254 (rejecting *Apprendi* argument); *Davis*, 487 F.3d at 287-88 (same); *United States v. Hageon*, 418 F. App'x 295, 299 (5th Cir. 2011) (same).

contrary result.[19] Accordingly, **[*949]** the district court did not err under *Apprendi* by finding that Schorovsky's prior convictions were committed on different occasions.

III

Schorovsky next argues that his burglary-of-a-habitation conviction cannot be an ACCA predicate because the relevant statute, Texas Penal Code § 30.02(a), covers "buildings" that are not used for habitation and is thus broader than "generic" burglary in the ACCA. Because Schorovsky objected below, our review is de novo.[20]

Binding circuit precedent forecloses this argument. Burglary is an enumerated "violent felony" under the ACCA.[21] We previously held *en banc* that Penal Code § 30.02(a) fits within the generic definition of burglary and thus qualifies as an ACCA violent felony.[22] Since that decision in *Herrold II*, we have reiterated that "§ 30.02(a) constitutes **[**6]** generic burglary in its entirety, and thus *any* § 30.02(a) conviction qualifies as a predicate under the ACCA."[23] Accordingly, the district court properly classified Schorovsky's burglary-of-a-habitation conviction as an ACCA predicate.

IV

Schorovsky also argues that the district court violated his due process right to notice by finding that his burglary conviction was an ACCA violent felony. He explains that "burglary of a dwelling" is no longer considered a violent crime under the Sentencing Guidelines' career offender enhancement and that this disparity with the ACCA makes him wonder "whether or not burglary should now be considered a violent crime." Because Schorovsky raises this argument for the first time on appeal, we review for plain error.[24]

This argument likewise fails. As the Government notes, the ACCA "unambiguously gives the public notice that a prior burglary conviction may be used for the purpose [of] enhancing a criminal actor's penalty range to ACCA's 15-year mandatory minimum sentence, even though the § 4B1.2 definition of a crime of violence excludes that offense." In *Herrold II*, we held *en banc* that burglary of a habitation categorically fits within the definition **[**7]** of burglary under the ACCA.[25] Moreover, the Guidelines themselves "do not implicate" Schorovsky's due process right to notice.[26] "All of the notice required is provided by the applicable statutory range, which establishes the permissible bounds of the court's

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[19] *See United States v. Valencia*, 66 F.4th 1032, 1032-33 (5th Cir. 2023) (per curiam) (discussing *Wooden*, 595 U.S. 360).

[20] *See Fuller*, 453 F.3d at 278; *Alkheqani*, 78 F.4th at 723.

[21] 18 U.S.C. § 924(e)(2)(B)(ii).

[22] *United States v. Herrold* (*Herrold II*), 941 F.3d 173, 182 (5th Cir. 2019) (en banc).

[23] *United States v. Clark*, 49 F.4th 889, 892 (5th Cir. 2022) (per curiam) (emphasis added); *see also United States v. Wallace*, 964 F.3d 386, 389 (5th Cir. 2020) ("[W]e disagree with Wallace's assertion that our holding in *Herrold II* is confined to Herrold's failure to provide supportive Texas cases."); *United States v. Walton*, 804 F. App'x 281, 282 (5th Cir. 2020) (per curiam) ("[C]hallenges to the Texas burglary statute as being nongeneric for purposes of the ACCA enhancement are foreclosed.").

[24] *See Puckett*, 556 U.S. at 135.

[25] *See Herrold II*, 941 F.3d at 176-77.

[26] *See Beckles v. United States*, 580 U.S. 256, 265, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017); *see also United States v. Osorio*, 734 F. App'x 922, 924 (5th Cir. 2018) (per curiam) (same).

sentencing discretion."[27] Schorovsky points to no case law—because there is none—to show that the Guidelines' definition of "crime of violence" overrides the ACCA's definition of "violent **[*950]** felony" or that the ACCA is unconstitutionally vague. "We ordinarily do not find plain error when we 'have not previously addressed' an issue."[28] Accordingly, the district court did not, plainly or otherwise, violate Schorovsky's due process rights by characterizing burglary as a violent felony and sentencing him to the ACCA's 15-year mandatory minimum.

V

Finally, Schorovsky argues that his guilty plea was not knowing and voluntary because the magistrate judge advised him during the plea colloquy that his maximum sentence was 15 years (when the ACCA's mandatory maximum is life in prison), that his minimum sentence was 0 years (when the ACCA's mandatory minimum is 15 years), and that the maximum term of supervised release was 3 years **[**8]** (when it is 5 years).

Schorovsky says that he preserved this Rule 11 claim by making it "abundantly clear [before the district court] that he felt like he'd been blindsided by being characterized as an armed career criminal."[29] However, his objection was not "sufficiently specific to alert the district court to the nature of the alleged [Rule 11] error and to provide an opportunity for correction."[30] Even liberally construing his objection, he did not object to his plea or to the district court's alleged miscommunication about the proper sentencing range—he objected only to "getting enhanced on something that's not even nowhere in the sentencing guideline or the ACC Act." Accordingly, we review for plain error.[31]

The district court undeniably erred when it advised Schorovsky of the incorrect minimum and maximum terms of imprisonment that could result from his plea.[32] In *United States v. Rodriquez*, the Supreme Court observed, "If the judge told the defendant that the maximum possible sentence was 10 years and then imposed a sentence of 15 years based on ACCA, the defendant would have been sorely misled and would have a ground for moving to withdraw the plea."[33] Accordingly, "we have no difficulty concluding **[**9]** that the error was 'clear or obvious.'"[34]

Even so, the district court's error did not affect Schorovsky's substantial rights and thus fails to satisfy the third prong of plain-error review.[35] Schorovsky fails to meet his burden of showing "a reasonable

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[27] *Beckles*, 580 U.S. at 266.

[28] *See United States v. Evans*, 587 F.3d 667, 671 (5th Cir. 2009) (quoting *United States v. Lomas*, 304 F. App'x 300, 301 (5th Cir. 2008) (per curiam)).

[29] *See* Fed R. Crim. P. 11(b)(1)(H)—(I).

[30] *See United States v. Neal*, 578 F.3d 270, 272 (5th Cir. 2009).

[31] See *United States v. Vonn*, 535 U.S. 55, 58-59, 122 S. Ct. 1043, 152 L. Ed. 2d 90 (2002).

[32] *See* Fed R. Crim. P. 11(b)(1)(H)—(I).

[33] 553 U.S. 377, 384, 128 S. Ct. 1783, 170 L. Ed. 2d 719 (2008).

[34] *See United States v. Wallace*, 551 F. App'x 193, 196 (5th Cir. 2014) (per curiam) (quoting *Puckett*, 556 U.S. at 135).

[35] *See id.* (concluding that the Rule 11 error was "clear or obvious" under *Rodriquez* before proceeding to the "substantial rights" plain-error prong).

probability that, but for the error, he would not have entered the plea."[36] "Though the district court failed to inform [Schorovsky] of the punishment range for the charged crime, the presentence report specifically detailed the punishment range" applicable in light of the enhancement.[37] At sentencing, Schorovsky **[*951]** confirmed that he had reviewed the PSR. Despite learning of the ACCA statutory sentencing range in his PSR, Schorovsky did not object or seek to withdraw his plea.[38] Under these circumstances, Schorovsky was "aware of and understood" that his ACCA enhancement carried a statutory minimum sentence of 15 years, a statutory maximum of life, and a maximum term of supervised release of five years.[39]

And, critically, Schorovsky does not allege, let alone prove, that he would not have pleaded guilty had he been informed during his plea colloquy of the proper statutory sentencing range.[40] He merely "requests **[**10]** that he be returned to the pre-plea status so he can decide whether or not to take his case to trial."[41] Thus, the district court did not plainly err.

* * *

Accordingly, we AFFIRM Schorovsky's guilty plea and sentence.

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[36] *See United States v. Dominguez Benitez*, 542 U.S. 74, 83, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004).

[37] *See United States v. Vasquez-Bernal*, 197 F.3d 169, 171 (5th Cir. 1999) (per curiam) (discussing similar facts and holding that the Rule 11 error did not affect substantial rights).

[38] *See United States v. Herndon*, 7 F.3d 55, 57 (5th Cir. 1993) (per curiam) (considering whether the PSR and sentencing hearing provided "any basis upon which [the court] could reasonably conclude that the defendant was 'aware of and understood' that there was a [certain] minimum statutory sentence").

[39] *See id.*

[40] *See Dominguez Benitez*, 542 U.S. at 83.

[41] *See Vasquez-Bernal*, 197 F.3d at 171.

Appendix B

United States Court of Appeals for the Fifth Circuit

No. 23-50040

United States Court of Appeals
Fifth Circuit
FILED
April 5, 2024
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RICHARD SCHOROVSKY,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:22-CR-173-1

ON PETITION FOR REHEARING EN BANC

Before ELROD, WILLETT, and DUNCAN, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.