No. 17-1362

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOSHUA E. SHEPHERD,
Petitioner,

v.

STEPHEN JULIAN,
Warden, FCI Terre Haute,
Respondent.

On Appeal from the United States District Court
For the Southern District of Indiana, Terre Haute Division
The Honorable Larry J. McKinney
Case No. 2:17-cv-00026-LJM-MJD

AMENDED BRIEF OF PETITIONER JOSHUA E. SHEPHERD

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STEPHEN JULIAN, Warden, FCI Terre Haute, Respondent.	Hon. Larry J. McKinney, Presiding Judge

DISCLOSURE STATEMENT

I, the undersigned counsel for the Petitioner, Joshua E. Shepherd, furnish the following list in compliance with FED. R. APP. P. 26.1 and CIR. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case:

   Joshua E. Shepherd.

2. This party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court:

   Sarah O'Rourke Schrup (attorney of record), John N. Pavletic (senior law student), Brendan J. Gerdes (senior law student), and Claudia T. Brokish (senior law student) of the Bluhm Legal Clinic at the Northwestern Pritzker School of Law.

4. The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear:

   Joshua E. Shepherd, pro se.

Attorney's Signature: /s/ Sarah O'Rourke Schrup
Dated: March 20, 2018

Attorney's Printed Name: Sarah O'Rourke Schrup

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). **Yes**

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INTRODUCTION

Habeas corpus exists to protect against improper detentions that cannot be remedied in any other way. Here, Joshua Shepherd remains incarcerated beyond the statutory maximum term he has already served due to an improper Armed Career Criminal Act ("ACCA") sentencing enhancement. Shepherd retained the right to appeal that determination and has consistently fought to do so from direct appeal through his collateral challenges. The Supreme Court issued its decision in *Mathis v. United States* in 2016; Shepherd promptly pursued relief, arguing that the Kentucky burglary statute used to enhance his sentence under the ACCA was overbroad. Most recently, he filed in the Southern District of Indiana, his district of confinement, a petition pursuant to 28 U.S.C. § 2241. The district court improperly denied the petition. Although the Sixth Circuit has now recognized that the enhancement was illegal and both parties to this case filed a joint motion stipulating that Shepherd's prior offenses do not qualify as ACCA predicates, Shepherd sits in prison. He asks this Court to recognize the unjust nature of his sentence and grant his petition for a writ of habeas corpus.

JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of Indiana had subject matter jurisdiction over Joshua Shepherd's § 2241 petition for a writ of habeas corpus pursuant to 28 U.S.C. § 1331. *See, e.g.*, *Moore v. Olson*, 368 F.3d 757, 759 (7th Cir. 2004). The district court entered a final order denying Shepherd's petition for a writ of habeas corpus on February 2, 2017. (A.45.)[1] On February 22, 2017, Shepherd filed a timely notice of appeal in the United States Court of Appeals for the Seventh Circuit. (R.11, Notice of Appeal.) This Court has jurisdiction to review the district court's denial of habeas corpus relief pursuant to 28 U.S.C. § 2253.

[1] References to the material in the first appendix shall be denoted as (A.__.). References to the material in the second appendix shall be denoted as (B.__.).

STATEMENT OF THE ISSUES

I. Written plea agreements often include standard-form provisions purporting to waive a defendant's right to appeal his conviction and sentence. The first issue presented for review is whether a waiver is enforceable when, in open court, the judge, prosecutor, and defense counsel agreed that the defendant retained his right to appeal a sentencing enhancement under the ACCA.

II. Under the framework set out in *In re Davenport*, 147 F.3d 605 (7th Cir. 1998), an intervening Supreme Court decision interpreting a relevant statute may be grounds for habeas relief under 28 U.S.C. § 2241. The second issue presented for review is whether post-conviction relief is available under § 2241 for a claim pursuant to *Mathis v. United States*, 136 S. Ct. 2243 (2016). If so, the question becomes whether the merits of the claim should be decided using the law of the circuit of conviction or the circuit of confinement, and, under either, whether Kentucky's second-degree burglary statute is a predicate offense under the ACCA.

STATEMENT OF THE CASE

After police pulled over Petitioner Joshua Shepherd in Kentucky, discovering marijuana and a gun in his car, Shepherd pled guilty to one count of possession of marijuana with the intent to distribute and one count of being a felon in possession of a firearm. (A.2–3.) During sentencing, the district court applied an ACCA enhancement and, as a result, sentenced Shepherd to 15 years' imprisonment. (A.27.) The Sixth Circuit affirmed this decision on direct appeal, as has every court in Shepherd's subsequent collateral attacks. (B.5.) Shepherd now seeks relief once again. The issues before this Court involve the intersection of plea procedure, substantive sentencing law, and the privilege of habeas corpus.

The Plea Process

On February 6, 2008, the government indicted Shepherd. (B.39.) A little over a week later, on February 15, law enforcement arrested Shepherd, and he has been detained on these charges ever since. (B.39.) Shepherd signed a guilty plea on July 28, 2008. (A.11.) As part of his guilty plea, Shepherd waived certain aspects of his appeal, but contradictory representations within the written plea agreement, the change-of-plea hearing, and the sentencing hearing muddied the scope of that waiver. The written plea agreement, for example, told Shepherd that he "waive[d] his right to directly appeal his conviction and the resulting sentence," but in the very next breath stated that he did "maintain his right to appeal the sentence imposed" under certain circumstances. (A.8.)

Notwithstanding this confusing language in the agreement, at the change-of-plea hearing, the court, the prosecutor, the defense attorney, and Shepherd himself all agreed that Shepherd could appeal any potential ACCA sentencing enhancement. (A.13–17); *see also* (A.17) (district court telling Shepherd "essentially, you are agreeing no matter what the language is of this agreement that all of those things that I just talked about having to decide are things that you can appeal if I decide them against you."). At sentencing, the parties continued to discuss Shepherd's right to appeal. (A.29–30.) Each party involved in the proceedings agreed that Shepherd retained his right to challenge his sentence. (A.30.)

The ACCA Sentence Enhancement

Relying on Shepherd's three prior convictions for Kentucky second-degree burglary, the district court found Shepherd eligible for an ACCA enhancement. (A.27.) The parties and the court recognized that the Kentucky burglary statute at issue was broader than generic burglary because it included theft from cars, boats, and planes. (A.24–26.) The district court did not stop with its overbreadth rationale. Instead, the district court—relying on an unpublished Sixth Circuit case—followed the government's suggestion and applied the modified categorical approach. (A.23–27) (citing *United States v. McGovney*, 270 F. App'x 386 (6th Cir. 2008)). In examining the underlying documents, the court found that Shepherd was actually convicted of the generic form of burglary because he burglarized residences (not cars, boats, or planes).[2] (A.26–27.)

[2] The sentencing judge explained that he was not counting the four third-degree burglary convictions from 1998. (A.27.) In Kentucky, a "person is guilty of burglary in the third

Accordingly, the judge sentenced Shepherd to two concurrent terms of imprisonment: (1) 60 months for Count I, possession of marijuana with intent to distribute; and (2) 180 months for Count II, felon in possession of a firearm. (A.34.) With the ACCA enhancement, Shepherd faced a 15-year mandatory minimum with the possibility of a life sentence. Without the ACCA enhancement, however, Shepherd would have faced no mandatory minimum; Count I carried a maximum sentence of five years and Count II prescribed a maximum sentence of 10 years. The court entered a judgment pursuant to the plea agreement on April 10, 2009. (A.32.) Shepherd has been incarcerated since February 15, 2008, and so he has now served more than the ten-year statutory maximum sentence that he would have received absent the ACCA enhancement. (B.39–40.) Shepherd appealed his ACCA-enhanced sentence. (B.3.)

Shepherd's Direct Appeal and Collateral Attacks

On April 24, 2009, Shepherd filed a notice of appeal in the United States Court of Appeals for the Sixth Circuit. Shepherd's appointed appellate attorney ultimately filed an *Anders* brief and an accompanying motion to withdraw as counsel. (B.2.) The attorney suggested that any appeal would be frivolous given Shepherd's waiver of his appeal rights in the plea agreement. Shepherd, proceeding *pro se*, responded by arguing that the sentencing judge should not have counted his prior convictions as separate predicate offenses under the ACCA. (B.4.)

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degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building." Ky. Rev. Stat. Ann. § 511.040. The same definition of "building" that applies to second-degree burglary applies to third-degree burglary. *Id.* § 511.010(1).

On May 5, 2011, the Sixth Circuit granted the appointed attorney's motion to withdraw and affirmed the district court's judgment. (B.5.) The court held that Shepherd waived his right to appeal any issue that did not involve the calculation of the Guidelines range. (B.3.) Nevertheless, the court reviewed the merits of Shepherd's ACCA claim and the reasonableness of his sentence. (B.3–5.) Rejecting Shepherd's *pro se* arguments and relying on an unpublished Sixth Circuit opinion, the court found that the district court properly sentenced Shepherd with an ACCA enhancement. (B.4) (citing *United States v. Manness*, 23 F.3d 1006 (6th Cir. 1994)).

Motion to Vacate the Sentence under 28 U.S.C. § 2255

Shepherd filed a § 2255 motion to vacate his sentence on August 12, 2011. (B.11.) He argued that he: (1) was actually innocent of being an armed career criminal because his prior burglary convictions were not crimes of violence; and (2) received ineffective assistance of counsel. (B.11.) The government countered that Shepherd expressly waived his right to appeal the sentence. (B.11.) Shepherd, however, claimed that the waiver did not preclude his challenge to the district court's calculation of his Guidelines range because it erred in applying the ACCA enhancement. (B.11.) The district court referred the motion to a magistrate judge. (B.7.)

Relying solely on the written plea agreement—and not the transcripts from the change-of-plea or sentencing hearings—the magistrate judge found that the ACCA sentencing enhancement was an exception to Shepherd's appellate waiver. (B.12.) The magistrate judge then reasoned that because the portion of the agreement

containing the exception appeared after the waiver of direct appeal, and a similarly worded provision did not appear after the waiver of collateral attack, the exception only applied on direct appeal. (B.12–13.) The magistrate judge thus recommended dismissal. (B.16.) The district court adopted the opinion of the magistrate judge in full, dismissed the motion on November 14, 2011, and declined to issue a certificate of appealability. (B.21.)

Shepherd then appealed to the Sixth Circuit, which also denied his application for a certificate of appealability. (B.26.) In its order, the Sixth Circuit held that the plea agreement included an express waiver of Shepherd's right to collateral attack under § 2255. (B.25.) The court explained that, even if the right was not waived, the motion failed on the merits. (B.26.) The court relied on the law of the circuit and applied the modified categorical approach to an indivisible statute. (B.26.)

Successive Motions under § 2255

Shepherd has since filed several successive motions under § 2255 in the Sixth Circuit. In 2014 Shepherd filed his second motion under § 2255, challenging his sentence under a newly decided Supreme Court ACCA case. (B.29.) The panel denied his motion. (B.29.) That panel cited to the court's previous holdings of waiver in the direct appeal, in the first § 2255 motion, and the subsequent § 2255 appeal. (B.28–29.) The court denied relief under § 2255 because it did not believe that the new Supreme Court precedent met the threshold requirements for successive habeas relief. (B.29.) Specifically, it neither articulated a new rule of constitutional law, nor was it made retroactive by the Supreme Court. (B.29.) Then, in 2015,

Shepherd filed his third motion under § 2255. The Sixth Circuit dismissed the case for want of prosecution because Shepherd did not timely comply with circuit rules. (B.32.) Accordingly, the court did not reach the substantive bases of his motion. (B.32.)

Shepherd tried again in 2016, filing a fourth successive motion—arguing that the court improperly enhanced his sentence under ACCA's residual clause, which the Supreme Court had recently invalidated. (B.34–35.) The Sixth Circuit—without ever mentioning waiver—focused on its earlier direct-appeal ruling that applied ACCA's enumerated-offenses clause. (B.35.) Because Shepherd was sentenced under the enumerated-offenses rather than the residual clause, the court concluded that the new Supreme Court precedent did not apply. (B.35.) In his reply brief, Shepherd had argued that the Supreme Court's new rule in *Mathis v. United States* warranted relief under § 2255. (Movant Joshua Shepherd's Reply to the United States' Response to Petition Under 28 U.S.C. § 2244 at 2, Shepherd v. United States, No. 16-5795 (6th Cir. July 8, 2016) (arguing that Kentucky second-degree burglary is broader than the generic offense under *Mathis*).) Despite this, the Sixth Circuit did not address *Mathis* in its order denying his successive motion. (B.34–35.)

Petition for a Writ of Habeas Corpus under § 2241

In 2017 Shepherd filed a petition under § 2241 in the Southern District of Indiana, his district of confinement. (A.41.) He argued that Kentucky's burglary statute was overbroad under *Mathis* and, therefore, his prior convictions were not violent crimes under the ACCA. (Verified Petition for a Writ of Habeas Corpus

Pursuant to Title 28, United States Code, § 2241 at 4, 6–7, 8, Shepherd v. Julian, No. 2:17-cv-00026-LJM-MJD (S.D. Ind. Jan. 12, 2017).) The district court dismissed the petition. (A.45.) In doing so, the district court never addressed waiver, but rather relied on § 2244(a). (A.42.) That statute, in relevant part, states that:

> No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States *on a prior application for a writ of habeas corpus*, except as provided in section 2255.

28 U.S.C. § 2244(a) (emphasis added). The court reasoned that it need not consider Shepherd's petition because the Sixth Circuit had previously determined the legality of his detention in 2016. (A.42.)

The court applied § 2244(a) even though this was Shepherd's first petition for a writ of habeas corpus. (A.42.) Further, the court did not discuss the savings clause of the statute, § 2255(e), which excepts litigants like Shepherd who seek relief under § 2255. (A.41.) Finally, although the district court observed that Shepherd cited *Mathis* in support of his most recent § 2255 motion in 2016, and that the Sixth Circuit's ruling on the motion post-dated *Mathis*, the district court did not acknowledge that the Sixth Circuit opinion failed to mention *Mathis* at all. (A.42.)

This Appeal

On February 22, 2017, Shepherd appealed the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2241. (R.11, Notice of Appeal.) After Shepherd filed his opening brief, the parties agreed to resolve the appeal, and on December 15, 2017, filed a stipulated motion to reverse and remand to the

district court of conviction for resentencing. (Stipulated Motion to Reverse and Remand, Shepherd v. Julian, 17-1362 (7th Cir. Dec. 15, 2017), ECF No. 17 (hereinafter, "Stipulated Motion").) On January 12, 2018, this Court ordered the parties to provide it with memoranda responding to the following questions: (1) Would Shepherd's prior burglaries count as predicate offenses under the Armed Career Criminal Act under Seventh Circuit precedent?; (2) If yes, should this court apply the law of the Sixth Circuit or of the Seventh Circuit?; and (3) If yes, would it be a "miscarriage of justice" for this court to refuse to enforce Sixth Circuit law with which it disagrees? (Shepherd v. Julian, No. 17-1362 (7th Cir. Jan. 12, 2018), ECF No. 19.)

In its memorandum, the government argued that: (1) a conviction under the Kentucky second-degree burglary statute does not count as a predicate offense under the ACCA in the Sixth or the Seventh Circuits under *Mathis*, and that *Smith* does not extend far enough to meet the definition of "dwelling"; (2) the result of this case would be the same under either circuit's law, but that the choice-of-law question is unsettled, and although district courts in this circuit favor applying the law of the circuit of conviction, it suggested instead that the Court apply the law of the circuit of confinement; and (3) an order denying the petitioner relief would be a miscarriage of justice. (Respondent's Memorandum, Shepherd v. Julian, 17-1362 (7th Cir. Jan. 22, 2018), ECF No. 20.)

Shepherd agreed with the government's ultimate conclusion that under Seventh Circuit law Shepherd is not an armed career criminal, although based on a slightly

different reading of *Smith*. (Memorandum for Petitioner at 2, 5 n.3, Shepherd v. Julian, 17-1362 (7th Cir. Jan. 25, 2018), ECF No. 21.) In addition to that distinction, Shepherd argued that the law of the circuit of conviction should apply on the merits. *Id.* at 10–11. At bottom, however, Shepherd agreed with the government that it would be a miscarriage of justice for this Court to deny him relief and asked for the opportunity to file an amended brief should the Court not wish to grant the parties' joint motion. *Id.* at 12. On February 21, 2018, this Court denied the motion but granted Petitioner's request to file an amended brief. (Shepherd v. Julian, No. 17-1362 (7th Cir. Feb. 21, 2018), ECF No. 22 (order denying the parties' joint motion to reverse and remand).)

SUMMARY OF ARGUMENT

Congress carefully crafted a scheme of collateral review to ensure that prisoners retain their constitutional right to have a court review and correct illegal convictions and sentences. *See generally* 28 U.S.C. §§ 2241–2256. Although federal prisoners typically use § 2255 to mount such a challenge, Congress acknowledged instances in which § 2255 could be insufficient to protect prisoners' constitutional rights. To address this, Congress included a "savings clause"—28 U.S.C. § 2255(e)—to provide prisoners an avenue for relief when the legal landscape changes during their incarceration and forecloses an otherwise valid remedy.

Here, Shepherd remains incarcerated, serving a 15-year sentence imposed in violation of Supreme Court precedent: *Mathis v. United States*. As a preliminary matter, although Shepherd agreed to a limited appellate waiver as a part of his plea, he retained the right to challenge the ACCA enhancement that resulted in his higher sentence; statements by the court, the prosecutor, defense counsel, and Shepherd himself amply demonstrate that Shepherd preserved this right.

Not only is Shepherd entitled to bring this sentencing claim, he may use § 2241 to do so. In *Davenport* and its progeny, this Court defined a three-part test to determine whether a prisoner may invoke § 2255's savings clause to bring a petition for a writ of habeas corpus under § 2241. First, the intervening Supreme Court precedent must be one of statutory interpretation. Second, the new rule must be retroactively applicable on collateral review, and the rule must have been

unavailable to the petitioner when filing the original motion under § 2255. Third, the alleged error must be a miscarriage of justice.

The court below erred in denying Shepherd's petition under § 2241 because it did not apply this Court's three-part test, even though Shepherd raised a claim that had not been previously reviewed on its merits. First, *Mathis* is a statutory interpretation case. Second, this Court has determined that *Mathis* applies retroactively on collateral review, and the *Mathis* rule was unavailable to Shepherd when he first sought review under § 2255 in 2011. Alternatively, at the time of his direct appeal and first collateral attack, binding Sixth Circuit precedent barred Shepherd's ACCA sentencing claim. Third, an unfounded ACCA sentence enhancement is cognizable under § 2241 because it is a fundamental sentencing defect. Thus, *Mathis v. United States* meets all three criteria, and this Court should authorize Shepherd's petition for a writ of habeas corpus under § 2241.

After authorizing Shepherd's petition as a procedural matter, the next step is to assess its substantive merits—that is, whether Shepherd will be afforded sentencing relief from his ACCA enhancement. Here, this Court has many options. It may reach the merits itself, remand to the Indiana district court, or even transfer the case to the district court that initially sentenced Shepherd. If this Court chooses to evaluate the substantive ACCA claim itself, history and policy indicate that this Court should use Sixth Circuit law—the circuit of conviction. After all, § 2241 is only available by virtue of a provision in § 2255, which itself requires petitioners to bring their claims in the more convenient and appropriate circuit of conviction.

Congress enacted § 2255, in part, to ease the burden on the circuits of confinement that had previously borne the responsibility for such petitions. Most courts already look to the circuit of conviction during their procedural assessment of § 2241's availability, so continuing that approach into the substantive realm creates consistency and avoids unfair, arbitrary results and forum shopping.

If this Court applies Sixth Circuit law, Shepherd's ACCA enhancement cannot stand. Kentucky's burglary statute includes vehicles, movable enclosures, and even more structures than permitted by the Supreme Court's definition of generic burglary. The Kentucky statute is overbroad, and Shepherd's convictions are thus not predicate offenses under the ACCA.

Even if this Court applies Seventh Circuit law—the circuit of confinement—to the merits of Shepherd's claim, Kentucky's statute is still overbroad. Both the Supreme Court and the Seventh Circuit have consistently placed vehicles beyond the scope of generic burglary. Although this Court in *Smith v. United States* recently held that trailers and motor homes could fall within the generic definition because they were adapted for overnight accommodation, *Smith* did not reach other types of vehicles. Because the Kentucky statute includes other vehicles that may qualify as a dwelling in some circumstances, but do not do so in all circumstances, it is overbroad.

Finally, it would be a miscarriage of justice to deny Shepherd relief given the particular circumstances of his case. The Sixth Circuit now recognizes that the enhancement it applied to Shepherd's sentence is unlawful. The law in this Court is

cloudy given its recent pronouncements and the fact that Smith is currently seeking certiorari review in the Supreme Court. Shepherd's case should be resolved now because each day that passes is another beyond the maximum term of imprisonment that could have been imposed absent the ACCA enhancement. If this Court denies him relief, he will have no choice but to finish this illegal sentence. The writ is designed to remedy just such injustices, and this Court should grant Shepherd's petition.

ARGUMENT

I. The totality of Shepherd's plea proceedings shows that Shepherd did not knowingly and voluntarily waive his right to challenge his ACCA-enhanced sentence and that any waiver should not be enforced.

The parties agree that Shepherd did not waive his right to challenge his sentence. (Stipulated Motion at 1 (citing *United States v. Chapa,* 602 F.3d 865, 868 (7th Cir. 2010); Fed. R. Crim. P. 11(b)(1)(N)).) Given the government's decision not to argue waiver, this Court should move directly to the merits of the legal questions presented. *See Wood v. Milyard*, 566 U.S. 463, 474 (2012); *United States v. Ryan*, 688 F.3d 845, 848 (7th Cir. 2012). Even if this Court were to decide to independently assess the waiver issue, the record shows that Shepherd did not "'knowingly and voluntarily' enter[ ] into the agreement," and that the waiver was not "express and unambiguous." *Chapa*, 602 F.3d at 868 (citing *United States v. Jemison*, 237 F.3d 911, 917 (7th Cir. 2001), and *United States v. Woolley*, 123 F.3d 627, 632 (7th Cir. 1997)).

Conflicting oral pronouncements at sentencing that he could appeal reasonably would have led Shepherd to believe that he retained the right to collaterally attack his ACCA status. During the plea colloquy, the district court, the prosecutor, and defense counsel all verbally agreed that Shepherd had not waived his right to appeal the ACCA enhancement. (A.15–16.) Following this exchange, the judge turned to Shepherd and paraphrased that conversation: "So, essentially, you are agreeing *no matter what the language is of this agreement* that all of those things that I just talked about having to decide are things that you can appeal if I decide

them against you." (A.17) (emphasis added). The prosecutor and defense counsel again agreed to this characterization of Shepherd's rights. (A.17.) This happened at sentencing. After the district court determined that Shepherd qualified for an ACCA sentencing enhancement, it asked defense counsel whether Shepherd had waived his right to appeal. (A.28–29.) Defense counsel stated—with no objections from the prosecutor—that it was a limited waiver. (A.28–29.) Then, after the clerk advised Shepherd of his right to appeal, the judge concluded sentencing by underscoring this right: "So if you want to appeal the issues that you raised here today about whether the armed career offender statute applies, then you are free to do so." (A.30.)

Even putting aside these express representations, a plea is only voluntary when "the defendant is made aware of the direct consequences of the plea." *United States v. Jordan*, 870 F.2d 1310, 1316 (7th Cir. 1989) (citing *Brady v. United States*, 397 U.S. 742, 755 (1970)). The district court failed to comply with Rule 11 when it did not ensure that Shepherd actually understood his appellate waiver and, specifically, the distinction between direct appeal and collateral review.[3] *See* Fed. R. Crim. P.

[3] This legal distinction often confuses defendants. *See, e.g.*, *Griffis v. United States*, No. CR 114-027, 2017 WL 1709316, at *5 (S.D. Ga. Feb. 16, 2017), *report and recommendation adopted*, No. CR 114-027, 2017 WL 1682538 (S.D. Ga. May 1, 2017); *Wiegand v. Zavares*, No. CIVA 08-CV-00862-BNB, 2008 WL 3895519, at *3 (D. Colo. Aug. 22, 2008); *Lamb v. United States*, No. 4:04-CV-116, 2007 WL 2402992, at *7 (E.D. Tenn. Aug. 20, 2007). ACCA errors are routinely pursued via collateral review, so Shepherd would have had no reason to believe that his appeal rights would not include this avenue of relief. *See Welch v. United States*, 604 F.3d 408, 412–13 (7th Cir. 2010) (stating "arguments of the sort at issue here, where a change in law reduces the defendant's statutory maximum sentence below the imposed sentence, have long been cognizable on collateral review").

11(b)(1)(N). Finally, any ambiguity should be read in favor of Shepherd, and against enforcing the waiver. *See United States v. Alcala*, 678 F.3d 574, 577 (7th Cir. 2012).

Since his guilty plea, Shepherd has persistently sought review of his sentence enhancement under the ACCA and nothing else. Shepherd has never and does not now seek to set aside his guilty plea; he merely asks this Court to recognize the limited appellate rights the district court repeatedly told him he retained. Because the parties have agreed that this is the best course, and because no prior court meaningfully considered the waiver question by examining the totality of the circumstances as required, *see* Stipulated Motion at 3 (explaining why "this an inappropriate case to press the law of the case doctrine"), this Court should find that Shepherd's claim may proceed.

II. This Court should hold that Shepherd is entitled to relief and that he may use § 2241 in order to obtain that relief.

District and circuit courts across the country have struggled to delineate the scope of the savings clause contained in § 2255(e) with different results. Courts likewise are grappling with how to apply the rapidly evolving ACCA jurisprudence, again with varied outcomes. And even when the § 2255(e) savings clause permits a given petitioner to employ § 2241, courts are unsure which jurisdiction's law should apply to the substantive merits of her underlying claim. Any one of these complex questions has sufficiently gummed up the lower courts such that Supreme Court guidance seems to be in order, if not inevitable.

Shepherd's case presents all three questions at once, but the path to resolving them is relatively straightforward. First, this Court has already answered the

question of when and how § 2241 should be used in its 1998 decision *In re Davenport*, 147 F.3d 605 (7th Cir. 1998). After resolving that threshold procedural question, this Court faces a fork in the road with three primary options: (1) apply Sixth Circuit ACCA law and grant Shepherd relief; (2) apply Seventh Circuit law and grant Shepherd relief; or (3) apply Seventh Circuit law and deny Shepherd relief. Keeping the fundamental purpose of habeas corpus top of mind—its role as a "bulwark against [detentions] that violate fundamental fairness"—renders the decision less thorny, at least in this particular case at this moment in time. *See Engle v. Isaac*, 456 U.S. 107, 126 (1982). Whichever route this Court chooses should be one that affords Shepherd relief because any other outcome would violate the notion of fundamental fairness that habeas corpus is meant to protect.

A. Shepherd may bring a § 2241 petition to challenge his sentence on *Mathis* grounds.

The parties agree that "§ 2241 is an appropriate vehicle for addressing the [*Mathis*] claim." (Stipulated Motion at 3.) Under this Court's test in *Davenport*, a petitioner must meet the following three conditions in order to bring a § 2241 petition: (1) there must have been an intervening Supreme Court decision involving statutory interpretation, not a constitutional case; (2) the Supreme Court's new rule must apply retroactively to cases on collateral review and the petitioner must have been unable to invoke the rule in his earlier proceeding; and (3) the error must be a miscarriage of justice. *Davenport*, 147 F.3d at 611. Had the district court applied this necessary test, it would have found that Shepherd's *Mathis* claim meets all three of that test's requirements.

Shepherd satisfies the first prong of the *Davenport* test because the Supreme Court interpreted a statute in *Mathis*—namely, the ACCA. *See Dawkins v. United States*, 829 F.3d 549, 551 (7th Cir. 2016) (per curiam). The second *Davenport* factor has two components: (1) retroactivity; and (2) prior unavailability of relief. Retroactivity is satisfied because this Court has held that "substantive decisions such as *Mathis* presumptively apply retroactively on collateral review." *Holt v. United States*, 843 F.3d 720, 721–22 (7th Cir. 2016) (citing *Davis v. United States*, 417 U.S. 333 (1974)); *see generally Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *see also Narvaez v. United States*, 674 F.3d 621, 625–26 (7th Cir. 2011). This Court uses two different tests for assessing prior unavailability of relief in cases brought under § 2241. *See Light v. Caraway*, 761 F.3d 809, 813 (7th Cir. 2014). Under one test, a petitioner satisfies the standard if the relevant Supreme Court case had not been decided by the time of his first motion under § 2255. *See Brown v. Rios*, 696 F.3d 638, 640 (7th Cir. 2012). An alternative test requires that the prisoner "show that his claim was 'foreclosed by binding precedent' at the time of his direct appeal and § 2255 motion." *Brown v. Caraway*, 719 F.3d 583, 595 (7th Cir. 2013) (quoting *Hill v. Werlinger*, 695 F.3d 644, 648 (7th Cir. 2012)).

Shepherd easily satisfies the first test for showing prior unavailability of relief; the Supreme Court decided *Mathis* in 2016— five years after Shepherd's first

§ 2255 motion.[4] Because the timing of the *Mathis* decision satisfies *Davenport's* second prong, this Court need not inquire any further. Nonetheless, Shepherd also satisfies this Court's second test. At the time of Shepherd's direct appeal and first § 2255 motion, the Sixth Circuit's precedent flatly contradicted not only existing Supreme Court precedent in *Taylor v. United States*, 495 U.S. 575 (1990), but also what would ultimately become the rule in *Mathis*. Further, there is contradictory case law in the Sixth Circuit that is irreconcilable with *Taylor* and its progeny because Kentucky defines burglary more expansively than federal law does. Courts held that second-degree burglary in Kentucky categorically counted as a crime of violence under the enumerated-offenses clause. *See United States v. Moody*, 634 F. App'x 531, 535 n.1 (6th Cir. 2015); *United States v. Taylor*, 800 F.3d 701, 719 (6th Cir. 2015); *United States v. Walker*, 599 F. App'x 582, 583 (6th Cir. 2015); *United States v. Jenkins*, 528 F. App'x 483, 484–85 (6th Cir. 2013); *United States v. Douglas*, 242 F. App'x 324, 331 (6th Cir. 2007).

Finally, an erroneous enhancement under the ACCA is a cognizable claim for habeas relief under § 2241 because it is a fundamental sentencing defect and therefore a miscarriage of justice. The Constitution voids a sentence that violates a substantive rule. *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016), *as revised*

[4] Shepherd could not have resorted to § 2255(h)(2)'s second-or-successive provisions in order to raise a *Mathis* claim. The rule in *Mathis* is not a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. *Holt*, 843 F.3d at 722 ("*Mathis* interprets the statutory word 'burglary' and does not depend on or announce any novel principle of constitutional law. Section 2255(h)(2) therefore does not authorize a second § 2255 proceeding."). Because a *Mathis* claim does not justify a second or successive motion under § 2255, section 2241 is Shepherd's only avenue of relief.

(Jan. 27, 2016) (citing *Ex parte Siebold*, 100 U.S. 371, 376 (1879)). This Court has held that "fundamental sentencing defects, such as a misapplication of the then-mandatory career offender Guideline, present a cognizable non-constitutional claim for initial collateral relief because the error resulted in a miscarriage of justice." *Light v. Caraway*, 761 F.3d 809, 813 (7th Cir. 2014) (citing *Brown v. Caraway*, 719 F.3d 583, 587 (7th Cir. 2013) (internal quotations omitted)). Here, the 15-year mandatory minimum sentence that the district court imposed pursuant to the ACCA exceeds the statutory maximum of ten years for Shepherd's felon-in-possession offense. Without the enhancement, Shepherd would not have been subject to the mandatory minimum.

B. Deciding the substantive merits of Shepherd's *Mathis* claim.

After applying *Davenport* and concluding that § 2241 is an option for Shepherd, the focus turns to the substantive merits of his *Mathis* claim. Here, the question becomes which circuit's law applies in order to decide whether he will obtain relief. No court, including this one, has definitively answered this question. Lower courts in this circuit seem to most often apply the law of the circuit of conviction on the merits (in Shepherd's case that would be the Sixth Circuit). *See Roberts v. Watson*, No. 16-CV-541-BBC, 2017 WL 2963527 at *2 (W.D. Wis. July 11, 2017); *but see Goodson v. Werlich*, No. 17-CV-1210-DRH, 2017 WL 5972989, at *2 (S.D. Ill. Nov. 30, 2017) (applying, without explaining why, the law of the circuit of confinement). Some district courts elsewhere apply the substantive law of the circuit of confinement but, again, most typically apply the law of the circuit of conviction to

the merits of a petitioner's claim. *See Hogan v. Butler*, No. CIV. 6:15-046-GFVT, 2015 WL 4635612, at *6–7 (E.D. Ky. Aug. 3, 2015) (applying the law of the circuit of conviction); *but see Rudisill v. Martin*, No. 5:08–cv–272(DCB)(MTP), 2013 WL 1871701 at *4, 6–7 (S.D. Miss. May 3, 2003) (applying the law of the circuit of confinement).

If and when it reaches the merits of a § 2241 petition, this Court appears to utilize both approaches without much explanation. *Compare Brown*, 719 F.3d at 595–96 (citing and relying on the circuit of confinement's—and the Supreme Court's—ACCA jurisprudence to determine whether third-degree arson qualified as a crime of violence under the mandatory sentencing Guidelines), *with Light*, 761 F.3d at 816 looking to both the law of the circuit of conviction and the circuit of confinement in the merits stage, but deferring to the circuit of conviction's interpretation of the substantive law). As a general matter, other circuits seemingly apply the law of the circuit of conviction when reaching the merits stage of the § 2241 analysis. *See, e.g.*, *Chaney v. O'Brien*, No. CIV.A. 7:07CV00121, 2007 WL 1189641 at *3 n.1 (W.D. Va. 2007), *aff'd* 241 Fed. App'x 977 (4th Cir. 2007) (per curiam) (reasoning that the substantive law relevant to a § 2241 petition is the law of the circuit of conviction).

As this Court's January 12, 2018, Order suggested, however, the time for equivocation and indefiniteness on these matters may have passed. For the reasons discussed below, applying the law of the circuit of conviction remains most faithful to habeas corpus principles and the AEDPA framework. But even if this Court

applies Seventh Circuit law, Shepherd should still be resentenced without the ACCA enhancement.

1. Apply Sixth Circuit law and grant Shepherd relief because under Stitt he is not an armed career criminal.

Shepherd was arrested, convicted, and sentenced in Kentucky under a Kentucky burglary statute. He happens to be incarcerated in Indiana because that is where the Bureau of Prisons sent him. Though his confinement in Indiana means his § 2241 claim must be filed in the Seventh Circuit, it by no means dictates that Seventh Circuit law should apply. Applying the law of the circuit of conviction—here, Sixth Circuit law—better aligns with congressional policies and judicial practice in habeas cases. It also ensures consistency through the collateral review process, avoiding the risk of post-conviction relief turning on the government's incidental decision about where it should house inmates. Should this Court choose to apply Sixth Circuit law, it should find that Shepherd is not an armed career criminal.

a. Sixth Circuit law should apply.

The law of habeas corpus is specialized and complex, informed by history and policies that make it unique. For instance, most routine legal questions are aptly and appropriately decided by the law of the circuit in which they are brought because that is where the activities underlying the lawsuit occurred. Civil suits, as well as criminal trials and direct appeals in federal and state court all for the most part orbit around a single jurisdiction and its laws. But federal courts sitting in habeas routinely look to, analyze, and apply other jurisdictions' laws, which makes

it different from the mine run of federal litigation. *See Aponte v. Gomez*, 993 F.2d 705, 707 (9th Cir. 1993) (federal courts are bound by a state court's construction of its own penal statutes); *see also, e.g., Snow v. Pfister*, 880 F.3d 857, 863–64 (7th Cir. 2018) (post-AEDPA, federal courts review state-court interpretations of federal law under a highly deferential standard). In a similar vein, habeas courts are accustomed to the fact that their litigants may have attenuated connections to the forum, either because they have long been incarcerated far away from where their underlying criminal cases took place or because they are bringing a claim in a court with no experience with the underlying case. Unlike the rhyme and reason that undergirds much federal litigation, the happenings in the world of habeas are different and courts should account for those differences in deciding whether the rules that apply to a typical litigant should apply to this special class.

In fact, Congress' decisions were animated by these special characteristics when it enacted AEDPA, and they weigh in favor of using the law of the circuit of conviction to decide cases arising under § 2241. For example, Congress required that § 2255 petitions be filed in the court where the defendant was convicted and sentenced, 28 U.S.C. § 2255(a), because before AEDPA district courts where federal prisons happened to be located had been flooded by habeas petitions in a way that significantly, and unequally, burdened them. *See United States v. Hayman*, 342 U.S. 205, 213–14 (1952). Congress also recognized that crucial evidence, such as witnesses and trial transcripts, was not readily available to courts reviewing habeas petitions filed in the circuit of confinement. *See id.* For that reason, using the circuit

of conviction was a more convenient and sensible solution. *See id.* at 219; *see also Johnson: Remembrance of Illegal Sentences Past*, 28 Fed. Sent. R. 58, 63, 2015 WL 7906242 (Vera Inst. Just.) ("the law of the [circuit of conviction] should govern the legality of the sentence, regardless of where the case is filed, *given § 2255's default to the home district*.") (emphasis added). Because Shepherd's § 2241 petition arises solely through the mechanism provided by § 2255(e), it makes sense to factor in the concerns that prompted Congress to enact AEDPA, and those concerns point towards using the court of conviction.

Indeed, this Court already does so in the procedural inquiry of its current § 2241 approach. Unlike the uncertainty that infects the "choice of law" question in the substantive inquiry, this Court typically looks to the law of the circuit of conviction as part of its second step of the *Davenport* test—deciding whether the petitioner's current claim could have been invoked in a § 2255 motion. *Brown v. Caraway*, 719 F.3d 583, 595–96 (7th Cir. 2013) (applying Third Circuit substantive law as the law of the circuit of conviction to determine whether the petitioner's claim was foreclosed by binding circuit precedent at the time of his original § 2255 motion); *see also Hill v. Masters*, 836 F.3d 591, 595–96 (6th Cir. 2016); *Light v. Caraway*, 761 F.3d 809, 813 (7th Cir. 2014).

District courts in this circuit have generally carried that procedural preference for circuit of conviction into the substantive realm when deciding § 2241 cases on the merits. These courts reason that because § 2255 motions are filed in the circuit of conviction, using that court's law ensures consistency throughout the collateral-

review process. *See, e.g., Hernandez v. Gilkey*, 242 F. Supp. 2d 549, 554 (S.D. Ill. 2001); *see also Hogan v. Butler*, No. CIV. 6:15-046-GFVT 2015 WL 4635612, at *6 (E.D. Ky. 2015) (commenting that, if the law of the circuit of confinement applied, it would "turn the rule of the finality of judgements and convictions on its ear."); *In re Nwanze*, 242 F.3d 521, 527 (3d Cir. 2001) (transferring a habeas petition to the court of conviction because that court is in the best position to know its intentions when it sentenced the petitioner). In fact, the vast majority of lower courts—here and nationwide—echo *Hernandez*'s reasoning and hold that it makes more sense to apply the circuit of conviction's law. *See Aiken v. Taylor*, No. 115CV00771VEHSGC, 2017 WL 6383182, at *2 (N.D. Ala. Dec. 14, 2017); *Roberts v. Watson*, No. 16-CV-541-BBC, 2017 WL 6375812, at *2 (W.D. Wis. Dec. 12, 2017); *Bender v. Carter*, No. 5:12CV165, 2013 WL 5636745, at *2 (N.D.W. Va. Oct. 15, 2013); *Johnson v. Haynes*, No. CV212-128, 2013 WL 53990, at *1 (S.D. Ga. Jan. 3, 2013); *Morgenstern v. Andrews*, No. 5:12-HC-2209-FL, 2013 WL 6239262, at *3 (E.D.N.C. Dec. 3, 2013); *Cantrell v. Warden, FCC Coleman-USP-1*, No. 5:10-CV-483-OC-10TBS, 2012 WL 2127729, at *5 (M.D. Fla. June 12, 2012); *Salazar v. Sherrod*, No. 09-CV-619-DRH-DGW, 2012 WL 3779075, at *4–5 (S.D. Ill. Aug. 31, 2012); *Eames v. Jones*, 793 F. Supp. 2d 747, 749–50 (E.D.N.C. June 20, 2011).

Notably, courts that have applied the law of the circuit of confinement—whether in the procedural or substantive phase of the inquiry—have done so without any meaningful explanation of their decision to do so. *See Rudisill v. Martin*, No. 5:08-CV-272 DCB MTP, 2013 WL 1871701, at *3–4 (S.D. Miss. May 3, 2013); *Searcy v.*

Young, 489 Fed. App'x 808, 810 n.2 (5th Cir. 2012); *Alaimalo v. United States*, 645 F.3d 1042, 1048 (9th Cir. 2011); *Connor v. Hollard*, No. CIV.A. 10-104-HRW, 2010 WL 4791945 (E.D. Ky. Nov. 17, 2010); *Sosa v. Shartle*, No. 1:10CV0769, 2010 WL 3075123 (N.D. Ohio Aug. 4, 2010). In any event, applying the substantive law of the circuit of confinement creates arbitrariness rather than consistency. *See Hernandez*, 242 F. Supp. 2d at 554. The Bureau of Prisons has vast discretion in where it places inmates, 18 U.S.C. § 3621(b), and it often chooses to place inmates based on practical necessities, such as which facilities have available beds or which institution can provide particular services for an inmate, *see Olim v. Wakinekona*, 461 U.S. 238, 245–46 (1983) (explaining that overcrowding and other concerns can necessitate transfers); *Taylor v. Lariva*, 638 F. App'x 539, 541 (7th Cir. 2016) (mem.) (discussing how the BOP may consider these statutory factors, including facility resources and the prisoner's history and characteristics, in designating inmates); *see generally* U.S. Dep't. of Justice, Fed. Bureau of Prisons, *Inmate Security Designation and Custody Classification* (2006) (Program Statement No. 5100.08), available at http://www.bop.gov/policy/progstat/5100_008.pdf) (guiding the designation of an inmate to a specific institution). Its decisionmaking in no way accounts for an inmate's possible future collateral attacks. *See* § 3621 (listing a number of factors for the Bureau to consider in deciding the place of an individual's imprisonment and not mentioning the potential litigiousness of that person).

Using the law of the confinement circuit would result in "similarly situated prisoners—perhaps even co-defendants convicted of the exact same crimes—being

treated differently because of their location." *Hernandez*, 242 F. Supp. 2d at 554. Forum shopping by prisoners might also occur: "a prisoner desiring to have Seventh Circuit law apply to him could misbehave in order to be sent to USP-Marion." *Id.*; *see also Meachum v. Fano*, 427 U.S. 215, 228 (1976) (explaining "[t]hat an inmate's conduct, in general or in specific instances, may often be a major factor in the decision of prison officials to transfer him"). Finally, given that this Court has held that a circuit split cannot serve as a basis for § 2241 relief, *see In re Davenport*, 147 F.3d 605, 612 (7th Cir. 1998), returning to the circuit of conviction when assessing the substantive merits ensures that this Court's approaches are consistent.

b. Under Sixth Circuit law, Shepherd is not an armed career criminal.

The ACCA authorizes a 15-year mandatory minimum sentence if a defendant is convicted of being a felon in possession of a firearm after three prior convictions for a "violent felony." 18 U.S.C. § 924(e)(1). A "violent felony" includes any felony—federal or state—that is "burglary, arson, or extortion." § 924(e)(2)(B)(ii). When Congress listed those crimes, it was referring to their usual or "generic" versions, not all their state-law variations. *See Taylor v. United States*, 495 U.S. 575, 598 (1990). The generic version of burglary is the "crime contain[ing] the following elements: an unlawful or unprivileged entry into . . . a building or other structure, with intent to commit a crime." *Id.*[5]

[5] For indivisible statutes, courts apply the categorical approach to determine whether a prior conviction is for generic burglary. *See Taylor v. United States*, 495 U.S. 575, 600–01 (1990). With an indivisible statute, the application of the categorical approach is relatively straightforward: the court compares the elements of the crime of conviction to those of generic burglary and decides if it criminalizes more conduct than the federal offense. *See id.* A state burglary statute may also be divisible: structured in a way that lists several

This is an easy case if Sixth Circuit law applies because "vehicles and movable enclosures . . . fall outside the definition sweep of [*Taylor*'s] 'building or other structure.'" *United States v. Stitt*, 860 F.3d 854, 857 (6th Cir. 2017) (en banc), *petition for cert. filed* (U.S. Nov. 21, 2017) (No. 17-765). The Tennessee statute that *Stitt* found broader than generic burglary criminalizes "burglary of a habitation." Tenn. Code Ann. § 39-14-403. In turn, the Tennessee Code defines "habitation" as "any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons . . . [including] a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant." *Id.* § 39-14-401. Because the Tennessee statute includes vehicles and movable enclosures, the Sixth Circuit held it is categorically broader than generic burglary, and so a conviction under the statute "does not count as a violent felony under the ACCA." *Stitt*, 860 F.3d at 862

The *Stitt* reasoning applies just the same to Kentucky's second-degree burglary statute. The Kentucky statute criminalizes burglary of a "dwelling," which it defines as "a building which is usually occupied by a person lodging therein." Ky. Rev. Stat. Ann. § 511.010(2). In turn, "building" is defined to include "any structure, vehicle, watercraft or aircraft . . . [w]here any person lives; or [w]here people assemble for

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different crimes in the alternative, each with its own elements, and only one of those listed crimes might match generic burglary. *See Mathis v. United States*, 136 S. Ct. 2243, 2248–49 (2016). The Kentucky statute is indivisible because it proscribes the act of burglarizing a variety of locations, any one of which independently satisfies that element of burglary. *See* Ky. Rev. Stat. Ann. § 511.010(1). Thus, this brief focuses on the indivisibility analysis.

purposes of business, government, education, religion, entertainment or public transportation." *Id.* § 511.010(1). *Stitt* holds that the mere inclusion of vehicles and movable enclosures in a State burglary statute goes too far for generic burglary. 860 F.3d at 858. The Kentucky statute is no different. It too includes vehicles and movable enclosures (and a lot more, including things that the Tennessee statute does not cover, like boats and planes and schools and churches).

And under *Stitt*, it does not matter that Kentucky requires a building be "usually occupied by a person lodging therein" to count as a dwelling—just like it did not matter that Tennessee requires a vehicle or movable enclosure be "designed or adapted for the overnight accommodation of persons." *Id.* ("The issue before us . . . is whether a burglary statute that covers vehicles or movable enclosures only if they are ['designed or adapted for the overnight accommodation of persons'] fits within the bounds of generic burglary. We hold that it does not.") Indeed, as a concurrence specifically makes clear: "Kentucky's definition of a 'dwelling' includes vehicles, watercraft, and aircraft, and is thus broader than the common-law meaning of dwelling." *Id.* at 874. (White, J., concurring). Based on *Stitt*, Kentucky's burglary statute is broader than generic burglary and so Shepherd's convictions are not predicate offenses under the ACCA.

2. Alternatively, if this Court holds that Seventh Circuit law governs, Shepherd is still entitled to relief.

Even under Seventh Circuit law, Shepherd's prior burglary convictions do not count as ACCA predicate offenses because Kentucky's second-degree burglary goes beyond generic burglary. Still, should this Court disagree and hold Shepherd an

armed career criminal under circuit precedent, it would be a miscarriage of justice to deny him relief when this Court, sitting in habeas, has a variety of means to ensure that no fundamental unfairness is worked in this case.

a. Under this Court's ACCA jurisprudence, Shepherd is not an armed career criminal.

ACCA burglary is not burglary in all its state-law mutations, but only the generic crime defined in *Taylor*, 495 U.S. at 598. Though *Taylor* does not define "building or other structure," it gives this qualification: a state burglary statute that includes "places, such as *automobiles* and vending machines, other than buildings" goes beyond generic burglary. *Id.* at 599 (emphasis added).

Four times after *Taylor*, the Supreme Court again placed vehicles beyond the scope of generic burglary. *Mathis v. United States*, 136 S. Ct. 2243, 2250 (2016) (holding that Iowa's burglary statute "reaches a broader range of places" than generic burglary because it covers "any building, structure, *[or] land, water, or air vehicle*.") (emphasis in original); *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009) (noting that "breaking into a building" falls within generic burglary but breaking into a "vessel" would not); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186–87 (2007) (noting that some States "define burglary more broadly, as by extending it to entries into boats and cars"); *Shepard v. United States*, 544 U.S. 13, 15–16 (2005) ("The [ACCA] makes burglary a violent felony only if committed in a building or enclosed space . . . not in a boat or motor vehicle.").

And just a few weeks ago, this Court reaffirmed that a state burglary statute is broader than generic burglary if it applies "for example, to unlawful entries into

vehicles as well as buildings or structures[.]" *United States v. Franklin*, No. 16-1580, 2018 WL 1044836, at *1 (7th Cir. Feb. 26, 2018) (emphasis added). A state burglary statute that reaches vehicles "does not count under the ACCA definition." *Id.* That remains the law in this circuit. This Court's recent decision in *Smith v. United States* is not to the contrary. 877 F.3d 720 (7th Cir. 2017), *petition for cert. filed* (U.S. Jan. 17, 2018) (No. 17-7517).

In *Smith*, this Court was tasked with deciding whether the Illinois residential burglary statute fell within the parameters of generic burglary so as to constitute an ACCA predicate. The Illinois statute criminalizes unlawful entry into the "dwelling place" of another, and defines "dwelling" as "a house, apartment, mobile home, trailer, or other living quarters in which at the time of the alleged offense the owners or occupants actually reside or in their absence intend within a reasonable period of time to reside." 720 ILCS § 5/2-6. Because prior Illinois case law had determined that this statute *excludes* "all vehicles other than occupied trailers," this Court's job was to simply decide whether mobile homes and trailers could be "structures" for *Taylor* purposes. *Smith*, 877 F.3d at 723. This Court held they could. *Id.* at 722-25 (analogizing to UCC definition of "mobile home" as a "structure" and calling it "just a prefabricated house."). But in *Smith* this Court had no occasion to—and did not—decide whether vehicles other than motor homes and trailers fall within the generic burglary definition.[6]

[6] At the very least, there is ambiguity in the Seventh Circuit about whether vehicles are categorically excluded from generic burglary under the ACCA. Ambiguity should be resolved in Shepherd's favor. *See Cleveland v. United States*, 531 U.S. 12, 25 (2000); *see also Taylor v. United States*, 495 U.S. 575, 596 (1990). (recognizing that criminal

The furthest any other circuit has gone in interpreting *Taylor*'s "building or other structure" element for generic burglary is to include vehicles (or other nonpermanent structures like tents) that are designed or adapted for human accommodation. *See, e.g.*, *United States v. Spring*, 80 F.3d 1450, 1462 (10th Cir. 1996); *United States v. Stitt*, 860 F.3d 854, 880–81 (6th Cir. 2017) (en banc) (Sutton, J., dissenting), *petition for cert. filed* (U.S. Nov. 21, 2017) (No. 17-765). Even under this approach, however, generic burglary does not include all vehicles (or all other nonpermanent structures); it only covers vehicles designed or adapted for human accommodation.

The Kentucky statute includes all sorts of vehicles: planes, trains, automobiles. Even watercraft—container ship to canoe—fall in the statute's sweep. Ky. Rev. Stat. Ann. § 511.010(1)(b) ("any structure, vehicle, watercraft or aircraft"). Because the statute adds vehicles to the list of places that can be burglarized, it is no different from the Iowa statute in *Mathis* and the Wisconsin statute in *Franklin*; like those statutes, the Kentucky statute is "a state burglary statute [that] is broader than 'generic burglary' by applying . . . to unlawful entries into vehicles as well as buildings or structures[.]" *Franklin*, 2018 WL 1044836, at *1. On this basis alone, a

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sentencing provisions—such as the ACCA—should be construed in favor of the accused so long as those interpretations are not implausible or at odds with generally accepted contemporary meanings of terms). Lenity is "especially appropriate" when the ambiguous criminal offense is a springboard for harsher punishment, like generic burglary is under the AACA. *Id.* (describing the rule of lenity as "especially appropriate" for the federal mail fraud statute because it is a predicate offense under RICO and the money laundering statute). Resolving ambiguity in Shepherd's favor means interpreting generic burglary to categorically exclude vehicles. *See Franklin*, 2018 WL 1044836, at *1.

conviction under the Kentucky statute "does not count under the ACCA definition [of generic burglary]." *Id.*

Even under the Tenth Circuit's and Judge Sutton's more inclusive (and less lenient) interpretation of generic burglary, the Kentucky statute goes too far. The statute does not even limit the types of buildings it includes in its already-broad sweep to buildings where people live. It goes further to include all buildings (which, remember, is defined to included vehicles, watercrafts, and aircrafts) "where any person lives; *or [w]here people assemble for purposes of business, government, education, religion, entertainment or public transportation*." Ky. Rev. Stat. Ann. § 511.010(1) (emphasis added). According to the statute, factories, town halls, classrooms, movie theatres, churches, and even train stations can be burglarized. Yet like Judge Sutton's examples of bridges, cranes, gazebos, and doll house, these places are "as a matter of function . . . not designed to house people." *Stitt*, 860 F.3d at 879. Whether it be a gazebo or a factory, a doll house or a town hall, stealing from those types of buildings is not generic burglary because they are not designed or adapted for humans to live. *Id.*

On the very broadest interpretation of the ACCA—the opposite of what the rule of lenity requires—Kentucky's burglary statute could only be generic if its twin unruly phrases "any structure, vehicle, watercraft or aircraft" and "[w]here people assemble for purposes of business, government, education, religion, entertainment or public transportation" were bridled to go only as far as places or structures adapted or designed for overnight accommodation. Kentucky's after-thought

requirement in its definition of "dwelling" that a building be "usually occupied by a person lodging therein" is not enough. Ky. Rev. Stat. Ann. § 511.010(2). The Supreme Court of Kentucky has held that whether a building meets the "dwelling" definition (and, therefore, the usually-occupied proviso) "turns on [a building's] capacity, at the time of unlawful entry, of being occupied overnight and the intent of lawful or authorized persons to use it as such." *Cochran v. Commonwealth*, 114 S.W.3d 837, 839 (Ky. 2003). This makes Kentucky's usually-occupied proviso more inclusive than a requirement that a structure be designed or adapted for human occupation. A building can be "usually occupied by a person lodging therein" (and so it would count for Kentucky burglary) even though it was not designed or adapted for human accommodation (and so it would not count for generic burglary). The Kentucky statute impermissibly looks to the *use* of a structure, as idiosyncratic as it may be, while the generic inquiry takes a narrower focus on the *nature* of a structure. *United States v. Rainer*, 616 F.3d 1212, 1215 (11th Cir. 2010), *overruled on other grounds by United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014). Something can be usually occupied by a lodger (Kentucky's use-focus) without it necessarily being designed or adapted for human accommodation (the generic offense's nature-focus).

For example, someone fallen on hard times may live out of his car. The car would likely count as a "dwelling" under the Kentucky burglary statute because it has "capacity . . . of being occupied overnight" and would be "usually occupied by a person lodging therein." Yet someone can live in his car without the car being

designed or adapted for human accommodation (unlike, for example, a motor home). Similarly, a church may open its doors each night so people can take shelter and sleep on its pews. The church would be a "dwelling" under the Kentucky statute because it has "capacity . . . of being occupied overnight" and would be "usually occupied by a person lodging therein." Yet someone can live in a church without the church necessarily being designed or adapted for human accommodation (unlike, for example, a church-run night shelter). As shown, Kentucky's usually-occupied proviso focuses on a structure's use, not its nature.[7] And so even with the proviso, the Kentucky statute still lets in what even the broadest interpretation of generic burglary keeps out.

As this Court acknowledged in *Smith*, "if any of the defined ways to commit [burglary] in [the State] falls outside the federal definition of 'burglary,' the state-law convictions do not count under the [ACCA]." 877 F.3d at 723. Just so here. Kentucky's second-degree burglary statute is categorically overbroad: a vehicle or boat usually occupied by a person lodging therein may sometimes fall within the generic crime, but not *always* (because the vehicle or boat, though usually occupied, may not have been designed or adapted for human accommodation). No matter

[7] Kentucky courts have not decided whether a car or church can be burglarized under the second-degree burglary statute. But Kentucky courts have held that a storage shed and warehouse are "buildings" under § 511.010(1). *See, e.g.*, *Spears v. Commonwealth*, 78 S.W.3d 755, 760 (Ky. Ct. App. 2002) (shed); *Clubb v. Commonwealth*, No. 2008-CA-002014-MR, 2009 WL 4723175, at *2 (Ky. Ct. App. Dec. 11, 2009) (unpublished) (warehouse). If someone sleeps in a shed or warehouse, each would be a building "usually occupied by a person lodging therein," and so each would constitute a "dwelling" within the reach of Kentucky's second-degree burglary statute. But, importantly, neither would necessarily be designed or adapted for human accommodation, placing both beyond generic burglary.

which approach to the "building or other structure" element of generic burglary is taken, Shepherd's prior burglaries are not predicate offenses under the ACCA.

b. Even if this Court believes Shepherd's prior convictions qualify as ACCA predicates, it should nonetheless grant him habeas relief to avoid a miscarriage of justice.

This Court has the power when acting in habeas corpus to "ensure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). To this end, the habeas statute requires that courts dispose of petitions "as law and justice require." 28 U.S.C. § 2243. Equitable considerations govern habeas corpus to effectuate that promise, such that it is not "a static, narrow, formalistic remedy," *Jones v. Cunningham*, 371 U.S. 236, 243 (1963), but rather one that has the "ability to cut through barriers of form and procedural mazes," *Harris v. Nelson*, 394 U.S. 286, 291 (1969). Federal courts may grant any form of relief necessary to see that justice is done. *See Hilton v. Braunskill*, 481 U.S. 770, 775 (1987); *see also Peyton v. Rowe*, 391 U.S. 54, 66 (1968).

In order for this Court to exercise its inherent flexibility, Petitioner has identified no less than five options that this Court could employ to ensure that no miscarriage of justice occurs. The first four remedies, discussed in more detail below, involve the Court granting the petition and taking some additional remedial action on the merits: (1) order Shepherd's immediate release; (2) order his conditional release; (3) reverse and remand instructing the trial court to resentence him without the ACCA enhancement; and (4) reverse and remand instructing the

trial court to simply resentence him. Finally, a fifth option is for this Court to authorize the petition and transfer the case to the Kentucky sentencing court for substantive analysis on the merits in the first instance.

As of the filing time of this brief, Shepherd has been incarcerated beyond the maximum ten-year sentence he could have received without an ACCA enhancement. The first two options identified above—immediate release and conditional release—would permit this Court to promptly remedy the injustice stemming from his continued incarceration. *See United States v. Llewlyn*, 879 F.3d 1291, 1296 (11th Cir. 2018) (noting that a court "may vacate and set aside the judgment, resentence the defendant, grant a new trial, or correct the sentence as it sees fit."); *see In re Bonner*, 151 U.S. 242 (1894) (recognizing conditional release subject to the right of the government to invoke the power of the court of original jurisdiction to resentence the petitioner). Turning to options three and four, this Court also has the ability to include relevant instructions to guide the district court in its exercise of discretion. *See Narvaez v. United States*, 674 F.3d 621, 630 (7th Cir. 2011) (reversing and remanding with instructions "to impose the sentence applicable without the imposition of a career offender status").[8]

[8] In criminal cases, penalty statutes are jurisdictional in and of themselves, meaning that they circumscribe the actual power of the court. *See In re Mills*, 135 U.S. 263, 270 (1890) (collecting cases). To be sure, an excessive sentence does not render the lawful portion of the sentence void, but merely voids the excess, and thus, opens it to challenge. *See United States v. Pridgeon*, 153 U.S. 48, 62 (1894). To remedy a sentence imposed beyond the jurisdiction of the trial court, a reviewing court can send the case to the trial court for a resentencing within the appropriate bounds of its jurisdiction.

This Court could also opt not to weigh in on the substantive merits of the case by simply transferring it back to the sentencing court to handle it in the first instance. *See Conley v. Crabtree*, 14 F. Supp. 2d 1203, 1206–07 (D. Or. 1998) (concluding "that the threshold determination of whether the petition may even proceed under § 2241 should be made" in the habeas court, and if § 2241 is the appropriate mechanism for the claim, "the case should then be transferred to the district in which the petitioner was convicted and sentenced."). Especially in habeas cases, courts rely on their transfer powers to effectuate the interests of justice. *See In re Nwanze*, 242 F.3d 521, 527 (3d Cir. 2001) (denying petitioner's habeas claim without prejudice so a claim could be reinstated if the petitioner could not get relief in the sentencing court on jurisdictional grounds); *Hill v. Daniels*, CIV.05-1292-AA, 2005 WL 2249858, at *2 (D. Or. Sept. 14, 2005) (citing *United States v. Hayman*, 342 U.S. 205 (1952)) (holding that "transfer is consistent with the dichotomy that Congress established between the responsibilities of the sentencing court and those of the court in the district of incarceration").

This Court can choose from a range of options to grant Shepherd relief even if it believes that he would qualify as an armed career criminal under its law as it stands today, but did not when he filed his original brief, and may not after this case is over. This Court should use the broad remedial tools at its disposal when sitting in habeas because this petition represents that rare case where exceptional circumstances necessitate a remedy afforded by the writ.

For nearly a decade, Shepherd has asked courts to earnestly review his ACCA-enhanced sentence. (B.5, B.21, B.26, B.29, B.32, B.35, A.45, R.11.) None have, until now. This Court appointed counsel to assist Shepherd and to determine if he indeed had meritorious claims. (R.9, Order Appointing Counsel.) And he did—the government agreed. (*See generally* Stipulated Motion.) The Sixth Circuit seemingly would have as well given its abrogation of the cases on which the Kentucky district court relied in imposing Shepherd's ACCA enhancement. *See United States v. Nance*, 481 F.3d 882 (6th Cir. 2007), *overruled by United States v. Stitt*, 860 F.3d 854, 861 (6th Cir. 2017) (en banc); *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015), *abrogated by United States v. Stitt*, 860 F.3d 854, 861 n.4 (6th Cir. 2017) (en banc); *see also United States v. Ozier*, 796 F.3d 597 (6th Cir. 2015), *abrogated by Mathis v. United States*, 136 S. Ct. 2243, 2251 n.1 (2016).

Even this Court, until just weeks after Shepherd filed his original brief, recognized as overbroad statutes that explicitly include vehicles in their grasp, as Kentucky's does. *See United States v. Perry*, 862 F.3d 620, 624 (7th Cir. 2017) (observing that, although Indiana burglary does not cover vehicles or other movable conveyances, those locations take statutes that do include them outside the scope of generic burglary); *United States v. Haney*, 840 F.3d 472, 475 (7th Cir. 2016) (holding that the 1973 Illinois burglary statute covered a greater swath of conduct than the generic offense because it included vehicles like trailers, watercraft, aircraft, and railroad cars); *United States v. Edwards*, 836 F.3d 831, 837 (7th Cir. 2016) (citing *Mathis*, 136 S. Ct. at 2251) (finding that Wisconsin's burglary statute was broader

than the Guidelines offense because it reached locations such as railroad cars and ships).

This Court issued *Smith* on December 13, 2017, days before the government's brief filing date and while the parties were in discussions about the stipulated motion to reverse and remand. As detailed above, Shepherd believes that his prior Kentucky convictions do not qualify as ACCA predicates even under *Smith*. But Petitioner cannot read the tea leaves of *Smith*'s import to this Court, even more cloudy given this Court's recent decision in *Franklin*, which seemingly reaffirmed its position that vehicles fall outside the definition of generic burglary. *Franklin*, 2018 WL 1044836 at *1–2 (maintaining that the Wisconsin burglary statute is broader than generic burglary because it includes a handful of vehicles). Because Smith himself did not seek rehearing en banc before filing his petition for certiorari, however, Shepherd can divine nothing from that case's subsequent history except that Smith disagrees with the panel's reasoning. Petition for Writ of Certiorari, Smith v. United States, No. 17-7517 (2018) (calling *Smith* into question because the *Taylor* Court made a conscious choice to eliminate an occupancy requirement to exempt the MPC's inclusion of vehicles and it also expressly rejected a dwelling element because many states expanded beyond this concept or omitted it altogether).

Thus, Shepherd unfortunately finds himself in a shifting legal landscape neither of his making nor dictated by the Supreme Court. His appeal will surely conclude before anyone has a real sense of what the Supreme Court believes to be the proper

resolution, as it should, given that he has already served more than all the time he would have served had he been sentenced without the ACCA enhancement. *See* 18 U.S.C. § 924(a)(2) (imposing a 10-year statutory maximum for being a felon in possession of a firearm). Finally, once this court disposes of his case, he will have no other options but to sit and serve out the remaining five years of his original sentence. 28 U.S.C. § 2244(a) ("No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in § 2255."); *see United States v. Wilkozek*, 822 F.3d 364, 368 (7th Cir. 2016) (requiring as a condition of obtaining coram nobis relief that the petitioner be challenging his *conviction* and be no longer in custody); *see also Valona v. United States*, 138 F.3d 693, 694–95 (7th Cir. 1998) (explaining that "§ 2244(a) bars successive petitions under § 2241 directed to the same issue concerning execution of a sentence.").

In unusual circumstances such as these, the unique nature of the writ and the flexibility afforded a court to right perceived wrongs permits this Court to exercise its vast discretion under habeas and grant Shepherd relief, even if it believes that he would qualify as an armed career criminal under its law as it stands today.

3. If this Court applies Seventh Circuit law and denies Shepherd relief on that basis, it would affirmatively create the very miscarriage of justice that habeas seeks to avoid.

Not only does this Court have the power to grant habeas relief against detentions that violate fundamental fairness, *Engle v. Isaac*, 456 U.S 107, 126 (1982), it has a duty not to use habeas law in a way that affirmatively works such unfairness, *see Francis v. Henderson*, 425 U.S. 536, 539 (1976) (explaining that there may be some circumstances where a federal court must forego the exercise of its habeas corpus power). In ordering supplemental memoranda last January, this Court posed the following question: "If [it found that Shepherd would be an armed career criminal under Seventh Circuit law], would it be a 'miscarriage of justice' for this court to refuse to enforce Sixth Circuit law with which it disagrees?" (Shepherd v. Julian, No. 17-1362 (7th Cir. Jan. 12, 2018), ECF No. 19 (ordering that the parties provide the court with memoranda answering three questions).) Petitioner hopes that this brief demonstrates precisely why the answer to that question must be yes.

A district court in the Sixth Circuit enhanced Shepherd's sentence, and now the Sixth Circuit recognizes that such an enhancement is unlawful. If this Court holds that Shepherd is an armed career criminal, and consequently denies him relief, it will be papering over a fundamental defect in Shepherd's sentence—a true miscarriage of justice. *Cf. United States v. Addonizio*, 442 U.S. 178, 187 (1979). Shepherd will remain imprisoned for longer than he should. *See United States v. Jenkins*, 854 F.3d 181, 192 (2d Cir. 2017) (stating that "[a]dditional months in prison are not simply numbers. Those months have exceptionally severe consequences for the incarcerated individual."); *United States v. Paladino*, 401 F.3d

471, 483 (7th Cir. 2005) (explaining that "[i]t is a miscarriage of justice to give a person an illegal sentence that increases his punishment, just as it is to convict an innocent person."); *Ex parte Lange*, 18 Wall. 163, 176–77 (1874) (holding that the Constitution prohibits a court from imposing a sentence greater than what the legislature authorized). If his sentence was imposed or reviewed in the Sixth Circuit today, Shepherd would receive a remedy. Here, and now, the privilege of habeas corpus guarantees him more than an arbitrary denial of relief solely because of his confinement in this circuit.

CONCLUSION

For the aforementioned reasons, this Court should grant Shepherd's petition for a writ of habeas corpus under 28 U.S.C. § 2241, and reverse and remand to the trial court with whatever conditions it deems appropriate. If this Court chooses not to do so, however, it should at a minimum order the transfer of this case to the Western District of Kentucky for a resentencing within that court's jurisdiction.

Respectfully submitted,

Joshua E. Shepherd
Petitioner

By: /s/ SARAH O'ROURKE SCHRUP
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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)

1. This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 12,232 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 365 in 12-point Century Schoolbook font with footnotes in 11-point Century Schoolbook font.

_____

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Dated: March 20, 2018

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Petitioner, Joshua E. Shepherd, hereby certify that I electronically filed this brief and appendices with the clerk of the Seventh Circuit Court of Appeals on March 20, 2018, which will send notice of the filing to counsel of record in the case.

_____

/s/ Sarah O'Rourke Schrup
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CIRCUIT RULE 30(d) STATEMENT

I, the undersigned, counsel for Petitioner, Joshua E. Shepherd, hereby state that all of the materials required by Circuit Rules 30(a) and 30(b) are included in the Appendix to this brief.

/s/ Sarah O'Rourke Schrup
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Dated: March 20, 2018

RULE 30(a) SHORT APPENDIX TABLE OF CONTENTS

Plea Agreement

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

FILED
Jeffrey A. Apperson, Clerk
JUL 28 2008
U.S. DISTRICT COURT
WEST'N. DIST. KENTUCKY

UNITED STATES OF AMERICA PLAINTIFF

v. CRIMINAL NO. _4:08CR-4-M

JOSHUA EUGENE SHEPHERD DEFENDANT

PLEA AGREEMENT

Pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure, the United States of America, by David L. Huber, United States Attorney for the Western District of Kentucky, and defendant, JOSHUA EUGENE SHEPHERD, and his attorney, Hon. Michael Lee, have agreed upon the following:

1. Defendant acknowledges that he has been charged in the Indictment under **Count 1** with violation of title 21 U.S.C. § 841(a)(1), relating to possession with intent to distribute a detectable amount of marijuana; **Count 2** with violation of Title 18 U.S.C. § 922(g)(1), relating to possession of a firearm by a convicted felon; and **Counts 3 & 4** relate to forfeiture.

2. Defendant has read the charges against him contained in the Indictment, and those charges have been fully explained to him by his attorney. Defendant fully understands the nature and elements of the crimes with which he has been charged.

3. Defendant will enter a voluntary plea of guilty to all indicted charges in this case. Defendant will plead guilty

because he is in fact guilty of the charges. The parties agree to the following factual basis for this plea: On June 3, 2007, in the Western District of Kentucky, Daviess County, the defendant was stopped by a Daviess County Sheriff for Driving Under the Influence (DUI). At the time of the stop, the defendant was in possession of a Taurus, model PT92 AFS, 9mm semi-automatic pistol, serial number TVB54935, that had traveled in interstate commerce, and approximately 6 lbs of marijuana packaged for sale. It was defendant's intent to distribute the marijuana in the Western District of Kentucky. The defendant is a multiple time convicted felon resulting from Davies County, Kentucky convictions under indictments 97CR00321, 98CR00091, 97CR00412, and 00CR00032. The defendant cooperated with law enforcement and gave a taped statement admitting his possession of the firearm and marijuana.

4. Defendant understands that the charges to which he will plead guilty carries a maximum combined term of imprisonment of 15 years, a maximum combined fine of $500,000.00, and no more than a combined 5 year term of supervised release. Defendant understands if he is found to be an Armed Career Criminal, pursuant to Title 18 U.S.C. §924 (e)(1), then the charges to which he will plead carries a maximum term of imprisonment of Life, and a mandatory minimum of no less than 15 years. Defendant understands that an additional term of imprisonment may be

ordered if the terms of the supervised release are violated, as explained in 18 U.S.C. § 3583.

5. Defendant understands that if a term of imprisonment of more than one year is imposed, the Sentencing Guidelines require a term of supervised release and that he will then be subject to certain conditions of release. §§5D1.1, 5D1.2, 5D1.3.

6. Defendant understands that by pleading guilty, he surrenders certain rights set forth below. Defendant's attorney has explained those rights to him and the consequences of his waiver of those rights, including the following:

A. If defendant persists in a plea of not guilty to the charge against him, he has the right to a public and speedy trial. The trial could either be a jury trial or a trial by the judge sitting without a jury. If there is a jury trial, the jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that defendant is presumed innocent and that it could not convict him unless, after hearing all the evidence, it was persuaded of defendant's guilt beyond a reasonable doubt.

B. At a trial, whether by a jury or a judge, the United States would be required to present its witnesses and other evidence against defendant.

Defendant would be able to confront those government witnesses and his attorney would be able to cross-examine them. In turn, defendant could present witnesses and other evidence in his own behalf. If the witnesses for defendant would not appear voluntarily, he could require their attendance through the subpoena power of the Court.

C. At a trial, defendant would have a privilege against self-incrimination and he could decline to testify, without any inference of guilt being drawn from his refusal to testify. If defendant desired to do so, he could testify in his own behalf.

7. Defendant understands that the United States Attorney's Office has an obligation to fully apprise the District Court and the United States Probation Office of all facts pertinent to the sentencing process, and to respond to all legal or factual inquiries that might arise either before, during, or after sentencing. Defendant admits all acts and essential elements of the indictment counts to which he pleads guilty.

8. Defendant understands that the United States will inform the court that no restitution is owed. The defendant further understands that he may be responsible for a fine, costs of prosecution, costs of incarceration and supervision which may be required.

9. Defendant acknowledges liability for the special assessment mandated by 18 U.S.C. § 3013 and will pay the assessment in the amount $100 per count for felony offenses involving individuals to the United States District Court Clerk's Office by the date of sentencing.

10. At the time of sentencing, the United States will:

-recommend a sentence of imprisonment at the lowest end of the applicable Guideline Range, but not less than any mandatory minimum term of imprisonment required by law;

-recommend a reduction of 3 levels below the otherwise applicable Guideline for "acceptance of responsibility" as provided by §3E1.1(a) and (b), provided the defendant does not engage in future conduct which violates a condition of bond, constitutes obstruction of justice, or otherwise demonstrates a lack of acceptance of responsibility. Should such conduct occur and the United States, therefore, opposes the reduction for acceptance, this plea agreement remains binding and the defendant will not be allowed to withdraw his plea;

-consider making a motion pursuant to §5K1.1 of the Sentencing Guidelines and 18 U.S.C. § 3553(e), stating the extent to which the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense. Whether or not to make such motion shall be in the sole discretion of the United States Attorney; and

-agree to a fine at the low end of guidelines as determined by the Court to apply in this case, provided the Court determines the defendant has the ability to pay a fine.

11. Both parties have reserved for sentencing all arguments relating to the applicable advisory guideline range. However,

for informational purposes and not be to be construed as a binding calculation the United States its belief of the applicable Sentencing Guideline range as follows:

A. The Applicable Offense Level should be determined as follows:

Base Offense Level Firearms U.S.S.G. §2k2.1	24
Connection to felony offense U.S.S.G. §2k2.1	+4
Armed Career Criminal U.S.S.G. §4B1.4	34
Acceptance of Responsibility U.S.S.G. §3E1.1(b)	-3
Total	31

Base Offense Level Marijuana U.S.S.G. §2D1.1(14)	12
Firearm U.S.S.G. §2D1.1(b)	+2
Career Offender U.S.S.G. §4B1.1	17
Acceptance of Responsibility U.S.S.G. §3E1.1(b)	-3
Total	14

Grouping U.S.S.G. §3D1.1	
Total	**31**

B. The Criminal History of defendant shall be determined upon completion of the pre-sentence investigation, pursuant to Fed. R. Crim. P. 32(c). Both parties reserve the right to object to the USSG §4A1.1 calculation of defendant's criminal history. The parties agree to not seek a departure from the

Criminal History Category pursuant to §4A1.3.

C. The foregoing statements of applicability of sections of the Sentencing Guidelines and the statement of facts are not binding upon the Court. The defendant understands the Court will independently calculate the Guidelines at sentencing and defendant may not withdraw the plea of guilty solely because the Court does not agree with either the statement of facts or Sentencing Guideline application.

12. Defendant is aware of his right to appeal his conviction and that 18 U.S.C. § 3742 affords a defendant the right to appeal the sentence imposed. The Defendant knowingly and voluntarily waives the right to directly appeal his conviction and the resulting sentence pursuant to Fed. R. App. P. 4(b) and 18 U.S.C. § 3742. However, defendant shall maintain his right to appeal the sentence imposed only if the Court departs from the applicable advisory guideline range, *as determined by the Court*. Defendant expressly waives the right to contest or collaterally attack his conviction and the resulting sentence pursuant to 28 U.S.C. § 2255 or for any other reason. Defendant understands and agrees that nothing in this plea agreement should be construed as a waiver by the United States of its right to appeal the sentence under 18 U.S.C. § 3742.

13. Defendant agrees not to pursue or initiate any civil

claims or suits against the United States of America, its agencies or employees, whether or not presently known to defendant, arising out of the investigation or prosecution of the offense covered by this Agreement.

14. The defendant hereby waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act of 1974, 5 U.S.C. § 552a.

15. Defendant agrees to interpose no objection to the United States transferring evidence or providing information concerning defendant and this offense, to other state and federal agencies or other organizations, including, but not limited to the Internal Revenue Service, other law enforcement agencies, and any licensing and regulatory bodies, or to the entry of an order under Fed. R. Crim. P. 6(e) authorizing transfer to the Examination Division of the Internal Revenue Service of defendant's documents, or documents of third persons, in possession of the Grand Jury, the United States Attorney, or the Criminal Investigation Division of the Internal Revenue Service.

16. It is understood that pursuant to Fed. R. Crim. P. 11(c)(1)(B), the recommendations of the United States are not

binding on the Court. In other words, the Court is not bound by the sentencing recommendation and defendant will have no right to withdraw his guilty plea if the Court decides not to accept the sentencing recommendation set forth in this Agreement.

17. Defendant agrees that the disposition provided for within this Agreement is fair, taking into account all aggravating and mitigating factors. Defendant states that he has informed the United States Attorney's Office and the Probation Officer, either directly or through his attorney, of all mitigating factors. Defendant will not oppose imposition of a sentence incorporating the disposition provided for within this Agreement, nor argue for any other sentence. If Defendant argues for any sentence other than the one to which he has agreed, he is in breach of this Agreement. Defendant agrees that the remedy for this breach is that the United States is relieved of its obligations under this Agreement, but Defendant may not withdraw his guilty plea because of his breach

18. This document states the complete and only Plea Agreement between the United States Attorney for the Western District of Kentucky and defendant in this case, and is binding only on the parties to this Agreement, supersedes all prior understandings, if any, whether written or oral, and cannot be modified other than in writing that is signed by all parties or on the record in Court. No other promises or inducements have

been or will be made to defendant in connection with this case, nor have any predictions or threats been made in connection with this plea.

AGREED:

DAVID L. HUBER
United States Attorney

By: _____ 7/28/08
Mac Shannon Date
Assistant U.S. Attorney

I have read this Agreement and carefully reviewed every part of it with my attorney. I fully understand it and I voluntarily agree to it.

_____ 7/28/08
Joshua Eugene Shepherd Date
Defendant

I am the defendant's counsel. I have carefully reviewed every part of this Agreement with the defendant. To my knowledge my client's decision to enter into this Agreement is an informed and voluntary one.

_____ 7/28/08
Hon. Michael Lee Date
Counsel for Defendant

DLH:MAC

Change of Plea Transcript [pp. 7–10, 14, 20]

that you don't have to prove anything at the trial, you don't have to call witnesses, you don't have to testify, that the United States has to prove your guilt beyond a reasonable doubt.

It's a fairly high burden of proof that they have to meet, and sometimes they meet it and sometimes they don't. They try to meet their burden by bringing witnesses in here to testify about the things that they claim you did. And Mr. Lee would be there to assist you throughout the trial, to cross-examine the witnesses, that means, ask them questions. He tries to bring out things that would help you in your defense.

Then it becomes your time to put on your case if you want to. But like I said before, you don't have to. But you could subpoena witnesses and have them testify, and then you could choose to testify if you wanted to. After all of the evidence is in, then I have to give jury instructions to the jury and -- they would all have to agree on any verdict that they reach whether it is guilty or not guilty.

If they should convict you of any one of these charges, then you could appeal the conviction itself and the sentence to a higher court

to see whether mistakes had been made, to see whether or not the sentence that I gave you was a reasonable one or not.

This plea agreement, does it waive the right to appeal?

MR. SHANNON: It does, Your Honor. The defendant does maintain his right to appeal should the Court depart in the sentencing.

THE COURT: All right. In this plea agreement, Mr. Shepherd, there is -- I guess there is a limited waiver of an appeal right.

What's the statutory parameter here for these offenses?

MR. SHANNON: Your Honor, for the offenses, what the defendant is facing is a combined maximum penalty of no more than 15 years. There is no mandatory minimum. However, in this case, based on his criminal history, we believe that he will be an armed career criminal, which then would change the penalty to no more than life and a mandatory minimum of 15 years.

THE COURT: But that's a guideline mandatory or is that a statutory?

MR. SHANNON: That's statutory.

THE COURT: Statutory. Okay. If he

meets -- is there going to be an argument about that?

MR. LEE: Yes, Your Honor.

THE COURT: Okay. And it's going to be based on whether or not something is a qualifying conviction or not?

MR. LEE: At least that, Judge.

THE COURT: Okay. All right.

MR. LEE: But, yes, there will be an argument about whether certain previous convictions meet that criteria.

THE COURT: Okay. So the armed career criminal is a statutory term, and then a career offender is the guideline term. So this is not a guideline thing where I have discretion about whether or not, right?

MR. SHANNON: Correct.

THE COURT: Okay. If I find he qualifies as a non-career criminal, then he is looking at a mandatory minimum sentence of 15 years?

MR. LEE: That's correct. And he understands that we would be addressing that issue with you irrespective of a jury trial or a plea.

THE COURT: And if I find that he is an armed career criminal and sentence him accordingly,

has he given up his right to appeal that finding?

MR. LEE: No. My understanding was that we were not waiving that.

THE COURT: Is that right?

MR. SHANNON: Judge, in this instance, I think based on the language for departing from the advisory guidelines, I know it would still be within the guidelines, I believe that the United States is not seeking for a waiver of appeal on that issue, so they can't appeal that.

THE COURT: Okay. Now, the guideline application as set out in the plea agreement, is that -- it looks like you're finding that there is an -- are you agreeing to this?

MR. LEE: No, I am not agreeing to that yet, Judge. If you read the plea agreement, it says the United States' belief is that that is what it would be. The defendant does not agree or concede that that is true. That's their representation as to what they believe the calculation would be.

THE COURT: Okay. So the first sentence of Paragraph 11 is the one that is most important to you?

MR. LEE: Yes.

THE COURT: Okay. Mr. Shannon, anything

is that if I find that you're an armed career criminal statutorily, then that would be a law that says I cannot sentence you to less than 15 years, even if the guidelines should be something different or even if I wanted to.

Do you understand how that works?

THE DEFENDANT: Yes, sir.

THE COURT: So I will be deciding all of those things at your sentencing hearing. And regardless of how they come out, your only recourse will be to appeal those things. You won't be able to say, well, I'll take my chances with a jury now, I want to take all of this back.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. So, essentially, you are agreeing no matter what the language is of this agreement that all of those things that I just talked about having to decide are things that you can appeal if I decide them against you, Mr. Lee, right?

MR. LEE: Yes, Your Honor.

THE COURT: Okay. And you agree with that?

MR. SHANNON: Yes, Your Honor.

THE DEFENDANT: Guilty.

THE COURT: All right. There is no question about the fact that the firearm was a firearm and travelled in interstate commerce?

MR. LEE: None, Your Honor.

THE COURT: Okay. All right. Mr. Shepherd, I am going to accept your plea. I will make a finding that you are competent to have entered it.

Did anyone threaten you in way to get you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Did anyone promise you anything other than the promises contained in this written plea agreement?

THE DEFENDANT: No.

THE COURT: All right. I will make a finding that your plea is freely and voluntarily made, there is a factual basis to support it.

Your sentencing will be when?

DEPUTY CLERK: October the 20th at 1:30.

THE COURT: Okay. It's at that time that we will talk about all of those issues related to your sentence. The probation officers will do a report for you. They will get with you in a little

Sentencing Transcript [pp. 6, 7, 11, 15–17, 26, 27, 33–35]

THE COURT: Because if he does, then whether he was given two levels for the stolen firearm doesn't --

MR. LEE: It really isn't material.

THE COURT: Because it bumps it up to 34 anyhow.

MR. LEE: Only if you agreed with the issue with regard to the enhancement, does that two level issue come into play.

THE COURT: Right. Right. Okay. Well, let's get to that then, because I think that's where your --

MR. LEE: Judge, in essence, the argument from the defense perspective as to that is based on -- as the Court knows, the armed career criminal enhancement specifically refers to burglary, and the case law from the Supreme Court talks about that in the sense of a generic burglary statute.

The *United States v. McGovney* -- and that's an unreported Sixth Circuit case -- says that our burglary statute is not a generic burglary statute. And so it's --

THE COURT: And when they say that, do they mean that it also covers vehicles or out

buildings --

MR. LEE: Yes, Judge. What they do is they talk about that if you look at the burglary statutes in the terms of first, second, third, and then you read it in the context of I think it's 510.010, which is the definitions section that applies to our burglary statute on the state level, combining those two together, they say it is not a generic burglary statute as set out in the enhancement provision.

And so that's where our argument comes into play then, that if you look at -- and the conviction that we're talking about is Daviess Circuit Court, 97-CR-412 I believe is the actual indictment number, that indictment and conviction is under a complicity theory under state law. And the complicity statute, Judge, is --

THE COURT: Well, now, how do I know that? Just because you're telling me, I don't -- is there anything in here?

MR. LEE: I can hand you the statute, Judge.

THE COURT: Well, the complicity part of this, I mean, how do I --

MR. LEE: Well, I tendered the

MR. LEE: Which if under complicity theory, I don't think fits under this definition if it's not the generic burglary statute.

THE COURT: I mean, burglary second is burglary of a dwelling, isn't it?

MR. LEE: Well, if you read the definitions section, it's burglary of a lot of things.

THE COURT: I mean, if I would have had more time to do this, Mike, if you would have maybe filed your papers like you should have, maybe I would have. But tell me what it says.

MR. LEE: We struggled with how to best deal with the armed career offender provision under this case. Okay. And all the plea does is say that -- it talks about acting together with the other person, and it says that it's a burglary second, and it's five years, and the three counts run concurrent.

The indictment alleges those different means of conviction or commission of the offense. I'm not sure that the plea form itself actually answers that question, nor does the judgment. The judgment simply says -- as you know, it addresses the burglary statute as a burglary second and

that would also qualify as a burglary?

MR. SHANNON: Yes, Your Honor.

THE COURT: Okay. You only need three of them.

MR. LEE: I guess just for that purpose, then, I would object to that being tendered as a basis since it's not included in the PSR -- it's not the basis for the probation officer making that determination.

THE COURT: On notice grounds, I guess?

MR. LEE: Right.

THE COURT: I mean, you don't need the other one, do you?

MR. SHANNON: Well, Your Honor, no, but it will tie in with the argument, and they saw him -- there is no notice requirement for armed career criminal. He -- it was pled, he understood, and part of the agreement, the United States did understand that there would be an objection to this.

And to address one point in particular to begin with, the Kentucky Violent Offender Statute has no bearing on this. The cases of Taylor and Shepard have outlined what the Supreme Court believes the appropriate analysis should be.

And, essentially, the Court is asking,

does Kentucky's burglary statutes fall under a generic rendering, which means that they will always apply. And in Taylor, that is defined as unlawful or unprivileged entry or remaining in a building or other structure with the intent to commit a crime.

And I believe the Court has hit on under Kentucky statutes a non-generic version of burglary is one that expands it beyond that element, and does it have essentially structures that are not buildings or structures, namely, vehicles, aircraft or watercraft. And in the Kentucky statute, it does, which is the reason why the United States tendered as KRS 511.010 where it defines a building, it defines a dwelling and a premises.

With that, and turning to burglary in the second degree, which is the conviction to which he stands convicted, under Shepard what the Court is allowed to do in making its analysis to determine whether or not the case is generic or non-generic is to turn to the indictment, plea agreements, plea colloquies, the judgment, to look for guidance as to interpret what the defendant has been charged with and what they have been convicted of.

I point the Court to the statutory law as it states, burglary in the second degree is a

person that is guilty of burglary in the second degree when with the intent to commit a crime, he knowingly enters, remains unlawfully in a dwelling. Turning to Kentucky statute, dwelling means a building, which is used, occupied by a person or a lodging herein.

If the Court would look to Exhibit 1, which should contain the indictment and the judgment, on the face of the indictment for each of the counts, there is three counts, it lists the residence and the address. Based on that, with the definition of dwelling, it is the United States' position that should the Court -- I believe that that indictment based on the law of the way it's defined in Kentucky, burglary in the second degree is a generic burglary.

However, should the Court believe that it is not, to look at these elements to make sure that it fits, then, clearly, the Court is able and has proof to establish that based on the PSR, which is objected to on grounds not that it was unconstitutional, but more factual grounds that it is not a burglary, and I will address the complicity argument.

Based on what is being tendered to the

that the Court should look at under Title 18.

THE COURT: Okay. Let me read this one paragraph here.

MR. LEE: Judge, I think the only difference between McGovney and our case is that that issue wasn't specifically argued in this way before the trial court in that case. I think there may have been a generic sort of we object to the career offender determination, but I don't think that they made this specific objection.

THE COURT: I mean, really all this case said was that the Kentucky statute is not generic, so you have to look further.

MR. LEE: Yes.

THE COURT: And if you look at the Exhibit 1 here, then you see that it charges a generic burglary.

MR. LEE: But it's not the charge, it's the conviction.

THE COURT: Well, that seems very generic too. He was charged with breaking into a residence. And this complicity business, I don't know that that carries the day for you. It just seems that the law is against you here. You have -- and I'm not going to look at these others either.

But you have three burglary convictions based on the indictment under 97-CR-412, and they seem to be generic in my understanding of the word. It's burglarizing of a dwelling.

MR. LEE: So you're not counting the -- what is it, 2000?

THE COURT: I'm not counting the other 98-CR-91. There is no reason to do that. And the violent offender statute under Kentucky law has no bearing here. We're talking about the armed career criminal statute, not the career offender, so the complicity argument I don't buy. And, you know, I did give some attention to whether or not these burglaries were -- should be deemed to have been committed on different occasions from one another, and the law is against you on that too.

So, you know, unfortunately, I don't think that this is a very difficult call either. And I find that you are an armed career offender under the statute, which requires a mandatory minimum sentence of 15 years.

MR. LEE: And, Judge, it would be our request that -- I know the guideline calculation is above that, but we would ask that the Court impose only the minimum

MR. LEE: Judge, two requests. One, that the Court include in the judgment the recommendation about being housed as close to family as is possible by way of the Bureau of Prisons. And a second request would be that there would be a provision regarding substance abuse treatment as well.

THE COURT: Okay. I will do that. You know, the Bureau of Prisons doesn't always follow my recommendations. It's up to them. The residential drug treatment program, I think some people can get some time off for that, but you probably can't because of the firearms.

MR. LEE: But I still think that would be beneficial.

THE COURT: Sure.

All right. You gave up your right to appeal?

MR. LEE: In a limited way, Your Honor.

THE COURT: Okay. Well, advise him of his right to appeal.

THE CLERK: You are now notified that you have a right to appeal your case to the Sixth Circuit Court of Appeals, which will review this case and determine whether there has been error of

law. If you do not have sufficient money to pay for the appeal, you have a right to apply for a leave to appeal without having to pay for it. And notice of appeal must be filed within 10 days from the date of entry of judgment.

If you are without the services of an attorney and want to appeal, the Clerk of this Court shall prepare and file a notice of appeal on your behalf if you request. If you do not have sufficient money to employ an attorney, the court of appeals may appoint your present attorney or another to prosecute the appeal for you. And you may request to be released on a reasonable bond pending the appeal.

THE COURT: Mr. Lee, you talk to him about whether he wishes to appeal and whether you have waived certain aspects of it. And if he is expressing an interest to do so, then either you file the notice of appeal or do something.

MR. LEE: Our previous limitation with regard to the appeal would pertain to the armed career offender determination, so --

THE COURT: You have a different take on it?

MR. SHANNON: No, Your Honor. I believe

just based on the way this came about, in fairness, that if he is going to appeal this armed career, the United States will be --

THE COURT: Okay. So if you want to appeal the issues that you raised here today about whether the armed career offender statute applies, then you are free to do so. Is that everyone's understanding?

MR. LEE: But, otherwise, there is no basis to appeal any other issue.

MR. SHANNON: That's right.

THE COURT: Okay. All right. Thank you.

* * *

C E R T I F I C A T E

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

s/Michelle E. Kerr, RPR June 17, 2009
Michelle E. Kerr, RPR DATE
Court Reporter

Western District of Kentucky Judgment (2009)

United States District Court

Western District of Kentucky

OWENSBORO DIVISION

UNITED STATES OF AMERICA
V.
JOSHUA EUGENE SHEPHERD

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 4:08CR-00004-001-M
Counsel For Defendant: **Michael Lee, Retained**
Counsel For The United States: **Mac Shannon, Asst. U.S. Atty.**
Court Reporter: **Michelle Kerr**

THE DEFENDANT:

☒ **pursuant to a Rule 11(c)(1)(B) plea agreement**

☒ **pleaded guilty to counts 1 and 2 of the Indictment on 07/28/2008, knowingly, willingly and voluntarily.**

☐ Pleaded nolo contendere to count(s)
which was accepted by the court.

☐ Was found guilty on count(s)
after a plea of not guilty

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

Title & Section Number(s)	Nature of Offense	Date Offense Concluded	Count

FOR CONVICTION OFFENSE(S) DETAIL - SEE COUNTS OF CONVICTION ON PAGE 2

The defendant is sentenced as provided in pages 2 through 7 Of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) (Is) (are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and the United States Attorney of any material change in the defendant's economic circumstances.

IT IS FURTHER ORDERED that the presentence report be returned to the United States Probation Office, and shall be available to counsel on appeal. **IT IS FURTHER ORDERED** that the sentencing recommendation be returned to the United States Probation Office, and shall not be available to counsel on appeal.

04/10/2009
Date of Imposition of Judgment

Joseph H. McKinley, Jr., Judge
United States District Court

April 21, 2009

DEFENDANT: **SHEPHERD, JOSHUA EUGENE**
CASE NUMBER: **4:08CR-00004-001-M**

COUNTS OF CONVICTION

	Title & Section Number(s)	Nature of Offense	Date Offense Concluded	Count
21	USC 841(a)(1) and 21 USC 841(b)(1)(D)	Possession With Intent to Distribute a Mixture or Substance Containing a Detectable Amount of Marijuana, a Schedule I Controlled Substance	On or about 06/03/2007	1
18	USC 922(g)(1) and 18 USC 924(e)	Felon in Possession of a Firearm	On or about 06/03/2007	2
21	USC 853(a)	Criminal Forfeiture		3
18	USC 924(d) and 28 USC 2461	Criminal Forfeiture		4

DEFENDANT: **SHEPHERD, JOSHUA EUGENE**
CASE NUMBER: **4:08CR-00004-001-M**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months as to Count 1 of the Indictment and 180 months as to Count 2 of the Indictment, which shall be served concurrently, for a total term of 180 months imprisonment.

☒ **The Court makes the following recommendations to the Bureau of Prisons: The Defendant be placed in a facility wherein he may participate in a Residential Drug Abuse Treatment Program (RDAP) for treatment of narcotic addiction and/or drug/alcohol abuse. The Defendant be placed in an institution close to his family for visitation purposes.**

☒ **The defendant is remanded to the custody of the United States Marshal.**

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at A.m. / p.m. on
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:.

- ☐ Before 2:00 p.m. on
- ☐ as notified by the United States Marshal.
- ☐ As notified by the Probation or Pretrial Services Office.
- ☐ The defendant shall continue under the terms and conditions of his/her present bond pending surrender to the institution.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ To _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By_____
Deputy U.S. Marshal

DEFENDANT: **SHEPHERD, JOSHUA EUGENE**
CASE NUMBER: **4:08CR-00004-001-M**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years as to each of Counts 1 and 2, which shall run concurrently, for a total term of 3 years.

The defendant shall report to the probation office in the district in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ **The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.**

☒ **The defendant shall cooperate in the collection of DNA as directed by the probation officer.**

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer.

☐ The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;
2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of Each month;
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) The defendant shall support his or her dependents and meet other family responsibilities;
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other Acceptable reasons;
6) The defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) The defendant shall refrain from excessive use of alcohol;
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a Felony unless granted permission to do so by the probation officer;
10) The defendant shall permit a probation officer to visit him or her at anytime at home or elsewhere and shall permit confiscation of any Contraband observed in plain view of the probation officer;
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the Permission of the court;
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal Record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the Defendant's compliance with such notification requirement.

DEFENDANT: **SHEPHERD, JOSHUA EUGENE**
CASE NUMBER: **4:08CR-00004-001-M**

ADDITIONAL SUPERVISED RELEASE TERMS

14) The Defendant shall participate in a program approved by the U.S. Probation Office for treatment of narcotic addiction or drug or alcohol dependency, which will include testing for the detection of substance use or abuse.

DEFENDANT: **SHEPHERD, JOSHUA EUGENE**
CASE NUMBER: **4:08CR-00004-001-M**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$ 200.00**	**$ 0**	**$ 0**

☒ **The fine and the costs of incarceration and supervision are waived due to the defendant's inability to pay.**

☐ The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☒ **Restitution is not an issue in this case.**

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	** Total Amount of Loss	Amount of Restitution Ordered	Priority Order Or Percentage Of Payment

☐ If applicable, restitution amount ordered pursuant to plea agreement. . . . . **$**

☐ The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. 3612(f). All of the payment options on Sheet 5, Part B may be subject to Penalties for default and delinquency pursuant to 18 U.S.C. 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived for the ☐ Fine and/or ☐ Restitution

☐ The interest requirement for the ☐ Fine and/or ☐ Restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: **SHEPHERD, JOSHUA EUGENE**
CASE NUMBER: **4:08CR-00004-001-M**

SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payment of $ Due immediately, balance due

☐ not later than , or
☐ in accordance with C, D, or E below); or

B ☐ Payment to begin immediately (may be combined with C, D, or E below); or

C ☐ Payment in *(E.g. equal, weekly, monthly, quarterly)* installments of $
Over a period of *(E.g. months or years)* year(s) to commence *(E.g., 30 or 60 days)* after the date of
This judgment, or

D ☐ Payment in *(E.g. equal, weekly, monthly, quarterly)* installments of $
Over a period of *(E.g. months or years)* year(s) to commence *(E.g., 30 or 60 days)* after
Release from imprisonment to a term of supervision; or

E ☒ **Special instructions regarding the payment of criminal monetary penalties:**

Any balance of criminal monetary penalties owed upon incarceration shall be paid in quarterly installments of at least $25 based on earnings from an institution job and/or community resources (other than Federal Prison Industries), or quarterly installments of at least $60 based on earnings from a job in Federal Prison Industries and/or community resources, during the period of incarceration to commence upon arrival at the designated facility.

Upon commencement of the term of supervised release, the probation officer shall review your financial circumstances and recommend a payment schedule on any outstanding balance for approval by the court. Within the first 60 days of release, the probation officer shall submit a recommendation to the court for a payment schedule, for which the court shall retain final approval.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons Inmate Financial Responsibility Program, are to be made to the United States District Court, Gene Snyder Courthouse, 601 West Broadway, Suite 106, Louisville, KY 40202, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

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

☐ Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ **The defendant shall forfeit the defendant's interest in the following property to the United States: To be addressed by separate order of the Court.**

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Southern District of Indiana Order Denying Petition Under § 2241 (2017)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JOSHUA SHEPHERD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2:17-cv-026-LJM-MJD
	)	
STEVEN JULIAN, Warden,	)	
	)	
Respondent.	)	

Entry Dismissing Action and Directing Entry of Final Judgment

I.

"Federal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on its face." *McFarland v. Scott*, 512 U.S. 849, 856 (1994). For the reasons explained in this Entry, this is an appropriate case for such a disposition.

Background

In 2009, petitioner Shepherd pleaded guilty to possessing with intent to distribute marijuana and being a felon in possession of a firearm. He was sentenced as an armed career criminal to a total term of 180 months of imprisonment. The disposition was affirmed in *United States v. Shepherd*, No. 09-5507 (6th Cir. May 4, 2011) (order).

Following the imposition of sentence, Shepherd filed a motion for relief pursuant to 28 U.S.C. § 2255. The trial court denied relief. Shepherd most recently sought leave in the Sixth Circuit in No. 16-5795 to file a second or successive 28 U.S.C. § 2255 motion, challenging his ACCA sentence based on *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). The Sixth Circuit denied that motion on November 16, 2016, explaining:

> Shepherd argues that he no longer qualifies as an armed career criminal because his prior Kentucky burglary convictions were counted as violent felonies under [18 U.S.C.] § 924(e)(2)(B)(ii)'s now-invalidated residual clause.
> . . . .
> Shepherd was classified as an armed career criminal because he had three prior Kentucky convictions for second-degree burglary. The district court specifically found at sentencing that the burglary convictions constituted "generic" burglaries and thus were proper predicates under the ACCA's enumerated offenses clause. We also found on direct appeal that Shepherd's second-degree burglary convictions were "generic" burglaries that fell under the enumerated offenses clause . . . . Because Shepherd's predicate offenses were counted under the enumerated offenses clause rather than the residual clause, Shepherd has not made a prima facie showing that he is entitled to relief under *Johnson. See Johnson*, 135 S. Ct. at 2563.
> Accordingly, we DENY Shepherd's motion.

This action, in which Shepherd invokes 28 U.S.C. § 2241(c)(3), was then filed on January 12, 2017.

Discussion

A motion pursuant to 28 U.S.C. § 2255 is the presumptive means by which a federal prisoner can challenge his conviction or sentence. *See Davis v. United States*, 417 U.S. 333, 343 (1974); *United States v. Bezy*, 499 F.3d 668, 670 (7th Cir. 2007). Shepherd, however, challenges his sentence and seeks habeas corpus relief pursuant to 28 U.S.C. § 2241(c)(3). "A federal prisoner may use a § 2241 petition for a writ of habeas corpus to attack his conviction or sentence only if § 2255 is 'inadequate or ineffective.'" *Hill v. Werlinger*, 695 F.3d 644, 645 (7th Cir. 2012) (quoting 28 U.S.C. § 2255(e)). Whether § 2255 is inadequate or ineffective depends on "whether it allows the petitioner 'a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence.'" *Webster v. Daniels*, 784 F.3d 1123, 1136 (7th Cir. 2015) (en banc) (quoting *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998)). To properly invoke the Savings Clause of 28 U.S.C. § 2255(e), a petitioner is required to show "something more than a lack of success with a section 2255 motion," *i.e.,* "some kind of structural problem

with section 2255." *Id.* "The petitioner bears the burden of coming forward with evidence affirmatively showing the inadequacy or ineffectiveness of the § 2255 remedy." *Smith v. Warden, FCC Coleman–Low*, 503 F. App'x 763, 765 (11th Cir. 2013) (citation omitted).

Additionally, and of pivotal significance here, under 28 U.S.C. § 2244(a), "[n]o circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255."

The Sixth Circuit explained that Shepherd's prior convictions for burglary in Kentucky were violent offenses under the enumerated-offenses clause of the ACCA. His argument otherwise was explicitly rejected in No. 16-5795 when his motion for leave to file a second or successive 28 U.S.C. § 2255 motion was denied. The Sixth Circuit's ruling post-dates *Mathis v. United States*, 136 S. Ct. 2243 (2016), which Shepherd cited in support of his motion in his filing of July 8, 2016. Sixth Circuit law controls on this point. *Salazar v. Sherrod*, 2012 WL 3779075 at *3 (S.D. Ill. Aug. 31, 2012) (unpublished) (citing *Hernandez v. Gilkey*, 242 F.Supp.2d 549, 554 (S.D. Ill. 2001)). And 28 U.S.C. § 2244(a) prohibits another bite at the apple in these circumstances.

Conclusion

The dispositive question here is whether Shepherd's habeas claim permits him to traverse the portal created by § 2255(e). *It does not.* Based on the foregoing, Shepherd has sought relief pursuant to 28 U.S.C. § 2241 under circumstances which do not permit or justify the use of that remedy. This is apparent from the face of his habeas petition and the public record concerning his collateral challenges. Therefore, for the reasons outlined above, the petition for a writ of habeas corpus is **denied**.

II.

Judgment consistent with this Entry shall now issue.

IT IS SO ORDERED.

Date: 2/2/2017

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Distribution:

Joshua Shepherd
Reg. No. 10671-033
TERRE HAUTE FEDERAL CORRECTIONAL INSTITUTION
Inmate Mail/Parcels
P.O. BOX 33
TERRE HAUTE, IN 47808

Southern District of Indiana Final Judgment on § 2241 Petition (2017)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JOSHUA SHEPHERD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 2:17-cv-026-LJM-MJD
	)	
STEVEN JULIAN, Warden,	)	
	)	
Respondent.	)	

FINAL JUDGMENT PURSUANT TO FED. R. CIV. PRO. 58

The Court having this day directed the entry of final judgment, the Court now enters FINAL JUDGMENT in favor of the respondent and against the petitioner, Joshua Shepherd.

Shepherd's petition for writ of habeas corpus is denied and the action is dismissed with prejudice.

Date: 2/2/2017

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Laura Briggs, Clerk of Court

By: Lana Harves
Deputy Clerk

Distribution:

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