No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2024

RICHARD SCHOROVSKY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

MOTION FOR LEAVE TO FILE *IN FORMA PAUPERIS*

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

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

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

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

Respectfully submitted,

/s/ John A. Kuchera
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Attorney for Petitioner

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2024

RICHARD SCHOROVSKY,
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v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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Question Presented

1. In light of *United States v. Stitt*, 586 U.S. 27 (2018), can the Texas burglary statute – which the Fifth Circuit has held to be indivisible – properly be the basis for an enhanced sentence under the Armed Career Criminal Act, given that a person can be convicted under the statute for doing nothing more than entering a storage building with the intent to commit theft?

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PETITION FOR WRIT OF CERTIORARI

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

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit re-affirming Schorovsky's sentence is styled: *United States v. Schorovsky*, No. 23-50040, 2025 U.S. App. LEXIS 3276 (5th Cir. Feb. 12, 2025).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit re-affirming Schorovsky's sentence was announced on February 12, 2025 and is attached hereto as Appendix A. Pursuant to Supreme Court Rule 13.3, this Petition has been filed within 90 days of the date of the entry of judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Federal Statutes:

18 U.S.C. § 922(g)(1):

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

18 U.S.C. § 924(e)(1):

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(2)(B):

> [T]he term violent felony means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that – has an element the use, attempted use, or threatened use of physical force against the person of another; or is burglary, arson, or extortion, involves use of explosives, or otherwise

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

Texas Statutes

Tex. Penal Code Ann. § 30.02(a) (1984):

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

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

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

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

Tex. Penal Code Ann. § 30.01 (1984):

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

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

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

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

Statement of the Case

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

After Schorovsky's sentence was affirmed on appeal, he filed a petition for writ of certiorari, presenting three questions:

> 1. In light of *Erlinger v. United States,* No. 602 U.S. 821 (2024), was Petitioner Schorovsky properly sentenced as an armed career criminal based on a finding by the district court (not a jury) that Petitioner's two prior robbery convictions were committed on separate occasions?
>
> 2. In light of *Erlinger v. United States,* No. 602 U.S. 821 (2024), was it proper for the sentencing court to rely on *Shepard* approved documents to determine whether Petitioner's prior robbery convictions occurred on separate occasions?
>
> 3. In light of *United States v. Stitt*, 586 U.S. 27 (2018), can the Texas burglary statute – which the Fifth Circuit has held to be indivisible – properly be the basis for an enhanced sentence under the Armed Career Criminal Act, given that a person can be convicted under the statute for doing nothing more than entering a storage building with the intent to commit theft?

On October 15, 2024, the Supreme Court granted cert., vacated the Fifth Circuit judgment and remanded the case back to the Fifth Circuit

in light of *Erlinger. Schorovsky v. United States,* No. 23-7841, 145 S.Ct. 368 (Oct. 15, 2024). The Supreme Court did not address Schorovsky's third question. On February 12, 2025 the Fifth Circuit again affirmed Schorovsky's sentence. *United States v. Schorovsky*, No. 23-50040, 2025 U.S. App. LEXIS 3276, *7 (5th Cir. 2025). In so doing, the Fifth Circuit specifically reaffirmed its prior holding that Texas burglary qualifies as an ACCA predicate. *Id.*

Schorovsky now reasserts his argument that the Texas burglary statute – because it is broader than generic burglary as that term was understood at the time the ACCA was passed – should not be considered an ACCA predicate in light of *United States v. Stitt*, 586 U.S. 27 (2018).

First Reason for Granting the Writ: *Because the Texas burglary statute allows for conviction based upon burglarizing structures used only for storage, burglary in Texas cannot be generic burglary in light of the Supreme Court's decision in United States v. Stitt.*

In *United States v. Stitt*, 586 U.S. 27 (2018), the Supreme Court held that "burglary" for purposes of 18 U.S.C. § 924(e)(2)(B)(ii) should be construed in accordance with the generic sense in which the term was used in the criminal codes of most of the States at the time the Armed Career Criminal Act was passed in 1986. *Id.* at 33. The question before the Court was whether the term "burglary" includes burglary of "a structure or vehicle that has been adapted or is customarily used for overnight accommodation." *Stitt,* 586 U.S. at 29. At issue therein were two statutes, a Tennessee burglary statute and an Arkansas burglary statute, both of which criminalized burglarizing a structure or vehicle that has been adapted or is customarily used for overnight accommodation. *Id.* at 29-30. The Court held that generic "burglary" for purposes of 18 U.S.C. § 924(e)(2)(B)(ii) does include such conduct. *Id.* at 29, 35-36. The Court noted the inherent danger in burglarizing a structure that is customarily used for overnight accommodation:

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

Id. at 33-34.

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

Id. at 34.

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

Id.

The *Stitt* Court went on to distinguish its holding from its previous holdings in *Taylor v. United States,* 495 U.S. 575 (1990) and *Mathis v. United States,* 579 U.S. 500 (2016) having to do with structures used only for storage:

> In *Taylor* . . . we referred to a Missouri breaking and entering statute that among other things criminalized breaking and entering "*any* boat or vessel, or railroad car." . . . We did say that that particular provision was *beyond the scope* of the federal Act. But the statute used the word "any"; it referred to ordinary boats and vessels often at sea (and railroad cars *often filled with cargo, not people*), *nowhere restricting its coverage, as here, to vehicles or structures customarily used or adapted for overnight accommodation.* (Emphasis added.)

Stitt, 586 U.S. at 35.

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

Id. at 35-36.

Because the Arkansas residential burglary statute might cover a "car in which a homeless person occasionally sleeps," the Court remanded the Arkansas case back to Arkansas courts. *Id.* at 36.

As noted above, the Texas burglary statute in effect at the time the ACCA was passed, criminalized burglarizing a "habitation" or a

"building." The Fifth Circuit has held that the Texas burglary statute is indivisible. *United States v. Herrold*, 941 F.3d 173, 176 (5th Cir. 2019). This means that there is only one Texas burglary offense, with multiple manner and means of committing that offense. *See Mathis v. United States,* 579 U.S. 500, 507 (2016).

Assuming the "least of the acts criminalized" by the Texas burglary statute, suppose a person enters a building with the intent to commit theft. Again, building is defined as:

> any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.

Tex. Penal Code Ann. § 30.01. Texas courts have upheld burglary convictions in each of the following cases, *none of which involved a structure adapted or is customarily used for overnight accommodation*: *Warren v. State*, 2020 Tex. App. LEXIS 2473, at *6-7, 9 (Tex. App.—Tyler 2020, pet. ref'd) (unpublished) (defendant stole the victim's lawn mower from the victim's backyard storage shed); *Ellett v. State*, 607 S.W.2d 545, 548-49 (Tex. Crim. App. 1980) (defendant entered former hotel that had been closed for years and was being used for storage, and had broken-out and boarded windows; Court stated, "We hold that 'storage' constitutes a

'use' within the scope of Sec. 30.01[.]"); *Wilson v. State*, 1998 Tex. App. LEXIS 6044, at *4-5 (Tex. App.—Dallas 1998) (unpublished) (Defendant took show horse bridles from tack room in victim's barn); *Ysassi v. State*, 1998 Tex. App. LEXIS 3459, at *5-6 (Tex. App.—Dallas 1998, no pet.) (unpublished) (Defendant stole gardening tools from a structure attached to a nursery used for storing fertilizer, chemicals and tools); *Batiste v. State*, 1993 Tex. App. LEXIS 3020, at *1, 6 (Tex. App.—Houston [1st Dist.] 1993, no pet.) (Defendant stole lawn mower from detached garage at the end of a long driveway, the garage being used to park the family's cars and to store tools); *In re J.T.*, 824 S.W.2d 671, 673 (Tex. App.—Fort Worth 1992, no pet.) (Defendant stole fireworks from a fireworks stand, "a small little house built on a trailer."); *Frizzell v. State*, 1987 Tex. App. LEXIS 8318, at *3 (Tex. App.—Houston [14th Dist.] 1987, no pet.) (unpublished) (Defendant attempted to take a welding machine inside a storage building); *Allen v. State*, 719 S.W.2d 258, 259 (Tex. App.—Waco 1986, no pet.) (Defendant stole tires from a trailer used to store auto supplies and tires); *Lopez v. State*, 660 S.W.2d 592, 594 (Tex. App.—Corpus Christi 1983, pet. ref'd) (Defendant stole tools from locked office in a radiator shop); *See also Kemp v. State*, 2020 Tex. App. LEXIS 2506,

at *5-9 (Tex. App.—Fort Worth Mar. 26, 2020, no pet.) (unpublished) (Defendant on trial for burglary of a habitation was entitled an instruction on the lesser included offense of burglary of a building, given that the structure appeared to be used only for storage; "brimming with trash bags, boxes, and bins full of goods."); *Bryan v. State*, No. 04-22-00757-CR, 2023 Tex. App. LEXIS 8609, at *1 (Tex. App.—San Antonio Nov. 15, 2023, no pet. h.) (unpublished) ("Skipper Jerome Bryan, Jr. entered an open plea of guilty to burglary of a building, and the evidence established that he entered a storage unit that did not belong to him and stole items."); *Gomez v. State*, No. 11-21-00236-CR, 2023 Tex. App. LEXIS 3582, at *1-2 (Tex. App.—Eastland May 25, 2023, pet. ref'd) (unpublished) (Defendant entered a storage building and was preparing to steal comic books and vinyl records when caught); *Davidson v. State*, Nos. 03-20-00146-CR, 03-20-00147-CR, 2021 Tex. App. LEXIS 5033, at *19 (Tex. App.—Austin June 24, 2021, no pet.) (unpublished) (Defendant stealing clothes from laundry facility); *Deanda v. State*, No. 13-20-00022-CR, 2021 Tex. App. LEXIS 1833, at *3 (Tex. App.—Corpus Christi Mar. 11, 2021, no pet.) (unpublished) (Water heater stolen from utility building).

According to *Stitt*, generic burglary applies only to structures that have "been adapted or is customarily used for overnight accommodation." *Stitt,* 586 U.S. at 29. If the statute at issue criminalizes burglarizing a structure that is only used for storage, safekeeping, or cargo, the statute criminalizes conduct outside the generic definition of burglary. *Id.* at 35-36.

Second Reason for Granting the Writ: *Federal Courts have determined that at least eight States have (or had in 1986) burglary statutes that criminalize conduct more broadly than what Stitt requires.*

Kansas (1985):

> Burglary is knowingly and without authority entering into or remaining within any: Building, mobile home, tent or other structure, or any motor vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property, with intent to commit a felony or theft therein;

Kan. State. Ann. § 21-3715 (Repealed 2010); *See Greer v. United States,* 938 F.3d 766, 778 (6th Cir. 2019).

Idaho (1981):

> Every person who enters any house, room, apartment, tenement, store, shop, warehouse, mill, barn, stable, outhouse, or a building, tent, vessel, vehicle, trailer,

> airplane, or railroad car with intent to commit any theft or any felony is guilty of burglary.

Idaho Code Ann. § 18-1401; *See Greer,* 938 F.3d at 778.

Oklahoma (1961):

> Every person who breaks and enters any building or any part of any building, room, booth, tent, railroad car, automobile, truck, trailer, vessel or other structure or erection – in which any property is kept – or breaks into or forcibly opens, any coin operated or vending machine or device with intent to steal any property therein or to commit any felony, is guilty of burglary in the second degree.

Okla. Stat., Tit. 21, § 1435; *See Greer,* 938 F.3d at 778.

Missouri (1969):

> Every person who shall be convicted of breaking and entering any building, the breaking and entering of which shall not be declared by any statute of this state to be burglary in the first degree, * * * in which there shall be at the time any human being or any goods, wares, merchandise or other valuable thing kept or deposited, with the intent to steal or commit any crime therein, shall, on conviction, be adjudged guilty of burglary in the second degree.

Mo. Rev. Stat. § 560.070; *See Brown v. United States,* 929 F.3d 554, 557 (8th Cir. 2019).

Georgia (1968):

> A person commits burglary when, without authority and with the intent to commit a felony or theft therein, he enters or

> remains within the dwelling house of another, or any building, vehicle, railroad car, aircraft, watercraft, or other such structure designed for use as the dwelling of another, or enters or remains within any other building or any room or any part thereof. A person convicted of burglary shall be punished by imprisonment for not less than one nor more than 20 years.

Ga. Code § 26-1601; *See United States v. Cornette,* 932 F.3d 204, 214 (4th Cir. 2019).

Alabama (1975):

"Building" defined as:

> Any structure which may be entered and utilized by persons for business, public use, lodging or the storage of goods, and such term includes any vehicle, aircraft or watercraft used for the lodging of persons or carrying on business therein, and such term includes any railroad box car or other rail equipment or trailer or tractor trailer or combination thereof.

Ala. Code § 13A-7-1(2); *See Olmsted v. United States*, 426 F. Supp. 3d 588, 600 (W.D. Mo. 2019); *United States v. Howard*, 742 F.3d 1334, 1348 (11th Cir. 2014).

Alaska (1978):

> "building", in addition to its usual meaning, includes any propelled vehicle or structure adapted for overnight accommodation of persons or for carrying on business;

Alaska Stat. § 11.81.900; *See Olmsted*, 426 F. Supp. 3d at 600.

Washington (1975):

> "Building," in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building;

Wash. Rev. Code Ann. § 9A.04.110; *See*, 426 F. Supp. 3d at 602.

Third Reason for Granting the Writ: *"Burglary of a dwelling" is no longer considered a violent crime under the Career Offender Guideline.*

"[T]he Sentencing Commission expressly modeled the career-offender Guideline after the ACCA." *Lester v. United States,* 921 F.3d 1306, 1330 n.4 (11th Cir. 2019). The definition of a predicate "crime of violence," for purposes of the Sentencing Guidelines' career offender enhancement, closely tracks the ACCA's definition of a "violent felony." *James v. United States*, 550 U.S. 192, 206 (2007). Section 4B1.4, entitled "Armed Career Criminal," is the sentencing guideline that applies to the ACCA. U.S.S.G. § 4B1.4(a). In 1995, the Second Circuit stated:

> [Section] 4B1.4 is consistent with Congress's intent to have the guidelines provide "*a comprehensive and consistent statement of the Federal law of sentencing*" that would "structure judicial sentencing discretion [and] eliminate indeterminate sentencing." . . . *Section 4B1.4 was designed to offer a more consistent approach to sentencing armed career criminals.* (Emphasis added.)

United States v. McCarthy, 54 F.3d 51, 53 (2d Cir. 1995).

Effective August 1, 2016, the Sentencing Commission deleted "burglary of a dwelling" from the enumerated offenses clause set forth in §4B1.2 of the Sentencing Guidelines. U.S.S.G. App. C, amend. 798. The following statements appear under "Reason for Amendment":

> This amendment is a result of the Commission's multi-year study of statutory and guideline definitions relating to the nature of a defendant's prior conviction (e.g., "crime of violence," "aggravated felony," "violent felony, "drug trafficking offense," and "felony drug offense") and the impact of such definitions on the relevant statutory and guideline provisions (e.g., career offender, illegal reentry, *and armed career criminal*).
>
> . . .
>
> The "crime of violence" definition at §4B1.2 is used to trigger increased sentences under several provisions in the Guidelines Manual, the most significant of which is §4B1.1 (Career Offender). . . . The career offender guideline implements a directive to the Commission set forth at 28 U.S.C. § 994(h), which in turn identifies offenders for whom the guidelines must provide increased punishment.
>
> . . .

> The amendment deletes "burglary of a dwelling" from the list of enumerated offenses. In implementing this change, the Commission considered that (1) burglary offenses rarely result in physical violence, (2) "burglary of a dwelling" is rarely the instant offense of conviction or the determinative predicate for purposes of triggering higher penalties under the career offender guideline, and (3) historically, career offenders have rarely been rearrested for burglary offense after release. The Commission considered several studies and analyses in reaching these conclusions.
>
> . . .
>
> In reaching this conclusion, the Commission also considered that courts have struggled with identifying a uniform contemporary, generic definition of "burglary of a dwelling."

U.S.S.G. App. C, amend. 798. The Supreme Court accords great deference to the Sentencing Commission:

> As then Chief Judge Breyer explained, "[t]he Commission, which collects detailed sentencing data on virtually every federal criminal case, is better able than any individual court to make an informed judgment about the relation between" a particular offense and "the likelihood of accompanying violence."

James v. United States, 550 U.S. 192, 206 (2007).

Conclusion

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

Respectfully submitted,

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Certificate of Service

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

SIGNED this 10th day of April, 2025.

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

Appendix A

United States v. Schorovsky

United States Court of Appeals for the Fifth Circuit

February 12, 2025, Filed

No. 23-50040

Reporter
2025 U.S. App. LEXIS 3276 *; 2025 WL 471108

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

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

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

United States v. Schorovsky, 95 F.4th 945, 2024 U.S. App. LEXIS 6319 (5th Cir. Tex., Mar. 15, 2024)

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

For Richard Schorovsky, Defendant - Appellant: John Andrew Kuchera, Waco, TX.

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

Opinion

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

PER CURIAM:[*]

This sentencing and plea appeal returns to us on remand from the Supreme Court, which vacated and remanded our judgment for further consideration consistent with its opinion in *Erlinger v. United States, 602 U.S. 821, 144 S. Ct. 1840, 219 L. Ed. 2d 451 (2024)*. *See* *Schorovsky v. United States, No. 23-7841, 220 L. Ed. 2d 137, 2024 WL 4486342, at *1 (U.S. Oct. 15, 2024)*. In *Erlinger*, the Supreme Court held that a defendant was entitled under the Fifth and *Sixth Amendments* to have a jury unanimously determine beyond a reasonable doubt whether his past offenses were committed on separate occasions in order for the Armed Career Criminal Act (ACCA) sentence enhancement to apply. *See* *602 U.S. at 834-35*.

In our prior decision in this case, we held that the district court's use of *Shepard*-approved documents to determine that "Texas offenses occurred on different dates and thus on separate occasions" was **[*2]** proper and that no jury was required to determine whether "his prior convictions occurred on different occasions for the ACCA enhancement." *United States v. Schorovsky, 95 F.4th 945, 947-49 (5th Cir. 2024)*. We also held: (1) burglary of a habitation qualified as an ACCA predicate offense, *id. at 949*; (2) the district court did not violate Schorovsky's due process rights by characterizing burglary as a "violent felony," *id. at 949-50*; and (3) the district court's error in

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

advising Schorovsky of the incorrect minimum and maximum terms of imprisonment that could result from his plea did not affect his substantial rights, *id. at 950-51*.

Only our holdings regarding the separate-occasions inquiries were affected by *Erlinger*. And after reconsidering those issues, we still AFFIRM the district court's sentence because Schorovsky has failed to show plain error. We REINSTATE our other holdings that were unaffected by *Erlinger*.

I

In his original briefing before us, Schorovsky argued that no *Shepard*-approved documents proved that his robbery and aggravated robbery convictions were "committed on occasions different from one another," as required by *18 U.S.C. § 924(e)*. He also argued that the district court violated *Apprendi v. New Jersey* by finding that his prior convictions occurred on different occasions for the ACCA enhancement—rather than a jury finding **[*3]** that fact beyond a reasonable doubt. *See Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)*. But, as we stated before, Schorovsky did not raise either objection below, so we review for plain error. *See Schorovsky, 95 F.4th at 947-48*; *United States v. Curry, 125 F.4th 733, 738 (5th Cir. 2025)* (applying plain-error review when defendant "failed to preserve [his] ACCA sentence enhancement challenge"); *see also Erlinger, 602 U.S. at 849-50* (ROBERTS, C.J., concurring) (discussing harmless-error review by appellate court on remand); *id. at 859-61* (KAVANAUGH, J., dissenting) (discussing harmless-error review for preserved challenge).

Accordingly, to prevail, Schorovsky must show (1) an error (2) that is "clear or obvious" and that (3) affected his "substantial rights." *Puckett v. United States, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009)*; *see Greer v. United States, 593 U.S. 503, 507-08, 141 S. Ct. 2090, 210 L. Ed. 2d 121 (2021)*. If he makes such a showing, we may remedy the error—but only if the error "seriously affect[s] the fairness, integrity[,] or public reputation of judicial proceedings." *Puckett, 556 U.S. at 135* (alteration in original) (quoting *United States v. Olano, 507 U.S. 725, 736, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)*). We may review the entire record in our plain-error analysis—not just the record from the relevant proceeding. *See, e.g., Greer, 593 U.S. at 511*; *United States v. Campbell, 122 F.4th 624, 633 (6th Cir. 2024)* ("[C]onsideration of the entire record is not limited to admissible evidence introduced at a trial. It can include, for example, 'information contained in a pre-sentence report.'" (citing *Greer, 593 U.S. at 511*)).

A

Based on *Erlinger*, the district court committed "error" that was "clear or obvious" **[*4]** when it failed to permit a jury finding on whether Schorovsky's prior burglaries qualified as different occasions. *See Erlinger, 602 U.S. at 835*. The Government now concedes this point.

Because of this clear error, we need not address Schorovsky's related argument that no *Shepard*-approved documents proved that his robbery and aggravated robbery offenses were "committed on occasions different from one another." As we recently held, "[r]egardless of the district court's reliance on the [presentence report] or other materials, the district court clearly erred by not submitting the separate-occasions inquiry to a jury. In other words, there was no evidence the district court *could have* permissibly relied on to make the separate-occasions inquiry." *Curry, 125 F.4th at 739* (emphasis added); *see United States v. Garza-Lopez, 410 F.3d 268, 274 (5th Cir. 2005)* ("[A] district court is not permitted to rely on a PSR's characterization of a defendant's prior offense for enhancement purposes.").

B

Where Schorovsky and the Government differ is whether the error affected Schorovsky's "substantial rights." For the error to affect his substantial rights, Schorovsky must show that "if the district court had correctly submitted the separate-occasions inquiry to the jury, there is a reasonable probability that he **[*5]** would not be subject to the ACCA-enhanced sentence." *Curry, 125 F.4th at 739*; *see also Greer, 593 U.S. at 507-08* (holding that for an error to affect a defendant's substantial rights, "there must be 'a reasonable probability that, but for the error, the outcome

of the proceeding would have been different'" (citation omitted)). Admittedly, making such a showing "is difficult." *Greer, 593 U.S. at 508* (quoting *Puckett, 556 U.S. at 135*).

While "no particular lapse of time or distance between offenses automatically separates a single occasion from distinct ones," *Erlinger, 602 U.S. at 841*, "a single factor—especially of time or place—can decisively differentiate occasions," *Wooden v. United States, 595 U.S. 360, 370, 142 S. Ct. 1063, 212 L. Ed. 2d 187 (2022)*. We recently decided a similar ACCA enhancement challenge on the more lenient harmless-error standard. *See United States v. Butler, 122 F.4th 584 (5th Cir. 2024)*. In *Butler*, the defendant's predicate convictions were seven months, ten months, and nearly a decade apart, respectively; involved different co-defendants or buyers in the ACCA-predicate drug sales; and involved different forms of illegal substances. *Id. at 590*. As a result, the district court's failure to permit a jury finding on the separate-occasions issue was harmless because "any rational jury would have found beyond a reasonable doubt" that the predicate drug offenses occurred on different occasions. *Id.*

Even more recently, we reviewed another **[*6]** ACCA-sentence-enhancement case for plain error. *See Curry, 125 F.4th at 738-39*. There, the record demonstrated that the defendant's "prior four burglaries were committed against different victims and were separated by weeks and sometimes years." *Id. at 740*. And the defendant never argued that the facts in the record—which the district court used—were inaccurate. *Id. at 742*. Accordingly, we found that the error did not affect the defendant's substantial rights. *Id.*

Our review of the entire record and the parties' briefing suggests no "reasonable probability" that Schorovsky's sentence "would have been different." *Greer, 593 U.S. at 507-08* (citation omitted). Indeed, Schorovsky's prior convictions took place multiple days to multiple years apart at separate locations, with different victims. *See Wooden, 595 U.S. at 369-70*; *Curry, 125 F.4th at 740*. Schorovsky committed aggravated robbery on January 26, 2012, and his robbery occurred on January 28, 2012. Both occurred in Ector County but involved two different victims. He also committed burglary of a habitation on July 14, 2009. This burglary occurred in Midland County and involved another, different victim. And when the Government provided the district court with the indictments and judgments for Schorovsky's prior convictions, Schorovsky did not object **[*7]** that the facts within them were inaccurate.

Although the two-day time frame between Schorovsky's robbery and aggravated robbery convictions is admittedly shorter than the time between offenses in *Butler* and *Curry*, the differing locations and victims of the crimes give "no reasonable probability" that a "rational jury" would have found a single "criminal episode" qualifying as one occasion.[1] *Cf. United States v. Johnson, 114 F.4th 913, 917 (7th Cir. 2024)* (finding no harmless error for robberies that were minutes and less than a mile apart). And Schorovsky's burglary—which occurred two-and-a-half years earlier—is just as "separate" from his other convictions as those in *Curry*.

Accordingly, the district court's "clear or obvious" *Erlinger* error did not affect Schorovsky's substantial rights. And as a result, Schorovsky has failed to show plain error.

II

Because Schorovsky has not shown plain error with respect to the district court's separate-occasions determination, we AFFIRM his ACCA-enhanced sentence. As for our previous holdings that (1) burglary of a habitation qualifies as a predicate ACCA offense, (2) the district court did not violate Schorovsky's due process rights by characterizing burglary as a violent felony, and (3) the district court did not plainly **[*8]** err when it advised Schorovsky of the incorrect minimum and maximum terms of imprisonment that could result from his plea, we REINSTATE them as none of those holdings was affected by *Erlinger*.

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[1] In his *Erlinger* dissent, Justice Kavanaugh assumed that *Wooden*'s statement that courts "have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart, or at a 'significant distance,'" *Wooden, 595 U.S. at 370* (citation omitted), "will inform the content of jury instructions." *Erlinger, 602 U.S. at 860 n.4* (KAVANAUGH, J., dissenting). If true, such jury instructions would only reinforce this conclusion.

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