No. 20-5279

In the Supreme Court of the United States

WILLIAM DALE WOODEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

ELIZABETH PRELOGAR
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Counsel of Record for Respondent

ALLON KEDEM
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
allon.kedem@arnoldporter.com

Counsel of Record for Petitioner

PETITION FOR A WRIT OF CERTIORARI FILED: JULY 24, 2020
CERTIORARI GRANTED: FEB. 22, 2021

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-5189

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM DALE WOODEN,
Defendant-Appellant.

RELEVANT DOCKET ENTRIES

DATE	#	PROCEEDINGS
03/01/2019	1	Criminal Case Docketed. Notice filed by Appellant William Dale Wooden. Transcript needed: y. (CAM) [Entered: 03/01/2019 10:41 AM]
05/13/2019	13	APPELLANT BRIEF filed by Mr. Michael Barrett Menefee for William Dale Wooden Certificate of Service: 05/13/2019. Argument Request: requested. [19-5189] (MBM) [Entered: 05/13/2019 10:48 PM]
07/12/2019	17	APPELLEE BRIEF filed by Mr. Luke A. McLaurin for USA Certificate of Service: 07/12/2019. Argument Request: not requested. [19-5189] (LAM) [Entered: 07/12/2019 04:13 PM]

DATE	#	PROCEEDINGS
08/16/2019	21	REPLY BRIEF filed by Attorney Mr. Michael Barrett Menefee for Appellant William Dale Wooden Certificate of Service: 08/16/2019. [19-5189] (MBM) [Entered: 08/16/2019 06:22 PM]
10/21/2019	29	CAUSE SUBMITTED on briefs to panel consisting of Judges Gilman, Kethledge and Readler. (JRH) [Entered: 12/12/2019 09:46 AM]
12/19/2019	30	OPINION and JUDGMENT filed : AFFIRMED. Decision for publication. Ronald Lee Gilman, Raymond M. Kethledge, and Chad A. Readler (AUTHORING), Circuit Judges. (CL) [Entered: 12/19/2019 01:41 PM]
01/02/2020	31	PETITION for en banc rehearing filed by Mr. Michael Barrett Menefee for William Dale Wooden. Certificate of Service: 01/02/2019. [19-5189] (MBM) [Entered: 01/02/2020 05:17 PM]
02/26/2020	35	ORDER filed denying petition for en banc rehearing [31] filed by Mr. Michael Barrett Menefee. Ronald Lee Gilman, Raymond M. Kethledge, and Chad A. Readler, Circuit Judges. (BLH) [Entered: 02/26/2020 08:12 AM]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

No. 3:15-CR-12-TAV-DCP-1

UNITED STATES OF AMERICA,
Plaintiff,

v.

WILLIAM DALE WOODEN,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	#	PROCEEDINGS
03/03/2015	1	INDICTMENT as to William Dale Wooden (1) count(s) 1. (Attachments: # 1 Criminal Cover Sheet Wooden)(JAN,) (Entered: 03/04/2015)
04/08/2015	5	Minute Entry for proceedings held before Magistrate Judge C Clifford Shirley, Jr: Initial Appearance and Arraignment Hearing as to William Dale Wooden held on 4/8/2015. Attorney Benjamin Sharp for William Dale Wooden appointed. Not guilty plea entered. Plea Agreement due by 6/3/2015. Jury Trial set for 6/16/2015 at 9:00 AM in Courtroom 4 - Knoxville, before Chief District Judge Thomas A Varlan. Pretrial Conference set for 6/3/2015 at 10:00

DATE	#	PROCEEDINGS
		AM in Courtroom 3B - Knoxville, before Magistrate Judge C Clifford Shirley Jr. (Court Reporter FTR) Defendant Remanded to Custody. (RLK) (Entered: 04/09/2015)
04/08/2015	7	ORDER APPOINTING FEDERAL DEFENDER as to William Dale Wooden. Signed by Magistrate Judge C Clifford Shirley, Jr on April 8, 2015. (RLK) (Entered: 04/09/2015)
07/21/2016	34	FACTUAL BASIS as to William Dale Wooden. (Norris, Kelly) (Entered: 07/21/2016)
08/02/2016	35	Minute Entry for Change of Plea Hearing as to William Dale Wooden held on 8/2/2016 before Chief District Judge Thomas A Varlan: Guilty Plea entered by William Dale Wooden as to Count 1. (Sentencing set for 12/7/2016 10:00 AM in Courtroom 4 - Knoxville before Chief District Judge Thomas A Varlan.) (Court Reporter Jill Zobel, Miller & Miller)Defendant Remanded to Custody. (JAN,) (Entered: 08/02/2016)
11/03/2016	36	PRESENTENCE INVESTIGATION REPORT (Sealed) as to William Dale Wooden. Objections or a Notice of No Objections must be filed within 14 days pursuant to LR 83.9(c). Instructions can be found here: http://www.tned.uscourts.gov/

DATE	#	PROCEEDINGS
		docs/psrs.pdf (Ballinger, Rachiel) (Entered: 11/03/2016)
11/09/2016	37	NOTICE OF NO OBJECTIONS to Presentence Investigation Report by USA as to William Dale Wooden (Norris, Kelly) (Entered: 11/09/2016)
11/22/2016	38	NOTICE OF NO OBJECTIONS to Presentence Investigation Report by William Dale Wooden (Sharp, Benjamin) (Entered: 11/22/2016)
11/29/2016	39	NOTICE OF OBJECTIONS to Presentence Investigation Report as to William Dale Wooden. (Attachments: # 1 Exhibit 1997 Burglaries Indictment, # 2 Exhibit 2005 Burglary Indictment) (McLaurin, Luke) (Entered: 11/29/2016)
12/01/2016	41	SENTENCING MEMORANDUM by USA as to William Dale Wooden (Attachments: #1 Aggravated Assault Indictment, #2 Aggravated Assault Judgment, #3 Burglaries-of-Building Indictment, #4 Burglaries-of-Building Judgment, #5 Burglary-of-Dwelling Indictment, #6 Burglary-of-Dwelling Judgment) (McLaurin, Luke) (Entered: 12/01/2016)
12/06/2016	42	PRESENTENCE INVESTIGATION REPORT (Addendum)(Sealed) as to William

DATE	#	PROCEEDINGS
		Dale Wooden (Ballinger, Rachiel) (Entered: 12/06/2016)
05/05/2017	44	RESPONSE TO OBJECTIONS to Presentence Investigation Report by USA, William Dale Wooden as to William Dale Wooden. (Sharp, Benjamin) (Entered: 05/05/2017)
05/10/2017	45	SENTENCING MEMORANDUM by William Dale Wooden (Sharp, Benjamin) (Entered: 05/10/2017)
06/21/2017	50	MOTION to Withdraw Plea of Guilty by William Dale Wooden. (Menefee, Michael) (Entered: 06/21/2017)
06/21/2017	51	MEMORANDUM in Support of 50 MOTION to Withdraw Plea of Guilty (Attachments: # 1 Exhibit Ex. 1 - Order of Dismissal)(Menefee, Michael) (Entered: 06/21/2017)
06/26/2017	52	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings as to William Dale Wooden held on August 2, 2016, before Judge Chief Judge Thomas A. Varlan. Court Reporter/Transcriber Miller & Miller, Telephone number 865-675-1471. NOTICE RE REDACTION OF TRANSCRIPTS: The parties have seven (7) calendar days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely

DATE	#	PROCEEDINGS
		electronically available to the public without redaction after 90 calendar days. The policy is located on our website at www.tned.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/17/2017. Redacted Transcript Deadline set for 7/27/2017. Release of Transcript Restriction set for 9/25/2017. (JAN,) (Entered: 06/26/2017)
06/30/2017	54	RESPONSE in Opposition by USA as to William Dale Wooden re 50 MOTION to Withdraw Plea of Guilty (Attachments: # 1 Exhibit 1 - Transcript of Initial Appearance and Arraignment Hearing, # 2 Exhibit 2 - Transcript of Change of Plea Hearing)(Norris, Kelly) (Entered: 06/30/2017)
08/14/2017	55	PRESENTENCE INVESTIGATION REPORT (Addendum)(Sealed) as to William Dale Wooden (Ballinger, Rachiel) (Entered: 08/14/2017)
08/14/2017	56	(REVISED) PRESENTENCE INVESTIGATION REPORT (Sealed) as to William Dale Wooden

DATE	#	PROCEEDINGS
		(Ballinger, Rachiel) (Entered: 08/14/2017)
11/29/2017	59	MEMORANDUM OPINION AND ORDER as to William Dale Wooden: For reasons fully set forth within this Order defendant's 50 MOTION to Withdraw Plea of Guilty filed by William Dale Wooden is GRANTED. (Plea Agreement due by 1/16/2018., Jury Trial set for 1/30/2018 09:00 AM in Courtroom 4 - Knoxville before Chief District Judge Thomas A Varlan.) The period of timebetween the defendants guilty plea and the new trial date shall be fully excludable time under the Speedy Trial Act. See 18 U.S.C. § 3161(i). Signed by Chief District Judge Thomas A Varlan on November 29, 2017. (JAN,) (Entered: 11/29/2017)
05/30/2018	68	Minute Entry for proceedings held before Chief District Judge Thomas A Varlan:Jury Trial as to William Dale Wooden held on 5/30/2018, Jury Verdict finding the defendant guilty as to Count 1 of the Indictment (Sentencing set for 10/16/2018 10:00 AM in Courtroom 4 - Knoxville before Chief District Judge Thomas A Varlan.), (Court Reporter Shannan Andrews)Defendant Remanded to Custody. (JAN,) (Entered: 05/30/2018)

DATE	#	PROCEEDINGS
05/30/2018	69	JURY VERDICT as to William Dale Wooden (1) Guilty on Count 1. (JAN,) (Entered: 05/30/2018)
05/30/2018	70	UNREDACTED JURY VERDICT (JAN,) (Entered: 05/30/2018)
11/02/2018	76	PRESENTENCE INVESTIGATION REPORT (Sealed) as to William Dale Wooden. Objections or a Notice of No Objections must be filed within 14 days pursuant to LR 83.9(c). Instructions can be found here: http://www.tned.uscourts.gov/sites/tned/files/psrs.pdf (Ballinger, Rachiel) (Entered: 11/02/2018)
11/09/2018	77	NOTICE OF NO OBJECTIONS to Presentence Investigation Report by USA as to William Dale Wooden (Davidson, Cynthia) (Entered: 11/09/2018)
11/16/2018	79	NOTICE OF OBJECTIONS to Presentence Investigation Report filed by William Dale Wooden. (JAN,) (Entered: 11/21/2018)
12/04/2018	81	RESPONSE TO OBJECTIONS to Presentence Investigation Report by USA, William Dale Wooden as to William Dale Wooden. (Davidson, Cynthia) (Entered: 12/04/2018)
12/11/2018	82	PRESENTENCE INVESTIGATION REPORT (Addendum)(Sealed) as to William

DATE	#	PROCEEDINGS
		Dale Wooden (Ballinger, Rachiel) (Entered: 12/11/2018)
12/11/2018	83	(REVISED) PRESENTENCE INVESTIGATION REPORT (Sealed) as to William Dale Wooden (Ballinger, Rachiel) (Entered: 12/11/2018)
01/31/2019	84	SENTENCING MEMORANDUM by William Dale Wooden (Attachments: # 1 Exhibit Burglary Jury Instruction)(Menefee, Michael) (Entered: 01/31/2019)
02/12/2019	85	RESPONSE re 84 Sentencing Memorandum (Attachments: # 1 Exhibit 1A - 1997 Burglaries Indictment, # 2 Exhibit 1B - 1997 Burglaries Judgment, # 3 Exhibit 2A - 2005 Burglary Indictment, # 4 Exhibit 2B - 2005 Burglary Judgment, # 5 Exhibit 3A - 1989 Aggravated Assault Indictment, # 6 Exhibit 3B - 1989 Aggravated Assault Judgment, # 7 Exhibit 4 - Georgia Assault Statutes)(McLaurin, Luke) (Entered: 02/12/2019)
02/21/2019	87	Minute Entry for sentencing hearing held 2/21/19 before Chief District Judge Thomas A Varlan: Sentencing William Dale Wooden (1), to 188 Months Imprisonment followed by 3 Years Supervised Release. $100 Special Assessment. (Court Reporter Rebekah Lockwood)Defendant

DATE	#	PROCEEDINGS
		Remanded to Custody. (JAN,) (Entered: 02/22/2019)
02/22/2019	88	JUDGMENT as to William Wooden 188 Months Imprisonment followed by 3 Years Supervised Release. $100 Special Assessment Signed by Chief District Judge Thomas A Varlan on February 22, 2019. (JAN,) Modified on 2/22/2019 (JAN,). Modified on 2/28/2019 (JAN,). (Entered: 02/22/2019)
02/22/2019	89	STATEMENT OF REASONS (Sealed) as to William Dale Wooden (JAN,) (Entered: 02/22/2019)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-5189

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM DALE WOODEN,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.
No. 3:15-cr-00012-1—Thomas A. Varlan, District Judge.

Decided and Filed: December 19, 2019

Before: GILMAN, KETHLEDGE, and
READLER, Circuit Judges

COUNSEL

ON BRIEF: Michael B. Menefee, MENEFEE & BROWN, P.C., Knoxville, Tennessee, for Appellant. Luke A. McLaurin, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee.

OPINION

CHAD A. READLER, Circuit Judge. While at home on a cold November morning, William Wooden heard a knock at the door. Upon opening it, Wooden was greeted by a man asking to speak with Wooden's wife. Wooden went to get her. And he allowed the man to enter the home, to stay warm while waiting for Wooden to return.

But Wooden's humane gesture soon became his undoing. As from there, things began to unravel. Wooden picked up a firearm. The man at the door turned out to be a plainclothes police officer. And the officer knew that Wooden was a convicted felon who could not lawfully possess a firearm. Wooden was thus taken into custody.

Wooden was later convicted and sentenced on a felon-in-possession charge. On appeal, Wooden asserts two challenges to that result. With respect to his conviction, Wooden contends that the officer's presence in his home violated the Fourth Amendment, meaning that much of the evidence used against him should have been suppressed. And as to his sentence, Wooden challenges the fifteen-year term of imprisonment imposed by application of the Armed Career Criminal Act. Finding no error in the district court's Fourth Amendment or sentencing analyses, we **AFFIRM** the decision below.

BACKGROUND

Along with two uniformed officers, Conway Mason, an Investigator for the Monroe County (Tennessee) Sheriff's Department, set out early one chilly November morning to track down Ben Harrelson, a fugitive wanted for theft. The officers had previously seen Harrelson's vehicle parked outside the home of William Wooden and

Janet Harris. Believing Harrelson might be hiding inside, the officers approached the home. Mason, who was not in uniform, went to the front door, and the two uniformed officers dispersed around the home.

Mason knocked on the door. When Wooden answered, Mason asked to speak with Harris. Mason also asked if he could step inside, to stay warm. According to Mason, Wooden responded "Yes. That's okay"—which Mason took to mean he could come inside.

Mason, along with a second officer, entered the home. As Wooden walked down the hallway, the officers saw him pick up a rifle. When the officers told him to put the weapon down, Wooden did as instructed. Mason knew Wooden was a felon, meaning he could not possess a firearm. So the officers took the rifle and handcuffed and searched Wooden. During the search, the officers discovered a loaded revolver holstered on Wooden.

Harris gave the officers permission to search the home. The officers did not find Harrelson. But they did find a third weapon, a .22 caliber rifle. After waiving his *Miranda* rights, Wooden admitted that he possessed all three firearms as well as ammunition.

Federal prosecutors subsequently filed an indictment charging Wooden with being a Felon in Possession of Firearms and Ammunition, in violation of 18 U.S.C. § 922(g)(1). Wooden in turn moved to suppress the evidence discovered during the search of his home. In his motion, Wooden argued that the officers violated his Fourth Amendment rights by entering his home without a warrant or his consent. The district court, however, denied Wooden's motion on the basis that Wooden consented to the officers' entry. At his subsequent jury trial, Wooden was convicted as charged.

The probation office prepared a presentence report in which Wooden was classified as an armed career criminal

under the Armed Career Criminal Act (or ACCA), given that he had three or more prior violent felony convictions. The basis for the classification was Wooden's prior Georgia convictions: a 1989 aggravated assault, ten 1997 burglaries, and a 2005 burglary. Wooden objected to the classification. He argued that neither the aggravated-assault nor burglary offenses qualify as violent felonies under the ACCA. He likewise contended that the ten 1997 burglaries arose out of a single occasion and thus qualify as a single ACCA predicate, rather than ten.

At the sentencing hearing, the district court rejected Wooden's objections. The court held that the Georgia burglary qualified as a violent felony under the ACCA. As to Wooden's 1997 burglary convictions specifically, the court held that each conviction qualified as a separate ACCA predicate offense. Wooden filed a timely appeal, and we now take up these same issues for review.

ANALYSIS

I. The District Court Properly Denied Wooden's Motion To Suppress.

Wooden first challenges the district court's denial of his motion to suppress evidence obtained after the officers entered his home. Wooden cites two purported errors. One, that he did not consent to the officer's entry into his home. And two, even if he did consent, that consent was not valid because the officer used deception to attain his consent.

Wooden's claims invoke the protections afforded by the Fourth Amendment to the United States Constitution. That familiar provision preserves "[t]he right of the people to be secure in their persons, houses, papers, and effects[.]" U.S. Const. amend. IV. In recognition of that right, an officer must have at least "reasonable suspicion" of criminal activity before infringing on a person's privacy and subjecting that person to a search or seizure. *See*

Ornelas v. United States, 517 U.S. 690, 693 (1996) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). In that way, "the Fourth Amendment Protects '[the] security of one's privacy against arbitrary intrusion by the police . . . .'" *David Levell W. v. California*, 449 U.S. 1043, 1048 (1980) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (alteration and ellipsis in original)).

The Fourth Amendment, of course, protects people, not places. But in assessing what protection one is owed, we must naturally consider the place of the search. And for Fourth Amendment purposes, the search here occurred on sacred ground, as "the Fourth Amendment has drawn a firm line at the entrance to the house." *Payton v. New York*, 445 U.S. 573, 590 (1980). This means government agents, oftentimes law enforcement officers, cannot enter a person's home unless the officer has a warrant supported by probable cause, or there exists a valid exception to the warrant requirement. *See Kentucky v. King*, 563 U.S. 452, 459 (2011). If officers enter a home without a warrant and without any other valid justification, courts will suppress the evidence obtained during that search, rendering the evidence inadmissible at trial. *See Hudson v. Michigan*, 547 U.S. 586, 592 (2006).

When analyzing a district court's decision to deny a motion to suppress evidence allegedly obtained in violation of the Fourth Amendment, we review the district court's legal conclusions de novo. *United States v. Carpenter*, 926 F.3d 313, 317 (6th Cir. 2019) (quoting *United States v. Lee*, 793 F.3d 680, 684 (6th Cir. 2015)). With respect to the district court's factual findings, however, we review them only for clear error. *See United States v. Winters*, 782 F.3d 289, 294–95 (6th Cir. 2015). A factual finding is clearly erroneous when we are left with "the definite and firm conviction" that the district court has made a mistake. *United States v. Cooper*, 893 F.3d 840, 843 (6th Cir. 2018) (citation omitted). In examining the underlying

evidentiary record, we defer to the district court's assessment of each witness's credibility, and we review the evidence in the light most likely to support the district court's decision. *United States v. Lawrence*, 735 F.3d 385, 436 (6th Cir. 2013) (citations omitted).

A. The District Court's Determination That Wooden Consented To Mason Entering His Home Was Not Clearly Erroneous.

1. As a state law enforcement officer, Mason was bound by the constraints of the Fourth Amendment in investigating criminal activity on the part of Wooden. One constraint was the warrant requirement, and all parties agree that Mason did not have a warrant authorizing him to search Wooden's home. To validate Mason's search under the Fourth Amendment, then, there must be an applicable warrant exception justifying Mason's entry into the home.

Relevant today is the warrant exception applicable in instances where an occupant of a home consents to an officer's entry. *Georgia v. Randolph*, 547 U.S. 103, 109 (2006). Where an occupant's consent is freely given, and not the result of undue coercion, the resulting search satisfies Fourth Amendment muster. *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973). Wooden contends that he did not consent to Mason's entry. But in disputing that factual finding, Wooden faces an uphill climb at this stage, in view of our deferential standard of review. That is, Wooden's arguments must lead us to "the definite and firm conviction" that the district court erred in assessing the record. *Cooper*, 893 F.3d at 843. Wooden has not met his burden.

2. We start with two points of agreement. All agree that if Wooden gave valid consent to Mason's entry, the district court properly denied Wooden's motion to suppress. And all agree that, when Wooden answered

Mason's knock on the door, Mason asked if he could speak with Harris, and asked if he could wait inside in the meantime.

From there, the parties diverge. Mason, while not certain of the exact words Wooden used in response, testified that Wooden told him he could wait inside. Wooden, on the other hand, testified unequivocally that he did not consent to Mason's entry. Seizing on Mason's partial equivocation, Wooden says that he was the more credible witness, noting that only he could remember exactly what was said between the two.

Assessing that collection of testimony, the district court held that Wooden did in fact consent to Mason's entry. Yes, as Wooden notes, the testimony was at times conflicting. But the responsibility for weighing conflicting testimony lies primarily with the district court, and its conclusions are given due respect. The district court evidently credited Mason's testimony, a determination to which we customarily defer, given the district court's front-row view of the evidentiary proceedings. *See Lawrence*, 735 F.3d at 436, 438. Seeing no "definite and firm" basis for discrediting the district court's assessment that Wooden consented to Mason entering his home, there was no clear error below warranting reversal. *See Cooper*, 893 F.3d at 843.

B. The Fruits Of The Search Were Not Obtained As A Result Of Police "Deception."

Disagreeing that he consented to the search of his home, Wooden alternatively argues that any purported consent was obtained through deception, making it invalid. But as forcefully as he makes that argument today, Wooden failed to do so in the district court. That failure begs the question whether there is any basis for this Court to consider the argument.

Sometimes, the failure to raise an issue in the district court is deemed a "waiver," meaning that we will not consider the claim at all. *See*, *e.g.*, *United States v. Street*, 614 F.3d 228, 235 (6th Cir. 2010). Other times, we will deem an unraised argument as merely "forfeited," meaning that we will consider the claim, but only against the backdrop of the demanding plain-error standard. *See*, *e.g.*, *United States v. Mabee*, 765 F.3d 666, 671 (6th Cir. 2014). When and how those doctrines apply is not always easy to assess, a struggle our cases oftentimes reflect. Our Fourth Amendment jurisprudence is no exception. Indeed, our prior cases assessing the waiver/forfeiture distinction in the context of motions to suppress reveal some apparent tension. A case in point is *United States v. Deitz*. In *Deitz*, we noted that a defendant's failure to file a motion to suppress is treated as a waiver of suppression issues. 577 F.3d 672, 687 (6th Cir. 2009). So far, so good. But we went on in *Deitz* to distinguish the scenario of failing to file a motion to suppress with the scenario of filing a motion to suppress that nonetheless failed to raise an argument later asserted on appeal. And that latter setting, we noted, we had previously treated as a forfeiture, rather than a waiver. *Id.*

Recognizing the potential conflict between applying waiver in one suppression setting and forfeiture in another, *Deitz* assumed without deciding that forfeiture applies when some (but not all) suppression arguments are raised in an unsuccessful motion to suppress. Accordingly, *Deitz* applied a plain-error standard to the previously unraised argument. *Id.* at 691. Today, we follow *Deitz*'s lead. That is, assuming for purposes of argument that Wooden's unraised suppression claim is properly before us, Wooden nonetheless cannot demonstrate plain error.

More settled is the standard we apply in evaluating the proceedings below for plain error. Plain error means

an "(1) error (2) that was obvious or clear, (3) that affected defendant's substantial rights and (4) that affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Vonner*, 516 F.3d 382, 386 (6th Cir. 2008) (en banc) (internal quotation marks omitted). No such error occurred here.

Much of Wooden's challenge turns on the fact that Mason was neither in uniform nor identified himself as a police officer. Both are true. But generally speaking, neither amounts to improper deception in the Fourth Amendment context. *United States v. Baldwin*, 621 F.2d 251, 252–53 (6th Cir. 1980) (citing *Lewis v. United States*, 385 U.S. 206, 211 (1966)). Nor did Mason take any affirmative steps to attempt to deceive Wooden regarding his identity. Mason was silent as to his official position; he did not hold himself out to be anything he was not. He merely asked to speak to Harris and then asked if he could come inside, to get out of the cold.

Wooden has little to say in response. He seems to suggest that we should revisit *Baldwin* in light of the Supreme Court's decisions in *Florida v. Jardines*, 569 U.S. 1 (2013), and *United States v. Jones*, 565 U.S. 400 (2012), which, together, described the Fourth Amendment's roots in the common law of trespass. Even accepting that latter understanding of the Fourth Amendment, it will nevertheless remain true that an officer's undercover status does not amount to deception under ordinary trespass principles. Wooden finds deception in the fact that he could not see the two uniformed officers on or near his property. But that is neither here nor there. The officers were not required to announce themselves. And their presence had no bearing on whether Mason did something to deceive Wooden. All told, the district court did not err, plainly or otherwise, in failing to equate Mason's conduct with improper deception. For these reasons, Wooden's consent-by-deception claim fails.

II. Wooden's Ten Burglary Convictions Were Each ACCA-Qualifying Offenses.

1. In addition to the denial of his motion to suppress, Wooden also challenges the district court's decision to sentence Wooden under the ACCA. At issue here is the ACCA's instruction that a defendant is subject to a fifteen-year minimum sentence if the defendant has previously been convicted of at least three ACCA-qualifying offenses. 18 U.S.C. § 924(e)(1).

That brings us to Wooden's numerous prior convictions under Georgia law: one for aggravated assault and eleven for burglary, ten of those coming in 1997. In view of Wooden's criminal history portfolio, the probation office recommended that Wooden be classified as an armed career criminal. Wooden objected to that recommendation on two grounds: one, that neither Georgia's aggravated-assault nor burglary offense is an ACCA-qualifying offense, and two, even if Georgia's burglary offense so qualifies, the ten 1997 burglaries arose out of a single occurrence, meaning they qualified as a single ACCA predicate. But the district court saw things differently. It determined that the Georgia burglaries were ACCA-qualifying offenses and, further, that Wooden's ten 1997 convictions each counted as a qualifying offense.

2. As set forth in 18 U.S.C. § 924(e)(1), to qualify as separate ACCA predicate offenses, multiple offenses must be "committed on occasions different from one another." So what does it mean for offenses to occur on different occasions? Our ordinary interpretive starting line is the text of the statute at issue. But neither § 924 nor its statutory counterparts offer any further definition of the phrase.

In the absence of additional statutory direction, our prior decisions have helped fill this interpretive gap, albeit with some lack of precision. Start with *United States v.*

Hill. There, we recognized "at least three indicia that offenses are separate from each other":

- Is it possible to discern the point at which the first offense is completed and the subsequent point at which the second offense begins?
- Would it have been possible for the offender to cease his criminal conduct after the first offense and withdraw without committing the second offense?
- Were the offenses committed in different residences or business locations?

United States v. Hill, 440 F.3d 292, 297–98 (6th Cir. 2006) (collecting cases); *see also United States v. Paige*, 634 F.3d 871, 873 (6th Cir. 2011). But *Hill* in many respects serves only as a starting point. After all, we have characterized it as articulating "informative standards, not hidebound rules." *United States v. Jenkins*, 770 F.3d 507, 510 (6th Cir. 2014). Said differently, *Hill*, far from establishing a bright-line, three-factor analysis, instead simply "sharpen[ed] the [different occasions] inquiry by focusing the court on the kinds of questions that have come up in prior ACCA cases." *Id.* And so while it is true that "[o]ffenses are separate if they meet *any* of these three tests" articulated in *Hill, United States v. Jones*, 673 F.3d 497, 503 (6th Cir. 2012) (emphasis in original) (citing *Paige*, 634 F.3d at 873), the *Hill* inquiries seemingly are just some of the questions to which an affirmative answer would reveal that multiple offenses should be deemed separate. *See Jenkins*, 770 F.3d at 510 (describing the "*any* of these three tests" statement from *Jones* as dictum).

3. To the extent there remains any precedential uncertainty in this sentencing setting, it makes no difference here, for Wooden's argument comes up short, no matter the metric. Back to Wooden's ten convictions for violating Georgia's burglary statute, Ga. Code Ann. § 16-7-1 (a) (1997). One violates that Georgia law when she "enters or remains within" a "building" to commit an offense. *Id.*

Recognizing that *Hill* may be more a floor than a ceiling with respect to articulating the characteristics of a separate offense, we can easily resolve today's case by relying on *Hill's* guidance alone.

Against the backdrop of *Hill*, we must first consider whether it is possible to discern the point at which Wooden's first offense for entering or remaining in a building was completed and the subsequent point at which his second offense began. Wooden believes the record is too thin to make that assessment. But the indictment to which Wooden pleaded guilty provides all the record we need. *See United States v. King*, 853 F.3d 267, 272 (6th Cir. 2017) (citing *Shepard v. United States*, 544 U.S. 13, 20 (2005)) (holding that when a guilty plea leads to a conviction for violating a statute with alternative elements, courts look to certain documents in the record to determine whether that conviction qualifies as an ACCA predicate). Wooden was accused of, and pleaded guilty to, "entering" ten different mini warehouses. Whatever the contours of a "mini" warehouse, Wooden could not be in two (let alone ten) of them at once. Rather, Wooden must have left one warehouse to "enter" another. It takes little imagination then to conclude that Wooden "entered" ten separate warehouses, and thus committed ten distinct acts of burglary, as measured by Georgia law.

This conclusion accords with *Hill*. There, we determined that two burglary offenses were separate offenses despite Hill arguing that there was "not a discernable lapse of time between them." *Hill*, 440 F.3d at 295. By way of background, Hill committed a burglary, left the location, and then illegally entered and stole from a separate location. That course of conduct, we concluded, counted for two burglaries, not one, as the first burglary was completed before the next one began. *Id.* For § 924(e)(1) purposes, then, those burglaries constituted two ACCA predicate offenses. *Id.* at 297–98.

For many of the same reasons, Wooden satisfies the second and third *Hill* guideposts as well. Start with the second—whether Wooden could have ceased his criminal conduct after the first offense and withdrawn without committing the second offense. We see no reason why it would have been impossible for Wooden to call it a night after the first burglary, without burglarizing nine more warehouses.

So too for the third *Hill* guidepost—whether Wooden's offenses were committed in different locations. They were. Each warehouse was its own location, with its own building number and storage space. And there were many different lawful occupants of those warehouses. Perhaps, as Wooden does, one could characterize this cluster of warehouses as being adjoined "at the same business location." *Hill* too spoke of different "residences or business locations," a phrase intended to assess whether each offense infringed upon a different bundle of property rights for ACCA purposes. In *Hill*, we concluded that the offenses were committed at different locations, as they involved different property rights. And using *Hill* as a yardstick, the same must be true for Wooden, who was convicted of burglarizing ten individual warehouses (rather than one storage business), and thus infringing upon ten distinct sets of property rights.

By any measure, then, Wooden satisfies the *Hill* standard. That means his burglary offenses were separate offenses for purposes of the ACCA, and thus there was no error in his imposed sentence.

III. Wooden's Claim Based On *Rehaif v. United States* Is Forfeited.

In his reply brief, Wooden claims for the first time that the government failed to prove that Wooden knew he was a convicted felon. And citing *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019), Wooden contends that

proving he had knowledge of his status as a felon is an essential element of being deemed a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). Like the defendant in *Rehaif*, Wooden grounds his claim in the jury instructions outlining the elements of § 922(g). Both in *Rehaif* and here, the respective jury instructions omitted any instruction to the jury that the government needed to prove the defendant's knowledge of his prohibited status. 139 S. Ct. at 2195.

Setting aside the distinct nature of the underlying issue in *Rehaif*, Wooden has an equally difficult procedural hurdle to clear. That is, we have long held that a party forfeits any claim that is not set forth in the party's opening brief. *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 257 (6th Cir. 2018). Yes, the Supreme Court decided *Rehaif* after Wooden filed his opening brief. But the Supreme Court granted the petition for certiorari and heard oral argument in *Rehaif* well before Wooden's filing. In that way, the legal issue here—whether Wooden's jury instructions needed to explain that the government must prove Wooden's knowledge of his prohibited status—was at the forefront of the relevant legal landscape. *See id.* (noting that when an argument is being presented by litigants in other jurisdictions, not presenting that argument is a forfeiture even when subsequent decisions make that argument more apparent). And it would be self-refuting for Wooden to argue that he could not have presented his claim until after *Rehaif* was decided. After all, the defendant in *Rehaif* did just that. Accordingly, Wooden's *Rehaif* claim is forfeited.

CONCLUSION

For these reasons, we **AFFIRM** the judgment of the district court.

STATE OF GEORGIA, WHITFIELD COUNTY

IN THE SUPERIOR COURT OF SAID COUNTY

THE GRAND JURORS SELECTED, CHOSEN AND SWORN FOR THE COUNTY OF WHITFIELD, TO-WIT:

Julia Tharpe, Foreman

Cynthia Clark	Roger Coffman
~~Mike Corbin~~	~~Stephani Wagener~~
Terry G. Hampton	John Boykin
~~James M. Stephens~~	Glenda S. Thomas
Connie E. Carnes	Linda O'Neal
Ed Freedman	~~Sue P. Boyd~~
J. Robert Beavers Jr.	Nancy Gregg
Carolyn Godfrey	~~Alan Little~~
Lucille Burchfield	J. M. Boring Jr.
Stella Crider	Florence Brent
Evelyn Smith	Sue Tuggle

COUNT I

In the name and on the behalf of the citizens of Georgia, charge and accuse

DEXTER DEWAYNE BAGGETT, MELVIN GRADY WASDIN, TERRY LYNN WOODEN AND WILLIAM DALE WOODEN

with the offense of

BURGLARY

for that the said accused in the County of Whitfield and the State of Georgia between the 24th and 25th days of March, 1997, did, without authority and with the intent to commit a theft therein, enter a building, to wit: the mini-warehouse #17, located at 100 Williams Road, Robert Lee Holt being the lawful occupant, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 2

In the name and on the behalf of the citizens of Georgia, charge and accuse

DEXTER DEWAYNE DAGGETT, MELVIN GRADY WASDIN, TERRY LYNN WOODEN AND WILLIAM DALE WOODEN

with the offense of

BURGLARY

for that the said accused in the County of Whitfield and the State of Georgia between the 24th and 25th days of March, 1997, did, without authority and with the intent to commit a theft therein, enter a building, to wit: the mini-warehouse #19, located at 100 Williams Road, Robert Lee Holt being the lawful occupant, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 3

In the name and on the behalf of the citizens of Georgia, charge and accuse

DEXTER DEWAYNE BAGGETT, MELVIN GRADY WASDIN, TERRY LYNN WOODEN AND WILLIAM DALE WOODEN

with the offense of

BURGLARY

for that the said accused in the County of Whitfield and the State of Georgia between the 24th and 25th days of March, 1997, did, without authority and with the intent to commit a theft therein, enter a building, to wit: the mini-warehouse #18, located at 100 Williams Road, John Davis being the lawful occupant, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 4

In the name and on the behalf of the citizens of Georgia, charge and accuse

DEXTER DEWAYNE BAGGETT, MELVIN GRADY WASDIN, TERRY LYNN WOODEN AND WILLIAM DALE WOODEN

with the offense of

BURGLARY

for that the said accused in the County of Whitfield and the State of Georgia between the 24th and 25th days of March, 1997, did, without authority and with the intent to commit a theft therein, enter a building, to wit: the mini-warehouse #14, located at 100 Williams Road, John Davis being the lawful occupant, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 5

In the name and on the behalf of the citizens of Georgia, charge and accuse

DEXTER DEWAYNE BAGGETT, MELVIN GRADY WASDIN, TERRY LYNN WOODEN AND WILLIAM DALE WOODEN

with the offense of

BURGLARY

for that the said accused in the County of Whitfield and the State of Georgia between the 24th and 25th days of March, 1997, did, without authority and with the intent to commit a theft therein, enter a building, to wit: the mini-warehouse #15, located at 100 Williams Road, John Davis being the lawful occupant, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 6

In the name and on the behalf of the citizens of Georgia, charge and accuse

DEXTER DEWAYNE BAGGETT, MELVIN GRADY WASDIN, TERRY LYNN WOODEN AND WILLIAM DALE WOODEN

with the offense of

BURGLARY

for that the said accused in the County of Whitfield and the State of Georgia between the 24th and 25th days of March, 1997, did, without authority and with the intent to commit a theft therein, enter a building, to wit: the mini-warehouse #16, located at 100 Williams Road, Vicky & Phil Elder being the lawful occupants, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 7

In the name and on the behalf of the citizens of Georgia, charge and accuse

DEXTER DEWAYNE BAGGETT, MELVIN GRADY WASDIN, TERRY LYNN WOODEN AND WILLIAM DALE WOODEN

with the offense of

BURGLARY

for that the said accused in the County of Whitfield and the State of Georgia, between the 24th and 25th days of March, 1997 did without authority and with the intent to commit a theft therein, enter a building, to wit: the mini-warehouse #2, located at 100 Williams Road, James & Joan Payne being the lawful occupants, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 8

In the name and on the behalf of the citizens of Georgia, charge and accuse

DEXTER DEWAYNE BAGGETT, MELVIN GRADY WASDIN, TERRY LYNN WOODEN AND WILLIAM DALE WOODEN

with the offense of

BURGLARY

for that the said accused in the County of Whitfield and the State of Georgia between the 24th and 25th days of March, 1997, did, without authority and with the intent to commit a theft therein, enter a building, to wit: the mini-warehouse #20, located at 100 Williams Road, Paula Adcock being the lawful occupant, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 9

In the name and on the behalf of the citizens of Georgia, charge and accuse

DEXTER DEWAYNE BAGGETT, MELVIN GRADY WASDIN, TERRY LYNN WOODEN AND WILLIAM DALE WOODEN

with the offense of

BURGLARY

for that the said accused in the County of Whitfield and the State of Georgia between the 24th and 25th days of March, 1997, did, without authority and with the intent to commit a theft therein, enter a building, to wit: the mini-warehouse #1, located at 100 Williams Road, Bud McCollough being the lawful occupant, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 10

In the name and on the behalf of the citizens of Georgia, charge and accuse

DEXTER DEWAYNE BAGGETT, MELVIN GRADY WASDIN, TERRY LYNN WOODEN AND WILLIAM DALE WOODEN

with the offense of

BURGLARY

for that the said accused in the County of Whitfield and the State of Georgia between the 24th and 25th days of March, 1997, did, without authority and with the intent to commit a theft therein, enter a building, to wit: the mini-warehouse #13, located at 100 Williams Road, Bud McCollough being the lawful occupant, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 11

In the name and on the behalf of the citizens of Georgia, charge and accuse

DEXTER DEWAYNE BAGGETT, MELVIN GRADY WASDIN, TERRY LYNN WOODEN AND WILLIAM DALE WOODEN

with the offense of

THEFT BY TAKING

for that the said accused in the County of Whitfield and the State of Georgia between the 24th and 25th days of March, 1997, did unlawfully take, several cassette tapes, one swag, one drop cord, one air tank, one tape measure, one tape case stand, one pair of yellow handled snips, one pair of pliers, one red hammer, and one crescent wrench, the property of Vicky and Phil Elder, with a value greater than $500, with intent to deprive said owner of said property, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 12

In the name and on the behalf of the citizens of Georgia, charge and accuse

DEXTER DEWAYNE BAGGETT, MELVIN GRADY WASDIN, TERRY LYNN WOODEN AND WILLIAM DALE WOODEN

with the offense of

THEFT BY TAKING

for that the said accused in the County of Whitfield and the State of Georgia between the 24th and 25th days of March, 1997, did unlawfully take, one weed trimmer, one 12 ton jack, one CB amplfier, one typewriter, two flyrod fishing poles, one Zebco 202 fishing rod and reel, one gold 25th anniversary coin, 1 vase and one black lighter, the property of James and Joan Payne, with a value greater than $500, with intent to deprive said owner of said property, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 13

In the name and on the behalf of the citizens of Georgia, charge and accuse

DEXTER DEWAYNE BAGGETT, MELVIN GRADY WASDIN, TERRY LYNN WOODEN AND WILLIAM DALE WOODEN

with the offense of

CRIMINAL DAMAGE TO PROPERTY IN THE SECOND DEGREE

for that the said accused in the County of Whitfield and the State of Georgia between the 24th and 25th days of March, 1997, did intentionally damage the property of John Davis Jr., to wit: the miniwarehouses located at 100 Williams Road, by forcibly entering said building and crushing the interior drywall of several rooms of the miniwarehouse building, said damage exceeding five hundred dollars ($500.00), contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 14

In the name and on the behalf of the citizens of Georgia, charge and accuse

DEXTER DEWAYNE BAGGETT, MELVIN GRADY WASDIN, TERRY LYNN WOODEN AND WILLIAM DALE WOODEN

with the offense of

THEFT BY TAKING

for that the said accused in the County of Whitfield and the State of Georgia between the 24th and 25th days of March, 1997, did unlawfully take, a toolbox and tools, the property of Michael Hogsed, with a value less than $500, with intent to deprive said owner of said property, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 15

In the name and on the behalf of the citizens of Georgia, charge and accuse

DEXTER DEWAYNE BAGGETT, MELVIN GRADY WASDIN, TERRY LYNN WOODEN AND WILLIAM DALE WOODEN

with the offense of

THEFT BY TAKING

for that the said accused in the County of Whitfield and the State of Georgia between the 24th and 25th days of March, 1997, did unlawfully take, a Craftsman toolbox and various tools, the property of Robert Lee Holt, with a value less than $500, with intent to deprive said owner of said property, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 16

In the name and on the behalf of the citizens of Georgia, charge and accuse

DEXTER DEWAYNE BAGGETT, MELVIN GRADY WASDIN, TERRY LYNN WOODEN AND WILLIAM DALE WOODEN

with the offense of

THEFT BY TAKING

for that the said accused in the County of Whitfield and the State of Georgia between the 24th and 25th days of March, 1997, did unlawfully take, one silver ring, assorted costume jewelry, one Brittania watch, one white heatlamp, one Polaroid camera, one Coleman stove & lantern, the property of Paula Adcock, with a value less than $500, with intent to deprive said owner of said property, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 17

In the name and on the behalf of the citizens of Georgia, charge and accuse

SHIRLEY LYNN RUSSELL

with the offense of

THEFT BY RECEIVING STOLEN PROPERTY

for that the said accused in the County of Whitfield and the State of Georgia between the 24th and 25th days of March, 1997, did receive and dispose of stolen property, to wit: assorted cassette tapes, one 12 ton jack, some drop cords, a swag, a toolbox and tools, the property of Michael Hogsed, Vicky and Phil Elder, James and Joan Payne, with a value greater than $500, which she knew or should have known was stolen, said property not having been received and disposed of with intent to restore it to said owner, contrary to the laws of said State, the good order, peace and dignity thereof.

IN THE SUPERIOR COURT OF WHITFIELD COUNTY, GEORGIA
FINAL DISPOSITION

vs

WILLIAM DALE WOODEN

CRIMINAL ACTION NO. 37326-J

OFFENSE(S) Cts. 1–10: Burglary-F; Cts. 11 & 12: Theft by Taking–F; Ct. 13: Criminal Damage to Property 2nd Dg.–F; Cts. 14, 15 & and 16: Theft by Taking–M

JULY TERM, 1997

☒ **PLEA:**
☐ NEGOTIATED
☒ GUILTY ON COUNT(S) 1–16
☐ NOLO CONTENDERE ON COUNT(S) _____
☐ TO LESSER INCLUDED OFFENSE(S) _____
☐ ON COUNT(S) _____

☐ JURY
☐ NON-JURY

☐ **VERDICT:**
☐ GUILTY ON COUNT(S) _____
☐ NOT GUILTY ON COUNTS(S) _____
☐ GUILTY OF INCLUDED OFFENSE(S) OF _____ ON COUNT(S)_____

☐ **OTHER DISPOSITION**
☐ NOLLE PROSEQUI ORDER ON COUNT(S) __
☐ DEAD DOCKET ORDER ON COUNT(S) __

(SEE SEPARATE ORDER)

☐ DEFENDANT WAS ADVISED OF HIS/HER RIGHT TO HAVE THIS SENTENCE REVIEWED BY THE SUPERIOR COURTS SENTENCE REVIEW PANEL

☒ FELONY SENTENCE ☐ MISDEMEANOR SENTENCE

WHEREAS, the above-named defendant has been found guilty of the above-stated offense, WHEREUPON, it is ordered and adjudged by the Court that the said defendant is hereby sentenced to confinement for a period of

Ct 1: 8 Years
Ct 2-10: 8 years concurrent to Count 1
Ct. 11 & 12: 8 years concurrent to Count 1
Ct. 13: 5 years concurrent to Count 1
Ct. 14, 15 & 16: 12 months concurrent to Count 1

In the State Penal System or such other institution as the Commissioner of the Georgia Department of Corrections or Court may direct, to be computed as provided by law.

So ordered this 15th day of October, 1997, [signature]
NUNC PRO TUNC to the 18th day of September, 1997.
J.S.C.C.C.

Min. - Final Record Book _____ Page _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

No. 3:15-CR-12-TAV-CCS

UNITED STATES OF AMERICA,
Plaintiff,

v.

WILLIAM DALE WOODEN,
Defendant.

MEMORANDUM OPINION AND ORDER

Before the Court is defendant William Dale Wooden's Motion to Withdraw Guilty Plea [Doc. 50]. The United States responded in opposition to the defendant's motion [Doc. 54]. On August 22, 2017, the Court held a hearing in which it heard argument on the defendant's motion, as well as the testimony of the defendant's former counsel [Doc. 57]. For the reasons explained below, the Court will **GRANT** the defendant's motion to withdraw his guilty plea [Doc. 50].

I. BACKGROUND

On March 3, 2015, the defendant was charged with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1) [Doc. 1]. After the Court granted the defendant several continuances and ultimately denied a motion to suppress, the defendant notified the United States and the Court that he wished to change his plea to a plea of guilty [*See* Docs. 34, 35]. The Court held a change of plea hearing on August 2, 2016, and the defendant knowingly and voluntarily pleaded guilty to

being a felon in possession of a firearm and ammunition [Doc. 35]. On May 16, 2017, the defendant's original attorney filed a motion to withdraw [Doc. 46], which the Court granted on June 9, 2017 [Doc. 48]. The Court appointed new counsel for the defendant on June 9, 2017 [*id.*], and with the aid of new counsel the defendant filed the instant motion to withdraw his guilty plea on June 21, 2017 [Doc. 50].

Throughout this process, the defendant was advised multiple times of the possibility that he could be designated as an armed career criminal, and that such designation would result in a fifteen-year mandatory minimum sentence [Docs. 54-1 p. 6 (initial appearance), 34 p. 2 (factual basis in support of guilty plea), 54-2 pp. 9, 11–12 (change of plea hearing)]. The defendant's prior counsel, however, made clear to the defendant before he pleaded guilty that it was highly unlikely he would be designated as an armed career criminal. At the hearing on the defendant's motion, his prior counsel testified that he repeatedly told the defendant he was "99% certain" the defendant would not be designated as an armed career criminal. This assessment was correct given the state of the law at the time, as the parties and the United States Probation Office did not believe the defendant should be designated as an armed career criminal—the original presentence investigation report included a guidelines range of 21–27 months [Doc. 36], and the parties filed notices of no objection to the presentence investigation report [Docs. 37, 38].

Between the defendant's guilty plea and his sentencing hearing, the United States Court of Appeals for the Eleventh Circuit issued its decision in *United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016), in which it held that Georgia burglary-of-a-building and burglary-of-a-dwelling-house convictions qualify as generic burglaries under the Armed Career Criminal Act, 18 U.S.C. § 924(e). The

defendant possesses ten prior Georgia burglary-of-a-building convictions, one burglary-of-a-dwelling-house conviction, and one aggravated assault conviction. Thus, after *Gundy*, the defendant's criminal history dictates that he be designated as an armed career criminal and, therefore, be subject to a 180-month mandatory minimum sentence.

After neither party objected to a guidelines range of 21–27 months' imprisonment, the majority of which the defendant had already served, the defendant was shocked to learn he would be facing a mandatory minimum sentence of 180 months. Defendant's original counsel testified that, upon learning of the armed career criminal designation, the defendant asked to withdraw his guilty plea. Relying on the advice of his original counsel, however, the defendant agreed instead to challenge his designation as an armed career criminal. After this challenge proved futile, and within two weeks after appointment of new counsel, the defendant filed a motion to withdraw his guilty plea [Doc. 50]. The defendant states that he would not have pleaded guilty had he known designation as an armed career criminal was a realistic possibility, and that he deferred to his original counsel's assessment of the armed career criminal issue and whether to withdraw his guilty plea immediately after the *Gundy* decision.

The defendant possesses a ninth-grade education, and states that he relied almost entirely on the advice of counsel to guide him in his defense [Doc. 51]. The defendant has significant experience in state criminal justice systems, but prior to this offense had no experience in the federal criminal justice system. Although the defendant concedes that he ultimately admitted guilt at his change of plea hearing, he argues that he initially maintained his innocence, and that a state charge arising out of the same facts as the instant federal charge was dismissed after the defendant asserted his innocence.

II. ANALYSIS

Granting a defendant permission to withdraw a guilty plea is a matter "within the broad discretion of the district court." *United States v. Valdez*, 362 F.3d 903, 912 (6th Cir. 2004). The defendant bears the burden of showing "a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). In determining whether the defendant has presented a fair and just reason for withdrawing his guilty plea, the Court weighs the following factors:

> (1) the amount of time elapsed between the plea and the motion to withdraw; (2) the presence or absence of a valid reason for not moving to withdraw earlier; (3) whether the defendant has asserted or maintained his innocence; (4) the circumstances underlying the entry of the guilty plea; (5) the defendant's nature and background; (6) the degree to which the defendant has prior experience in the criminal justice system; and (7) the potential prejudice to the government if the motion is granted.

United States v. Bashara, 27 F.3d 1174, 1181 (6th Cir. 1994). These factors, commonly known as the *Bashara* factors, do not constitute an exclusive list of the factors the Court may consider; no single factor is dispositive, and the Court need not analyze each factor. *United States v. Bazzi*, 94 F.3d 1025, 1027 (6th Cir. 1996). Nevertheless, the Court will address each of the *Bashara* factors in turn.

A. Time Elapsed Between the Plea and the Motion to Withdraw

The defendant pleaded guilty on August 2, 2016 and moved to withdraw his guilty plea on June 21, 2017. This amounts to a ten-month period between the defendant's guilty plea and motion to withdraw. Absent mitigating circumstances, such an extensive delay would weigh heavily against the defendant. *See United States v. Ryerson*, 502

F. App'x 495, 499 (6th Cir. 2012) (upholding this Court's denial of a motion to withdraw guilty plea based in part on an eight-month delay).

B. Presence or Absence of a Reason for Not Moving to Withdraw Earlier

According to the defendant's original counsel, the defendant immediately asked to withdraw his guilty plea upon learning that he faced designation as an armed career criminal. The defendant's original counsel, however, convinced the defendant that the better course of action would be to challenge his designation as an armed career criminal. Heeding the advice of counsel, the defendant agreed to not move to withdraw his guilty plea at that time. The defendant later moved to withdraw his guilty plea within two weeks of the appointment of his current counsel.

This series of events mitigates the effect of the extensive delay between the defendant's guilty plea and his motion to withdraw. As discussed in more detail below, the defendant's near-complete reliance on counsel in this situation was understandable given his lack of education or experience in the federal criminal justice system and his original counsel's certainty that he would not be designated as an armed career criminal. The Court thus concludes that the extensive delay between the defendant's guilty plea and motion to withdraw weighs against the defendant, but not heavily.

C. Whether the Defendant Asserted or Maintained His Innocence

The defendant initially asserted his innocence by pleading not guilty [Doc. 5]. The defendant also asserted his innocence with regard to a state court charge arising out of the same facts as the instant charge, which was later dismissed. The defendant then admitted guilt at his change of plea hearing [Doc. 35]. The Court finds that

under these circumstances this factor weighs in favor of neither the defendant nor the government.

D. The Circumstances Underlying the Entry of the Guilty Plea

Despite the Court's warnings that the defendant could be designated as an armed career criminal, the defendant relied on his original counsel's advice—that he would not be designated as an armed career criminal—in deciding to plead guilty. The defendant's original counsel told him he was "99% certain" the defendant would not be designated as an armed career criminal, and this assessment was accurate given the state of the law at that time. The United States and the United States Probation Office agreed with this assessment, as the Probation Office filed a presentence investigation report listing the defendant's guidelines range as 21–27 months [Doc. 36], to which the government did not object [Doc. 37]. Also of note is the fact that the defendant had served a majority of his expected sentence at the time of his decision to plead guilty, and thus, relying on his original counsel's assessment that he would likely receive a sentence of 21–27 months, it made strategic sense for the defendant to plead guilty at that time.

Upon learning that he faced sentencing as an armed career criminal after the Eleventh Circuit issued the *Gundy* decision, and thus could expect a mandatory minimum sentence of 180 months as opposed to a guidelines sentence of 21–27 months, the defendant immediately told his original counsel that he wanted to withdraw his guilty plea. The defendant's original counsel instead suggested that they challenge his designation as an armed career criminal. Again deferring to his original counsel's advice, the defendant agreed to not move to withdraw his guilty plea at that time.

The defendant clearly states that he would not have pleaded guilty had he known designation as an armed

career criminal was a realistic possibility, and that he deferred to his lawyer's assessment of the armed career criminal issue and the decision to not move to withdraw his guilty plea immediately after *Gundy*. The defendant's near-complete reliance on his counsel, with regard to both of these decisions, is understandable given the defendant's background. The defendant was in no position to independently make informed decisions as to his defense given his lack of education and experience in the federal criminal justice system. These factors, when considered alongside the conviction of his original counsel's assessments, left the defendant with little choice but to defer to the advice of his original counsel. These circumstances weigh in favor of permitting the defendant to withdraw his guilty plea.

E. The Defendant's Nature and Background

The defendant has a ninth-grade education and is currently disabled. He has worked as a painter and general laborer. Independently, these factors are not so significant that they weigh heavily in the defendant's favor. *See United States v. Valdez*, 362 F.3d 903, 906 (6th Cir. 2004). However, these factors weigh slightly in the defendant's favor, and more importantly they support his deference to the advice of counsel, as discussed above.

F. The Defendant's Prior Experience in the Criminal Justice System

The defendant has extensive experience in state criminal justice systems, but this is his first experience in the federal criminal justice system. Significantly, the defendant has no prior experience with the federal sentencing guidelines or the Armed Career Criminal Act. This Court has previously found that under these circumstances this factor weighs in favor of neither party, and that conclusion remains sound. *See United States v. Ryerson*, No. 3:09-cr-66, 2012 WL 113783, at *7 (E.D. Tenn. Jan. 13, 2012),

affirmed, 502 F. App'x 495 (6th Cir. 2012) ("On balance, the court found that [the defendant's experience in the criminal justice system] was neutral, and the record supports this finding.").

G. The Potential Prejudice to the Government if the Motion is Granted

The issue of prejudice to the government becomes relevant only if the defendant has established a fair and just reason to withdraw his guilty plea. *United States v. Osborne*, 565 F. Supp. 2d 927, 938–39 (E.D. Tenn. 2008). Based on the factors discussed above, the Court finds the defendant has established a fair and just reason for withdrawal sufficient for the Court to consider prejudice to the government.

Prejudice to the government can include wasted government resources and wasted judicial resources, *id.* at 939, but the time and expense of trial constitutes prejudice only when the government must spend time and expense preparing for trial beyond what would normally be expected due to the defendant's decision to withdraw his guilty plea, *id.* at 927. The United States argues that time has been wasted throughout this process, but makes no additional argument identifying unique circumstances in this case that would increase the time or expense needed to prepare for trial beyond what would normally be expected. Furthermore, the Court previously ruled on a motion to suppress in this case. The parties have thus already devoted time and resources toward preparing for trial, and need not revisit that phase of pretrial litigation moving forward. For these reasons, the Court finds that any prejudice the government may suffer as a result of the defendant's withdrawal of his guilty plea is insufficient to overcome the fair and just reason for withdrawal.

III. CONCLUSION

The Court finds the *Bashara* factors weigh in favor of permitting the defendant to withdraw his guilty plea. The defendant's reliance on counsel regarding his potential designation as an armed career criminal was understandable given his lack of education and experience in the federal criminal justice system and his counsel's degree of certainty on the subject. Despite the Court's warnings, it was reasonable under these circumstances for the defendant to proceed with his guilty plea under the assumption he would not be designated as an armed career criminal. The defendant's reliance on counsel also mitigates the extensive amount of time between his guilty plea and his motion to withdraw. Additionally, the large disparity between his original guidelines range of 21–27 months and a mandatory minimum sentence of 180 months weighs in the defendant's favor, as does the relative lack of prejudice to the government. For these reasons, the Court finds the defendant has presented a fair and just reason for requesting to withdraw his guilty plea. Accordingly, defendant's motion to withdraw his guilty plea [Doc. 50] is **GRANTED** and the trial of this case is rescheduled for **Tuesday, January 30, 2018, at 9:00 a.m.** The plea negotiation deadline is rescheduled to **Tuesday, January 16, 2018.** The period of time between the defendant's guilty plea and the new trial date shall be fully excludable time under the Speedy Trial Act. *See* 18 U.S.C. § 3161(i).

IT IS SO ORDERED.

s/ Thomas A. Varlan
CHIEF UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM DALE WOODEN, Defendant.	Case No.: 3:15-CR-12

SENTENCING PROCEEDINGS
BEFORE THE HONORABLE THOMAS A. VARLAN

February 21, 2019
2:39 p.m. to 3:51 p.m.

APPEARANCES:

FOR THE PLAINTIFF:	LUKE A. MCLAURIN, ESQUIRE CYNTHIA F. DAVIDSON, ESQUIRE Assistant United States Attorney United States Department of Justice Office of the United States Attorney 800 Market Street Suite 211 Knoxville, Tennessee 37902
FOR THE DEFENDANT:	MICHAEL B. MENEFEE, ESQUIRE

Menefee & Brown, LLP
9724 Kingston Pike
Suite 505
Knoxville, Tennessee 37922

ALSO PRESENT: WILLIAM DALE WOODEN, DEFENDANT

* * *

[3:1]

[THE COURT:] confirm you're represented here this afternoon by Mr. Michael Menefee. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Mr. Wooden, on May 30, 2018, a jury returned a verdict of guilty of Count -- on Count 1 of the indictment in this case, charging you with being a felon in possession of a firearm and ammunition, in violation of 18 United States Code Section 922(g)(1).

Do you understand that if it is determined -- and I know this is an issue we'll address in just a moment, but do you understand if it is determined that you are an armed career criminal within the meaning of 18 United States Code Section 924(e), then the offense described in Count 1 requires a sentence of 15 years to life in prison, up to five years of supervised release, a fine of up to $250,000, and a $100 special assessment?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: Mr. Wooden, have you received and had the opportunity to read and discuss the presentence report in this case with your attorney?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: Mr. Menefee, have you received the presentence report and reviewed it with Mr. Wooden?

MR. MENEFEE: Yes, Your Honor.

THE COURT: All right. The Court has received [4] defendant's objections to the presentence report. Before

we go into those, let me first ask, the government has no objections. Is that correct?

MR. McLAURIN: That's correct, Your Honor.

THE COURT: All right. Before we go into the objections, particularly those related to the armed career criminal designation, first, I do want to ask you -- and now I'm asking you just if you affirm the existence of these convictions, not whether they qualify you for armed career criminal status. Do you understand what I'm asking?

I'll ask the question and see if you have any questions.

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: All right. First, Paragraph 32 of the presentence report identifies ten burglary convictions in the Superior Court of Whitfield County, Georgia, Docket No. 37326-J.

Do you affirm the fact that these prior convictions occurred?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: And then let's see, next, Paragraph 36 references the burglary conviction in the Superior Court of Murray County, Georgia, Docket No. 05-CR-355.

Do you affirm the existence of or the fact that this prior conviction occurred? [5]

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: And then -- just a moment. Paragraph 26 identifies -- or identified in the presentence report at Paragraph 26 is the aggravated assault conviction in Superior Court, Murray County, Georgia, Docket No. 89-CR-3624.

Do you affirm, again, just the fact of this prior conviction?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: All right. Do you understand any challenge to these prior convictions not made before sentence is imposed may not thereafter be raised to attack

the fact of the sentence? Not precluding you -- we'll discuss the armed career criminal history, but now I'm just asking you to understand that any challenge to the fact of these prior convictions not made before sentence is imposed may not thereafter be raised to attack the existence of those sentences. Do you understand that?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: In light of that, do you still affirm the fact of these prior convictions?

THE DEFENDANT: Yes, sir.

THE COURT: Now, let's drop back to the defendant's objections to the presentence report. There's two besides the objection to career offender status -- or armed career criminal status. Is that correct?

* * *

[14:1]

[MR. MENEFEE:] that a violent felony must involve purposeful, violent, and aggressive conduct, and the Court will remember that Begay was a DUI case that held that negligent conduct, such as a DUI, would not qualify as a violent crime under the Armed Career Criminal Act.

Another case out of the Fourth Circuit, United States vs. Martin, was a -- interpreted a Maryland burglary statute, and held that it was not a predicate under this clause, under the Armed Career Criminal Act, because it could be committed with negligent conduct.

Just like this -- I can't even think of a better example than this motorcycle case. But, essentially, in Georgia, reading the statute, if you were driving your car down the street and didn't see someone in the street, caused them to jump out of the way, and you were just driving negligently, you could be convicted under this statute. And that is -- that -- we would argue that is not what is intended under the Armed Career Criminal Act.

Moving on to the burglary convictions. Paragraph 32 of the presentence investigation report states that Mr. Wooden's 1997 Georgia burglary convictions qualify as a predicate offense under the Armed Career Criminal Act. We've objected to that.

The '97 burglary convictions are the mini-warehouse unit convictions. There are ten counts to the indictment and [15] technically ten convictions, as the burglary described here alleged that the defendant and several others broke into ten storage units all in a row, all in the same occasion. We argue the conviction should be grouped into one conviction under the Armed Career Criminal Act, not ten, because burglaries -- all the burglaries were on the same occasion, during the same criminal episode at the same place, at the same business location, under the same roof, charged in a single indictment and charged -- served under the same sentence.

Under the facts of this case, there's no principled way to distinguish between the beginning of the first burglary and the beginning of the second or third burglaries. The government cites to a case, United States vs. Carnes, that held that two burglaries in two different houses in the same neighborhood committed on the same night counted as to different burglaries.

And that court held there were two separate burglaries, because the defendant in that case completed one burglary, paused, presumably had time to consider calling it a night and stopping, and then decided to commit a second burglary.

We would argue this case is more akin to United States vs. Murphy, Sixth Circuit case where there was a robbery of a duplex connected together, like the storage units where the defendant and several other defendants, like in this case, [16] convicted of robbing two sides of the duplex.

That Court held that Murphy never ceased his original conduct. He never successfully escaped the site for the first crime until the second crime was completed. Accordingly, the Court held that the defendant's convictions for the robberies of the two sides of the duplex constituted one single criminal episode for purposes of defining the predicate offense under armed career criminal.

We would argue that -- and in this case, the facts of this case are that there were several people that were charged under -- charged with burglarizing these units. Mr. Wooden was only a part of a group of people that were charged. And there is no evidence before the Court that they robbed one unit at a time. In fact, these units were all enclosed in one building and were all -- all robbed at the exact same time. And there's no evidence to the contrary of that.

And, again, to prove otherwise, the burden is on the government.

Next, Mr. Wooden argues that this set of burglaries convictions and along with his 2005 conviction of burglary described in Paragraph 36 of the presentence investigation report are not predicate offenses under the Armed Career Criminal Act.

And, admittedly, we're marching uphill on this, and we recognize that. We recognize that the Gundy decision has [17] come down, we recognize that the Richardson decision has come down, and there's been other cases, Vowell, that has come down, against our position here. We are still arguing that the Georgia burglary statute is divisible -- or that we're arguing that the Georgia burglary statute should not be held as divisible as both of those cases, both the Gundy and Richardson cases, and those line of cases are contrary to Georgia case law.

There are Georgia case -- Georgia state cases that consistently held that that there are two essential elements of Georgia burglary. There's unlawful entry of a

dwelling or building, and the second element is intent to commit a felony or theft therein.

Georgia cases have consistently held that the type of structure is not an element of burglary. There are plenty of cases allowing a defendant to be charged with burglarizing one type of structure and then being convicted of burglarizing a different type of structure.

And we have cited to those cases in our previous sentencing memorandums and responses, so I'm not going to go over all those again.

If -- if the Court -- in the event that this Court disagrees with Mr. Wooden and wants to follow the Gundy decision, or if the Court decides that after United States vs. Stitt, the entire Georgia burglary statute fits within the [18] definitions of generic burglary, Mr. Wooden would just reiterate that the set of convictions described in Paragraph 32, the warehouse-unit burglaries should be grouped as one conviction, leaving Mr. Wooden with two qualifying predicate offenses under the Armed Career Criminal Act and not three.

That's the -- everything else that we would argue is laid out in our sentencing memorandum.

THE COURT: Thank you. Thank you for the oral presentation as well as the detailed sentencing memorandum.

Hear from the government now in response.

MR. McLAURIN: Yes, Your Honor.

I'll just go in reverse order here and start with the last point about the burglary offenses. I think it's quite clear in light of the Sixth Circuit's decision of Richardson, which is binding on this Court, that Georgia's burglary statute is divisible. That is an accurate reading of Georgia law.

I know my colleague here said that the Georgia cases have said that the precise location of the burglaries is not

an element of offense. That is not accurate. The Georgia cases have said the contrary, as is noted by the Eleventh Circuit in Gundy, as is noted by the Sixth Circuit in Richardson. Georgia's burglary statute is divisible based on the type of location burglarized.

Here, the indictment for the ten burglary offenses [19] indicate that each one of those burglary offenses was for a building, which is the very type of Georgia burglary that Richardson is saying qualifies as a generic burglary and thus a violent felony under Armed Career Criminal Act.

His other burglary conviction in 2005 involved a dwelling house, again, another type of varying of Georgia burglary that the Sixth Circuit has said counts as a violent felony. In light of Richardson, I think the Court is bound to hold that those offenses qualify as generic burglary.

The more difficult question for the Court is whether or not the ten burglary offenses that were committed in 1997 qualify as a single ACCA predicate offense or whether they were committed on occasions different from one another.

Under the Sixth Circuit case law, we believe that the Court has to answer that question in that they are separate offenses. The Sixth Circuit said that, you know, offenses are separate if they meet one of three tests, right, if they were committed in different business locations, if it's possible to discern the point at which the first offense was completed and the subsequent offense was begun, or if it's possible for the offender to have ceased his criminal conduct after completing the first offense before going on to commit the second offense.

Under any one of these three tests, these ten burglaries qualify as ten separate offenses. If you look at them, they were actually -- the indictment for them, which is [20] the only facts that we know about them, point out that -- counsel has suggested or alleged some facts about the

warehouse location. None of those facts are in the record. There is no information that this Court can rely upon, other than what is included in the Shepard documents for those prior convictions. The Shepard documents conclude that each one of those burglaries was for a different -- occurred in a different mini-warehouse location, a different business location, a warehouse that belonged to a specific victim.

And if you look at the indictment, it actually lists different victims, different individuals who owned those mini -- who had rented out those mini warehouses. Those were discrete business locations. So under that third hill test, these offenses clearly count as separate.

If you look at the other hill test, they also count as separate. Right. The offense of burglary is complete once an individual enters a location unlawfully with intent to commit a felony. So once Mr. Wooden entered the first mini warehouse with intent to commit a felony, he had committed a burglary. And he could have ceased his criminal conduct at this point. That burglary offense was complete. He then went and chose to commit nine more burglary offenses. After each offense, he could have stopped his criminal conduct. He did not. He went and continued committing burglaries.

Now, I know that there's been reference to this case [21] involving a situation with two robberies that incurred inside of a duplex. I would argue that that situation is quite distinguishable from a situation of burglary. Because unlike robbery, which is a victim-focused offense, burglary is a location-focused offense. Right. You cannot be in two locations at the same time.

You can rob two people at the same time. Right. You can point a gun at two different people at the same time, rob them both on the same occasion. Robbery, you can have multiple robberies that occur on the same occasion.

You can't burglarize different locations at the same time, because you can only be in one place at one time. And so Mr. Wooden's burglary offense of the first mini warehouse was complete and was occurring at the moment he was in that mini warehouse. As soon as he moved to another mini warehouse, he was committing another burglary offense. He could have stopped his string of burglaries at any point. He chose not to do so. He was properly charged with ten separate burglary offenses and properly convicted of ten separate burglary offenses.

And under the Sixth Circuit case law, those ten separate burglaries count as offenses committed on occasions different from one another. Because at any point in time, he could have stopped his burglary spree. He chose not do so, and he now has to face the consequences for that.

* * *

[27:7]

MR. MENEFEE: Your Honor, just two points. The -- under the burglary convictions that you're considering for the mini-warehouse unit, the government has taken the position that these were different business locations, and there's -- there is no evidence of that. In fact, this is -- this is one business location. This is a -- like any mini-warehouse place, it's one business location.

And there -- the -- what the -- what the government is wanting the Court to do is to make some assumptions, to make some assumptions about -- that Mr. Wooden went from one unit, robbed that unit or burglarized that unit, and then went to the second unit, and then went to the third unit, and then went to the fourth unit, and make an assumption that that's how this burglary took place.

There were four individuals in this. And I don't need to give the Court all the possibilities that could have happened here, but one possibility is that Mr. Wooden came late to the burglary, after they drug everything out in the

hallway and helped them load it in the truck, and he'd still be [28] convicted of burglary or helping with these other individuals to burglarize all these units. And maybe he never went into any of the units.

But the fact of the matter is, those facts aren't before the Court, and neither is the fact that Mr. Wooden went from one unit to the next unit, to the next unit, to the next unit. Those -- they're not there.

And between the two cases that we were looking at, the -- between the case where they were robbing a -- or they had a robbery of the duplex or two separate houses in the same neighborhood, this is much closer to the duplex than the other.

So I would argue that the government hasn't carried its burden on -- you know, on whether or not -- on how this burglary took place.

* * *

[33:1]

[THE COURT:] the offense conduct paragraph or paragraphs of the presentence report and does further note as the government notes that this objection would not otherwise impact defendant's Guideline sentence.

Obviously, again, the most significant objections are defendant's objection to the listing of the predicate offenses which would determine whether he is an armed career criminal.

Defendant objects to Paragraph 18, 20, 26, 32, 36, 68, and 69 of the presentence report, arguing he does not have three prior convictions that would be necessary to qualify as predicate offenses under the ACCA. Among other things, he states that his prior convictions for Georgia burglary -- or more specifically states his convictions for Georgia burglary and aggravated assault do not qualify as a predicate offenses under the ACCA.

The presentence report, defendant's classified as an armed career criminal based on multiple convictions, one Georgia aggravated assault conviction, contained at Paragraph 26 of the presentence report; ten Georgia burglary of a building convictions from 1997, contained Paragraph 32 of the presentence report; and one Georgia burglary of a dwelling house conviction from 2005, contained at Paragraph 36 of the presentence report.

After considering the parties' arguments, both in writing and here in Court today, as well as the relevant law [34] and facts and focusing on -- at this point on the burglary convictions, both the multiple burglary of a building convictions and the one burglary of a dwelling house conviction, the Court would determine that these convictions do count or qualify as predicate offenses under the Armed Career Criminal Act.

As noted, the Sixth Circuit has explicitly held that Georgia burglary qualifies on a predicate offense under the Armed Career Criminal Act.

In Richardson v. United States, Sixth Circuit case, the Sixth Circuit conducted a categorical approach with respect to Georgia's burglary statute, Georgia Code Section 16-7-1, the same version of the statute in effect at the time of this defendant's convictions. The Sixth Circuit held the statute was divisible because it contains alternative locational elements, and further held that the building and dwelling house variance qualifies generic burglary under the Armed Career Criminal Act.

It's also noted and was argued the Eleventh Circuit reached the same result, albeit on somewhat difference reasoning in United States v. Gundy, 2016, Eleventh Circuit case.

Because the statute is divisible, the Court is permitted under Shepard v. United States to consider a limited class of documents from the convicting Court, including

[35] charging documents, plea agreements, plea colloquies, and jury instructions, referred to as Shepard documents to determine which variant the defendant was convicted of. This is called the so-called modified categorical approach.

And here, these documents as presented to the Court and the Court's determination made clear that defendant was convicted of the building and dwelling house variance of Georgia burglary, which the Sixth -- which the Sixth Circuit has held to be an ACCA predicate in Richardson.

The indictment for the 1997 convictions, of which there were ten, indicate that each one was for burglary of a building. And the indictment for the 2005 conviction indicates that it was for burglary of a dwelling house. The Court reviewing the documents submitted as Document 85 and the various exhibits thereunder. And, again, under Richardson, these prior burglary convictions qualify as violent felonies.

Defendant further argues that the ten 1997 burglaries should be counted as one predicate for purposes of the Armed Career Criminal Act. Here, however, the 1997 indictment demonstrates that the defendant burglarized ten separately numbered mini warehouses belonging to different victims. To qualify as separate under the ACCA, offenses must have been committed on occasions different from one other under 18 United States Code Section 924(e)(1).

And as the government noted in its argument, offenses [36] meet that standard if -- again, quoting or paraphrasing from the Sixth Circuit decision in United States v. Jones, if it is, one, it is possible to discern the point at which the first offense is completed and the subsequent point at which the second offense begins; two, it would have been possible for the offender to cease his criminal conduct after the first offense and withdraw without committing the second offense; or three, the offenses are

committed in different residences or business locations. Again, quoting from U.S. v. Jones, 2012, Sixth Circuit case.

Offenses are separate predicates if they meet any of these three tests. And the Court concludes that the defendant's crimes do satisfy at least the first two tests. Each separate mini warehouse provides a discrete point at which the first offense was completed and the second began and so on, and it was possible for the defendant to stop at any point between the mini warehouses; thus, each, the Court concludes, is a separate predicate conviction for purposes of the Armed Career Criminal Act.

So given this analysis, and given what the Court determines to be the Sixth Circuit precedence on this issue, or on the matter of the burglary of a building and burglary of a dwelling house, the Court would conclude the defendant has, in addition to the one conviction for dwelling house burglary, ten convictions for Georgia burglary of a building, all of which [37] the Court finds to be predicate offenses under the Armed Career Criminal Act.

So in light of these conclusions, while the Court appreciates the arguments and analysis related to the aggravated assault conviction, the Court is going to in this instance accept the government's invitation not to make a ruling on whether the aggravated assault conviction qualifies as a predicate offense for Armed Career Criminal Act purposes.

The Court notes in the 2013 case of United States v. Jenkins, a Sixth Circuit case, that Court quoted as follows: The ACC requires just three prior convictions, not more; the rest is overkill, closed quote.

In light of that, in light of the Court's previous ruling with respect to the Georgia burglary convictions, the Court will decline to make a ruling on the aggravated assault convictions.

In that regard, the Court determines that defendant's objections to Paragraphs 18, 20, 32, 36, 68, and 69 of the presentence report are overruled, and that the objection to Paragraph 26 is denied as moot.

And as a result, the Court determines that the presentence report Paragraph 69 accurately reflects the advisory Guideline range in this case, based upon a total offense level of 33 and criminal history category of IV, a Guideline imprisonment range of 188 months to 235 months.

* * *

[43:21]

[THE COURT:] Here, in light of everything discussed, including the Guideline range and the relevant 3553 factors, and considering the arguments and positions of the parties, the Court will impose a Guideline sentence of 188 months.

For all the reasons discussed, the Court finds this [44] sentence to be sufficient, but not greater than necessary, to comply with the purposes of 18 U.S.C. Section 3553.

Again, in light of the Court's previous rulings, the defendant is subject to a statutory mandatory minimum of 15 years or 180 months.

To the extent the defendant requests the Court to vary below the Guideline range of 188 months to 180 months, the Court would overrule or deny that request. The Court certainly takes into consideration the facts discussed by the defendant via his counsel, including his multi-year stay in multiple local prisons or jails pending his trial and sentencing today in this case, but given the 3553 factors, and given the facts as argued by the defendant, the Court does not believe that these facts and circumstances take the defendant outside the heartland of cases to which the Guidelines and/or defendant's status as an armed career criminal would otherwise apply.

So, again, the Court finds a Guideline sentence of 188 months to be sufficient, but not greater than necessary, to comply whether the purposes of 18 U.S.C. Section 3553.

Pursuant to 18 U.S.C. Section 3553(c)(1), the Court notes it finds a sentence at the low end of the Guideline range justified in this case, based upon the Court's belief that such a sentence adequately reflects the seriousness of the instant offense and protects the public from further crimes being committed by the defendant. [45]

Furthermore, the Court will impose in this case a term of supervised release of three years. The Court finding that term of supervised release, again, to be appropriate based upon its 3553 analysis.

The Court will also impose all of the standard conditions, as well as the following special conditions of supervision, specifically, though, set forth in Paragraphs 80 through 82 of the presentence report related to participation in a program for testing and treatment for drugs and/or alcohol, as well as submitting to searches upon reasonable suspicion of any violation of the conditions of the supervision. As well as, finally, based upon the defendant's criminal history, participation in a program that addresses domestic violence, anger management, or general violence, as directed by the probation officer.

The Court finding these special conditions of supervised release, to which there's not been objection, specifically to be reasonably related to the several sentencing factors discussed by the Court, including but not limited to the nature and circumstances of the offense and the history and characteristics of the defendant, as well as the need for the sentence imposed to afford adequate deterrence to criminal conduct, and to protect the public from further crimes of the defendant.

The Court, second, finds these special conditions to [46] involve no greater deprivation of liberty than

reasonably necessary for those several purposes, again, including but not limited to the need to afford adequate deterrence to criminal conduct and to protect the public from further crimes of the defendant, as well as to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. And, third and finally, the Court finds these conditions to be consistent with any pertinent policy statements issued by the Sentencing Commission.

Accordingly and pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court as to Count 1 of the indictment that the defendant, William Dale Wooden, is hereby committed to the custody of the Bureau of Prisons for a term of imprisonment of 188 months.

* * *