

INCAPACITATING DANGEROUS REPEAT OFFENDERS (OR NOT): EVIDENTIARY RESTRICTIONS ON ARMED CAREER CRIMINAL ACT SENTENCING IN *UNITED STATES v. KING*

Abstract: On March 30, 2017, in *United States v. King*, the United States Court of Appeals for the Sixth Circuit held that a sentencing court may not rely on information in bills of particulars for the Armed Career Criminal Act's different-occasions inquiry. In so doing, the Sixth Circuit joined the Second, Fourth, Fifth, Seventh, Tenth, Eleventh, and D.C. Circuits in holding that sentencing courts deciding the different-occasions question may rely only on the evidentiary sources that the United States Supreme Court approved in *Taylor v. United States* in 1990 and *Shepard v. United States* in 2005. In contrast, on January 2, 2014, the United States Court of Appeals for the Eighth Circuit in *United States v. Evans* suggested that the *Taylor*- and *Shepard*-evidentiary restrictions might not apply to the different-occasions inquiry. This Comment argues that the Sixth Circuit decided correctly in *King*, but also that the court's decision conflicts with congressional intent, and thus Congress should amend the act to resolve this conflict.

INTRODUCTION

The Armed Career Criminal Act ("ACCA") imposes a fifteen-year mandatory minimum sentence on any felon possessing a firearm who previously committed three violent felony or serious drug offenses on different occasions.¹ By imposing a lengthy mandatory minimum sentence, the ACCA is intended to help law enforcement reduce the number of dangerous habitual

¹ Armed Career Criminal Act, 18 U.S.C. § 924(e) (2012). The felon in possession of a firearm statute is 18 U.S.C. § 922(g), which makes it unlawful for any person convicted of a crime punishable by a prison sentence greater than one year to ship, transport, possess, or receive a firearm in interstate or foreign commerce. *Id.* § 922(g). To be sentenced under the Armed Career Criminal Act ("ACCA"), a defendant must not only violate § 922(g) but also have three prior violent felony or serious drug offenses that qualify as predicate offenses under the ACCA. *Id.* § 924(e). The ACCA defines "serious drug offense" as "an offense under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. § 951 *et seq.*), or chapter 705 of title 46," with a maximum sentence of ten or more years, or a state offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), " with a maximum sentence of ten or more years. 18 U.S.C. § 924(e)(2)(A)(i)–(ii). The ACCA defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year . . . that" either includes an element of "use, attempted use, or threatened use of physical force against [another person]" or "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B).

criminals in society.² A sentencing court, however, may apply the ACCA only if there is sufficient evidence that the defendant committed the three predicate offenses on different occasions.³ Congress did not enumerate in the text of the ACCA the types of evidence that courts may rely upon for this different-occasions inquiry, so sentencing courts accordingly rely on prior judicial interpretation for guidance.⁴

In 2017, in *United States v. King*, the United States Court of Appeals for the Sixth Circuit held that a sentencing court cannot rely on a bill of particulars, a list of the charges brought against the defendant, to decide the different-

² *Taylor v. United States*, 495 U.S. 575, 581 (1990) (stating that “[t]he [ACCA] was intended to supplement the States’ law enforcement efforts against ‘career’ criminals”); H.R. REP. NO. 98-1073, at 1 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3661, 3661 (noting that “[t]his bill is designed to increase the participation of the federal law enforcement system in efforts to curb armed, habitual (career) criminals”); James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 545–46 (2009) (explaining that the ACCA intends to help law enforcement incapacitate dangerous repeat offenders); Brett T. Runyon, Comment, *ACCA Residual Clause: Strike Four? The Court’s Missed Opportunity to Create a Workable Residual Clause Violent Felony Test*, 51 WASHBURN L.J. 447, 450 (2012) (noting that the ACCA’s purpose is to assist law enforcement efforts to stop career criminals from reoffending); *see also* H.R. REP. NO. 98-1073, at 2 (noting that “[b]oth Congress and local prosecutors around the nation have recognized the importance of incapacitating [the small group of] repeat offenders [who are responsible for a large number of crimes]”). This Comment uses the terms “career criminal,” “habitual criminal,” “repeat offender,” and “recidivist” synonymously.

³ 18 U.S.C. § 924(e). The government carries the burden of proving at sentencing by a preponderance of the evidence that the defendant committed the prior offenses on different occasions. *See, e.g., United States v. Linney*, 819 F.3d 747, 751 (4th Cir. 2016).

⁴ *See* 18 U.S.C. § 924(e) (not enumerating the types of evidence allowed under the different-occasions inquiry). *See generally* *United States v. King*, 853 F.3d 267, 271–73 (6th Cir. 2017) (explaining the Supreme Court’s reasoning in *Taylor v. United States* and *United States v. Shepard* and that the same concerns apply to the interpretation of the different-occasions question); *United States v. Dantzer*, 771 F.3d 137, 143, 145 (2d Cir. 2014) (explaining that the Supreme Court’s reasoning in *Taylor* and *Shepard* applies to the different-occasions inquiry); *Kirkland v. United States*, 687 F.3d 878, 883 (7th Cir. 2012) (noting that *Shepard*’s evidentiary restrictions apply to determining whether a defendant committed prior offenses on different occasions); *United States v. Boykin*, 669 F.3d 467, 471 (4th Cir. 2012) (stating that a sentencing court deciding the different-occasions question can consult evidentiary sources approved in *Shepard*); *United States v. Sneed*, 600 F.3d 1326, 1333 (11th Cir. 2010) (holding that sentencing courts determining whether a defendant committed prior offenses on different occasions may not rely on police reports because *Shepard* did not approve police reports as an evidentiary source); *United States v. Thomas*, 572 F.3d 945, 950 (D.C. Cir. 2009) (explaining that the sentencing court should have relied on two indictments and concluded that the defendant committed the prior offenses on different occasions because charging documents are one of the evidentiary sources that *Taylor* and *Shepard* approved); *United States v. Fuller*, 453 F.3d 274, 279 (5th Cir. 2006) (explaining that a sentencing court deciding the different-occasions question can rely on only *Shepard*-approved evidentiary sources); *United States v. Harris*, 447 F.3d 1300, 1305 (10th Cir. 2006) (noting that a sentencing court can rely on a presentence report (“PSR”) for the purposes of the different-occasions question only if the PSR complies with *Shepard*); *United States v. Taylor*, 413 F.3d 1146, 1157–58 (10th Cir. 2005) (explaining that a sentencing court deciding the different-occasions question can rely on only evidentiary sources that comply with *Shepard*).

occasions question.⁵ In so doing, the Sixth Circuit joined the Second, Fourth, Fifth, Seventh, Tenth, Eleventh, and D.C. Circuits in holding that sentencing courts may consider only the evidentiary sources that the United States Supreme Court approved in *Taylor v. United States* in 1990 and in *Shepard v. United States* in 2005.⁶ The Eighth Circuit, however, suggested in 2014 in *United States v. Evans* that the *Taylor*- and *Shepard*-evidentiary restrictions do not apply to the different-occasions inquiry.⁷

This Comment argues that the Sixth Circuit decided correctly in *King* that a sentencing court may not rely on bills of particulars to determine whether a defendant committed prior offenses on different occasions.⁸ This Comment also examines Justice O'Connor's dissent in *Shepard*, however, and argues that evidentiary restrictions on the different-occasions inquiry can lead to an absurd result in cases like *King*.⁹ Further, this Comment recommends that Congress amend the ACCA to enumerate the evidentiary sources allowed for the different-occasions inquiry.¹⁰

Part I of this Comment provides an overview of the history of the ACCA, the Supreme Court's decisions in *Taylor* and *Shepard*, and the facts and procedural posture of *King*.¹¹ Part II examines and discusses the circuit split regarding whether the *Taylor*- and *Shepard*-evidentiary restrictions apply to the ACCA's different-occasions inquiry.¹² Finally, Part III argues that the Sixth Circuit decided correctly in *King*, but also that Congress should amend the ACCA to enumerate approved evidentiary sources and thus resolve the conflict between Supreme Court precedent and Congressional intent.¹³

⁵ *King*, 853 F.3d at 275–78. A bill of particulars, also called a statement of particulars, is “[a] formal, detailed statement of the claims or charges brought by a plaintiff or a prosecutor, usu[ally] filed in response to the defendant’s request for a more specific complaint.” *Bill of Particulars*, BLACK’S LAW DICTIONARY (10th ed. 2014). Bills of particulars are governed by Federal Rule of Criminal Procedure 7(f). FED. R. CRIM. P. 7(f); *Bill of Particulars*, *supra*.

⁶ *King*, 853 F.3d at 273–74; *Dantzler*, 771 F.3d at 139; *Kirkland*, 687 F.3d at 886, 886 n.9; *Boykin*, 669 F.3d at 472; *Sneed*, 600 F.3d at 1332–33; *Thomas*, 572 F.3d at 950; *Fuller*, 453 F.3d at 279; *Harris*, 447 F.3d at 1305; *Taylor*, 413 F.3d at 1157.

⁷ See *United States v. Evans*, 738 F.3d 935, 936–37 (8th Cir. 2014) (per curiam) (noting that the court has previously rejected Sixth Amendment challenges to the type of evidence that the district court relies upon for the different-occasions question, and rejecting similar challenges in this case).

⁸ See *infra* notes 102–106 and accompanying text.

⁹ See *infra* notes 107–121 and accompanying text.

¹⁰ See *infra* notes 126–128 and accompanying text.

¹¹ See *infra* notes 14–81 and accompanying text.

¹² See *infra* notes 82–98 and accompanying text.

¹³ See *infra* notes 99–128 and accompanying text.

I. *UNITED STATES V. KING* AND THE HISTORY OF THE ARMED CAREER CRIMINAL ACT

Congress enacted the ACCA in 1984 and subsequently has amended the statute three times.¹⁴ Congress' intent in enacting the ACCA was to reduce the number of armed career criminals in society because these dangerous repeat offenders are responsible for a significant portion of violent and serious offenses.¹⁵ In *Taylor* and *Shepard*, the Supreme Court enumerated the sources that a sentencing court can rely on to determine whether a defendant's prior offenses qualify as ACCA predicates.¹⁶ These approved evidentiary sources are statutory definitions, charging documents, jury instructions, written plea agreements, transcripts of plea colloquies, and trial judges' factual findings to which the defendant agreed.¹⁷ In *King*, the defendant, Errol Dontes King, pled

¹⁴ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7056, 102 Stat. 4181, 4402 (1988) (codified at 18 U.S.C. § 924(e)(1)); Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207, 3207–39 (1986) (codified as amended at 18 U.S.C. § 924); Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104, 100 Stat. 449 (1986) (codified as amended at 18 U.S.C. § 921); Armed Career Criminal Act of 1984, ch. 18, 98 Stat. 1837 (1984) (codified at 18 U.S.C. § 1202(a), *repealed by* Firearms Owners' Protection Act § 104(b)).

¹⁵ *Taylor*, 495 U.S. at 581; H.R. REP. NO. 98-1073, at 1–2; James E. Hooper, Note, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 MICH. L. REV. 1951, 1952 (1991); Krystle Lamprecht, Comment, *Formal, Categorical, but Incomplete: The Need for a New Standard in Evaluating Prior Convictions Under the Armed Career Criminal Act*, 98 J. CRIM. L. & CRIMINOLOGY 1407, 1411 (2008); Levine, *supra* note 2, at 545–46; Emily Marano, Comment, *The Need for Speed: A Loophole in the Armed Career Criminal Act*, 52 B.C. L. REV. E. SUPP. 175, 175 (2011), <http://lawdigitalcommons.bc.edu/bclr/vol52/iss6/15>; Nick Poli, Comment, *Three Strikes and You're Out . . . Maybe: "Violent Felonies" and the Armed Career Criminal Act in United States v. Vann*, 54 B.C. L. REV. E. SUPP. 201, 203 (2013), <http://lawdigitalcommons.bc.edu/bclr/vol54/iss6/16>; Runyon, *supra* note 2, at 450.

¹⁶ *United States v. Shepard*, 544 U.S. 13, 26 (2005); *Taylor*, 495 U.S. at 602.

¹⁷ *Shepard*, 544 U.S. at 26; *Taylor*, 495 U.S. at 602. A charging instrument, also called an accusatory instrument, is "[a]ny of three formal legal documents by which a person can be officially charged with a crime: an indictment, information, or presentment." *Charging Instrument*, BLACK'S LAW DICTIONARY (10th ed. 2014). The three types of charging instruments are indictments, informations, and presentments. *Id.* An indictment is "[t]he formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person." *Indictment*, BLACK'S LAW DICTIONARY (10th ed. 2014). An information is "[a] formal criminal charge made by a prosecutor without a grand-jury indictment." *Information*, BLACK'S LAW DICTIONARY (10th ed. 2014). Indictments and informations are governed by Federal Rule of Criminal Procedure Rule 7. FED. R. CRIM. P. 7; *Charging Instrument*, *supra*. A presentment is "[a] formal written accusation returned by a grand jury on its own initiative, without a prosecutor's previous indictment request." *Presentment*, BLACK'S LAW DICTIONARY (10th ed. 2014). Presentments, however, are obsolete in federal courts. *Id.* A colloquy is "[a]ny formal discussion, such as an oral exchange between a judge, the prosecutor, the defense counsel, and a criminal defendant in which the judge ascertains the defendant's understanding of the proceedings and of the defendant's rights." *Colloquy*, BLACK'S LAW DICTIONARY (10th ed. 2014). A plea colloquy, specifically, is "[a]n open-court dialogue between the judge and a criminal defendant, usu[ally] just before the defendant enters a plea, to establish that the defendant understands the consequences of the plea." *Plea Colloquy*, BLACK'S LAW DICTIONARY (10th ed. 2014).

guilty to being a felon in possession of a firearm, but he argued that the ACCA did not apply to him.¹⁸ Although King's prior robbery convictions qualified as ACCA predicates, he argued that there was insufficient evidence to prove that he committed the robberies on different occasions for the ACCA.¹⁹

A. The History of the Armed Career Criminal Act

Congress enacted the first version of the ACCA in 1984, codifying the statute at 18 U.S.C. App. § 1202(a).²⁰ According to the House Report accompanying the ACCA, the purpose of the Act is to assist law enforcement in reducing the number of armed, career criminals.²¹ The House Report cited several recidivism studies demonstrating that a limited number of habitual criminals commit a high percentage of all homicides, rapes, robberies, burglaries, and other violent serious offenses.²² The ACCA's mandatory minimum fifteen-year sentence is directed at separating these dangerous repeat offenders from civilized society for a significant period of time, thus protecting society from their harms.²³

In 1986, Congress enacted the Firearms Owners' Protection Act, which amended the ACCA and recodified the statute at 18 U.S.C. § 924(e).²⁴ This amendment only slightly adjusted the statute's definition of burglary, but five months later, Congress made more significant changes to the ACCA when it enacted the Career Criminals Amendment Act of 1986 ("CCAA").²⁵ This amendment changed the ACCA in three ways; most notably, it changed the definition of predicate offense to "a violent felony or a serious drug offense,"

¹⁸ *King*, 853 F.3d at 268–69; Brief of Plaintiff-Appellee at 6, *King*, 853 F.3d 267 (No. 15-4192); Brief of Appellant, *Errol King* at 5, *King*, 853 F.3d 267 (No. 15-4192).

¹⁹ *King*, 853 F.3d at 268–69; Brief of Plaintiff-Appellee, *supra* note 18, at 6.

²⁰ Armed Career Criminal Act of 1984 § 1202(a).

²¹ *Taylor*, 495 U.S. at 581; H.R. REP. NO. 98-1073, at 1 (stating "[t]his bill is designed to increase the participation of the federal law enforcement system in efforts to curb armed, habitual (career) criminals"); Hooper, *supra* note 15, at 1952; Lamprecht, *supra* note 15, at 1411; Levine, *supra* note 2, at 545–46; Marano, *supra* note 15, at 175; Poli, *supra* note 15, at 203; Runyon, *supra* note 2, at 450.

²² *Taylor*, 495 U.S. at 581; H.R. REP. NO. 98-1073, at 1–2.

²³ Hooper, *supra* note 15, at 1953; Levine, *supra* note 2, at 545; Poli, *supra* note 15, at 203; see H.R. REP. NO. 98-1073, at 2 (stating that "both Congress and local prosecutors around the nation have recognized the importance of incapacitating these repeat offenders," referring to career criminals). Congress's intent to separate armed career criminals from society is consistent with the incapacitation theory of punishment. See Dawinder Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671, 678–79 (2015) (stating that the theory of incapacitation is "premised on . . . separat[ing] the offender from others"). There are four primary theories of punishment—retribution, deterrence, incapacitation, and rehabilitation. *Id.* at 677–78. Under the theory of incapacitation, offenders are separated from society, thus preventing future harm and protecting society. *Id.* at 678.

²⁴ Firearms Owners' Protection Act § 104.

²⁵ Anti-Drug Abuse Act of 1986 § 1402; Firearms Owners' Protection Act § 104; *Taylor*, 495 U.S. at 582. The Career Criminals Amendment Act of 1986 ("CCAA") is § 1402 of Section I of the Anti-Drug Abuse Act of 1986. Anti-Drug Abuse Act of 1986 § 1402.

thus capturing many more offenses than the original definition, which included only “robbery and burglary.”²⁶ According to the legislative history, Congress believed that the original 1984 version of the ACCA was successful, and in 1986, Congress wanted to broaden the predicate offenses so that the ACCA would reach even more repeat offenders.²⁷

In 1988, Congress amended the ACCA for a third time when it enacted the Anti-Drug Abuse Act of 1988.²⁸ This amendment added the phrase “committed on occasions different from one another,” which is the subject of *King* and this Comment.²⁹ Congress intended only to clarify ambiguous language, however, not to substantively change the statute.³⁰ This clarification responded to the United States Court of Appeals for the Eighth Circuit’s decision in 1986 in *United States v. Petty*.³¹ In *Petty*, the court counted the defendant’s conviction for robbing six people at the same time as six separate convictions, and thus held that the defendant satisfied the ACCA’s three prior convictions requirement.³² According to then-Senator Joseph Biden, by “career criminal,” Congress meant a person who commits at least three predicate offenses over a period of time, so simultaneously robbing multiple people is only one conviction for the ACCA.³³ The clarification reflects this understanding of a “career criminal.”³⁴

²⁶ Anti-Drug Abuse Act of 1986 § 1402; *Taylor*, 495 U.S. at 582. The other two changes were to classify burglary as one of these violent felonies and the removal of the definition of “burglary.” Anti-Drug Abuse Act of 1986 § 1402; *Taylor*, 495 U.S. at 582. The legislative history suggests, however, that Congress may have accidentally deleted the definition of “burglary,” rather than this being a planned amendment. *Taylor*, 495 U.S. at 589–90.

²⁷ *Taylor*, 495 U.S. at 583; 132 CONG. REC. 7697 (1986) (statement of Sen. Arlen Specter); see *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong., 2d Sess. 1–2 (1986) (explaining that the purpose of the hearing was for the House of Representatives to discuss whether to expand the ACCA’s predicate offenses); *Armed Career Criminal Act Amendments: Hearing on S. 2312 Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 99th Cong., 2d Sess. 1 (1986) (opening statement by Sen. Arlen Specter stating that “[he] think[s] the experience in the past year with the [ACCA] has been excellent,” and it is “time . . . to expand the [ACCA] to include other offenses, which S. 2312 seeks to do”).

²⁸ Anti-Drug Abuse Act of 1988 § 7056.

²⁹ *Id.* See generally *King*, 853 F.3d 267 (deciding whether a sentencing court is permitted to rely upon bills of particulars for the ACCA’s different-occasions inquiry).

³⁰ See Anti-Drug Abuse Act of 1988 § 7056 (describing the amendment as a “clarification of predicate offense requirements for [ACAA]”); 134 CONG. REC. 32702 (1988) (remarks of Sen. Joseph Biden) (describing § 7056 as clarifying the ACCA).

³¹ 134 CONG. REC. 32702 (remarks of Sen. Joseph Biden); see *United States v. Petty*, 798 F.2d 1157, 1159–60 (8th Cir. 1986), *vacated* 481 U.S. 1034 (1987), *rev’d*, 828 F.2d 2 (8th Cir. 1987); Hooper, *supra* note 15, at 1965–66; Levine, *supra* note 2, at 548; Marano, *supra* note 15, at 177.

³² *Petty*, 798 F.2d at 1159–60.

³³ 134 CONG. REC. 32702 (1988) (remarks of Sen. Joseph Biden); Hooper, *supra* note 15, at 1966.

³⁴ 134 CONG. REC. 32702 (1988) (remarks of Sen. Joseph Biden); Hooper, *supra* note 15, at 1966.

*B. The Supreme Court Enumerates Evidentiary Sources for the
ACCA-Predicate Question in Taylor v. United States
and Shepard v. United States*

In *Taylor* and *Shepard*, the Supreme Court enumerated the evidentiary sources that a sentencing court may rely on to determine whether a prior offense qualifies as a violent felony or serious drug offense under the ACCA.³⁵ Each case involved a defendant who was previously convicted of burglary under a state statute, and each Court had to decide whether the prior burglary offense was an ACCA predicate.³⁶ “Burglary” is a violent felony that qualifies as a predicate offense under the ACCA.³⁷ The ACCA has not defined the term “burglary” since 1986, however, when the CCAA removed the definition of “burglary” from the statute.³⁸ Moreover, state statutes’ definitions of “burglary” vary significantly, so there is not one common meaning of “burglary” that courts agree on.³⁹ Furthermore, the ACCA’s text does not explain which, if any, of these many definitions of “burglary” Congress intended to qualify as a predicate offense under the ACCA.⁴⁰ Consequently, in *Taylor*, the Court had to determine which state burglary convictions qualify as ACCA-predicate offenses.⁴¹

The *Taylor* Court concluded that Congress intended for “burglary” to have the generic, contemporary meaning that is consistent with how most state

³⁵ *Shepard*, 544 U.S. at 26; *Taylor*, 495 U.S. at 602.

³⁶ *Shepard*, 544 U.S. at 16; *Taylor*, 495 U.S. at 578–79. In *Taylor*, the defendant, Arthur Lajuane Taylor, had been convicted in Missouri for one robbery, one assault, and two burglaries. *Taylor* 495 U.S. at 578. At the United States District Court for the Eastern District of Missouri, Taylor pled guilty to one count of violating 18 U.S.C. § 922(g)(1) as a felon in possession of a firearm. *Id.* He argued that the ACCA did not apply, however, because his two burglary convictions did not qualify as predicate offenses under the ACCA. *Id.* at 579. The district court rejected Taylor’s argument, held that his two burglary convictions were predicate offenses, and sentenced him to the mandatory fifteen-year minimum sentence under the ACCA. *Id.* Taylor appealed to the United States Court of Appeals for the Eighth Circuit, and the court affirmed his sentence. *Id.* In *Shepard*, the defendant, Reginald Shepard, had previously pled guilty and been convicted of burglary under a Massachusetts statute four times. *Shepard*, 544 U.S. at 16. At the United States District Court for the District of Massachusetts, Shepard pled guilty to one count of violating 18 U.S.C. § 922(g)(1) as a felon in possession of a firearm. *Id.* The district court held that it could not examine police reports to determine whether the defendant’s burglary convictions qualified as predicate offenses for the purposes of the ACCA. *Id.* at 17. Consequently, the district court refused to sentence Shepard under the ACCA. *Id.* at 18. Shepard appealed to the United States Court of Appeals for the First Circuit, which vacated his sentence and held that the district court could rely on the police reports. *Id.* On remand, the district court again refused to sentence Shepard under the ACCA. *Id.* On appeal, the First Circuit vacated the sentence again. *Id.* at 19.

³⁷ Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

³⁸ See *id.* § 924(e) (not enumerating the definition of “burglary”); Anti-Drug Abuse Act of 1986 § 1402 (not enumerating the definition of “burglary”); *Taylor*, 495 U.S. at 582 (stating that the CCAA removed the definition of “burglary” from the ACCA).

³⁹ *Taylor*, 495 U.S. at 580; *United States v. Hill*, 863 F.2d 1575, 1582, 1582 n.5 (11th Cir. 1989) (surveying several burglary statutes).

⁴⁰ *Taylor*, 495 U.S. at 580.

⁴¹ 18 U.S.C. § 924(e); *Taylor*, 495 U.S. at 598.

statutes define “burglary.”⁴² At a minimum, the generic, contemporary meaning of “burglary” includes the following elements: “an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.”⁴³ Therefore, a defendant’s prior burglary conviction is an ACCA-predicate offense if the statute’s definition of burglary contains at least these elements.⁴⁴

Next, the *Taylor* Court addressed the evidentiary sources a sentencing court can rely on to determine whether a defendant’s prior burglary conviction satisfies the generic burglary definition.⁴⁵ The Court had to choose between two approaches—a formal categorical approach or a factual approach.⁴⁶ Under a formal categorical approach, a sentencing court may consider only the fact of conviction and the statutory definition of the prior offense.⁴⁷ A factual approach, however, allows a sentencing court to consider the facts underlying the prior conviction.⁴⁸

The Court concluded that a formal categorical approach is consistent with the ACCA’s text and legislative history as well as the Court’s concerns about the practicality and fairness of a factual approach.⁴⁹ Under a categorical ap-

⁴² *Taylor*, 495 U.S. at 598.

⁴³ *Id.* at 599.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 600. Prior to *Taylor*, the Fourth, Fifth, and Ninth Circuits held in favor of a formal categorical approach over a factual approach, and the *Taylor* Court agreed with these courts’ reasoning. *Id.*; see *United States v. Chatman*, 869 F.2d 525, 529 (9th Cir. 1989) (adopting a categorical approach, which avoids sentencing courts conducting “ad hoc mini-trials”), *abrogated by Taylor*, 495 U.S. 575; *United States v. Sherbondy*, 865 F.2d 996, 1006–10 (9th Cir. 1988) (adopting the approach of considering only an offense’s elements and not underlying facts); *United States v. Vidaure*, 861 F.2d 1337, 1340 (5th Cir. 1988) (adopting the approach that, to determine whether an offense is a violent felony under the ACCA, the court looks to the statutory definition of the offense); *United States v. Headspeth*, 852 F.2d 753, 758–59 (4th Cir. 1988) (adopting the approach of analyzing only prior offenses’ statutory definitions, not specific facts), *abrogated by Taylor*, 495 U.S. 575.

⁴⁷ See, e.g., *Mathis v. United States*, 136 S. Ct. 2243, 2245–46 (2016) (applying the formal categorical approach and comparing the elements of the defendant’s state burglary offense to the elements of the generic burglary offense); *Descamps v. United States*, 570 U.S. 254, 257–60 (2013) (applying the formal categorical approach and comparing the elements of the defendant’s state burglary offense to the elements of the generic burglary offense).

⁴⁸ *Taylor*, 495 U.S. at 600; see, e.g., *Chatman*, 869 F.2d at 529 (rejecting the government’s argument that the court should apply a factual approach, which would have required the court to consider the facts underlying the defendant’s conviction, specifically that the defendant was armed when he committed burglary).

⁴⁹ *Taylor*, 495 U.S. at 600–02. First, there are two sections of the ACCA where Congress chose language that supports that a sentencing court should consider only the fact that the defendant was convicted of a crime, not the particular facts underlying the crime. *Id.* at 600. In 18 U.S.C. § 924(e)(1), Congress chose the language “a person who . . . has three previous convictions” for violent felonies or serious drug offenses, rather than referring to a person who has committed violent felonies or serious drug offenses. 18 U.S.C. § 924(e)(1); *Taylor*, 495 U.S. at 600. Also, in 18 U.S.C. § 924(e)(2)(B)(i), the definition of “violent felony” refers to a crime that “has as an element” the use or threat of force, rather than a crime that involves the use or threat of force. 18 U.S.C. § 924(e)(2)(B)(i); *Taylor*, 495

proach, a sentencing court deciding whether a defendant's prior offense is an ACCA-predicate can consider the prior offense's statutory definition.⁵⁰ The *Taylor* Court also left open the possibility of what is now called a modified categorical approach, where a sentencing court can consider charging documents and jury instructions as well.⁵¹

In contrast to *Taylor*, the defendant in *Shepard* had pled guilty to all four of his prior burglary convictions, rather than being convicted by a jury at trial.⁵² The statutory definition of the defendant's state burglary offense was broader than the definition of generic burglary, and because the defendant did not have a jury trial, there were no jury instructions available for the sentencing court to consult.⁵³ Thus, the Supreme Court had to determine whether *Taylor* allows sentencing courts to consider additional evidentiary sources when determining whether an offense that the defendant pled guilty to qualifies as an ACCA predicate.⁵⁴ In *Shepard*, the Court expanded the group of evidentiary sources to include written plea agreements, transcripts of plea colloquies, and trial judges' factual findings that the defendant agreed to.⁵⁵ The *Shepard* Court concluded that a sentencing court cannot consider police reports or complaint applications.⁵⁶

Taken together, *Taylor* and *Shepard* dictate that a sentencing court deciding whether a prior offense qualifies as a violent felony or serious drug conviction under the ACCA may consider statutory definitions, charging documents, jury instructions, written plea agreements, transcripts of plea colloquies, and trial judges' factual findings to which the defendant agreed.⁵⁷

U.S. at 600. Second, the legislative history supports a categorical approach because, despite significant debate over predicate offenses, there is no discussion about a fact-finding process for predicate offenses. *Taylor*, 495 U.S. at 601. Third, a factual approach would present practical difficulties for the sentencing court trying to determine the facts of the defendant's conduct, and this approach could be unfair to defendants who pleaded guilty. *Id.* at 601–02.

⁵⁰ *Taylor*, 495 U.S. at 600, 602.

⁵¹ *Id.* at 602; *King*, 853 F.3d at 271 (citing *Descamps*, 570 U.S. at 260–62) (explaining that “[t]his method of consulting limited evidence to determine which of several alternative elements underlies a prior conviction is now known as the ‘modified categorical approach’”); see, e.g., *United States v. Henderson*, 841 F.3d 623, 625–26 (3d Cir. 2016) (applying the modified categorical approach and examining charging instruments to compare the elements of the defendant's prior offenses to the generic offenses and find that the defendant's prior convictions qualify as serious drug offenses under the ACCA).

⁵² *Shepard*, 544 U.S. at 16.

⁵³ *Id.* at 17.

⁵⁴ *Id.* at 18.

⁵⁵ *Id.* at 16, 26.

⁵⁶ *Id.* at 16.

⁵⁷ *Id.* at 26; *Taylor*, 495 U.S. at 602.

*C. The Sixth Circuit Applies Taylor and Shepard to the ACCA's
Different-Occasions Inquiry in United States v. King*

On August 11, 2014, two Cleveland Police Department officers arrested Errol Dontes King for firearm-related offenses following a violent altercation between King and the two officers.⁵⁸ On February 18, 2015, in the United States District Court for the Northern District of Ohio, King pled guilty to one count of violating 18 U.S.C. § 922(g)(1) as a felon in possession of a firearm.⁵⁹ King had three prior robbery convictions that qualified as predicate offenses under the ACCA.⁶⁰ All three of the offenses occurred on the same day—February 18, 2002.⁶¹ The issue on appeal to the Sixth Circuit was whether King committed the offenses on different occasions for the purpose of the ACCA.⁶² If King committed the offenses on different occasions, then the ACCA's mandatory minimum fifteen-year sentence would apply to him.⁶³

A majority of courts have held that whether multiple previous convictions were committed on the same or different occasions depends on whether the underlying offenses arose from the same criminal episode or separate criminal episodes.⁶⁴ Courts consider several relevant factors in determining whether

⁵⁸ Brief of Plaintiff-Appellee, *supra* note 18, at 4–6. King was at a gas station standing next to the open driver's side door of his vehicle, which was playing music loud enough to violate local noise ordinances. *Id.* at 4. Officers Aaron Reese and Vu Nguyen approached King and asked for his driver's license. *Id.* In response, King moved toward the open door of his vehicle, and the officers feared that he was reaching for a weapon. *Id.* The officers approached King, and King fought Officer Nguyen. *Id.* at 4–5. During the fight, King twice reached into his front waistband, causing the officers to fear that he was reaching for a weapon. *Id.* Despite Officer Reese's commands for him to stop, King continued to fight Officer Nguyen. *Id.* at 5. Officer Reese tased King for a single five-second cycle, and the officers were able to subdue and handcuff King. *Id.* When the officers searched King and his vehicle, they found one plastic bag of crack cocaine, one plastic bag of marijuana, and cash on King's person, and a loaded semi-automatic weapon in his vehicle. *Id.*

⁵⁹ *King*, 853 F.3d at 268–69; Brief of Appellant, Errol King, *supra* note 18, at 5. On September 16, 2014, a federal grand jury indicted King with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Brief of Appellant, Errol King, *supra* note 18, at 5. Originally, at his arraignment, King pled not guilty to this count, but, on February 18, 2015, he withdrew his plea of not guilty and entered a plea of guilty. *Id.*

⁶⁰ *King*, 853 F.3d at 269; Brief of Plaintiff-Appellee, *supra* note 18, at 6. According to the Pretrial Services and Probation Department in its PSR, King had three convictions—(1) attempted robbery, (2) robbery, and (3) two counts of robbery and one count of attempted robbery—which qualified as predicate offenses for the purposes of the ACCA. Brief of Plaintiff-Appellee, *supra* note 18, at 6; Brief of Appellant, Errol King, *supra* note 18, at 6–7. A PSR, or presentence investigation report, is “[a] probation officer's detailed account of a convicted defendant's educational, criminal, family, and social background, conducted at the court's request as an aid in passing sentence.” *Presentence Investigation Report*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁶¹ *King*, 853 F.3d at 269; Brief of Plaintiff-Appellee, *supra* note 18, at 6–8.

⁶² *King*, 853 F.3d at 268.

⁶³ *Id.*

⁶⁴ *Linney*, 819 F.3d at 751 (stating that “[t]o prove that each offense was committed on a different occasion, the government must show that each offense arose out of a ‘*separate and distinct criminal episode*’” (quoting *Boykin*, 669 F.3d at 470)); Jondavid S. DeLong, Annotation, *What Constitutes*

offenses arose from the same or distinct criminal episodes.⁶⁵ These factors include the location and time of each offense, whether the offenses share the same victims, collaboration with other criminals, mode of operation, criminal objective, type of offense, and firearm use.⁶⁶ When considering these factors, various evidentiary sources may be available for the sentencing court to rely upon.⁶⁷

In King's case, the evidentiary sources potentially available for consultation were: indictments, transcripts of plea colloquies, journal entries memorializing guilty pleas, and bills of particulars.⁶⁸ Each of the three indictments named the victim(s) and the date of the robbery.⁶⁹ None of the three indictments described when and where the offenses occurred.⁷⁰ King's plea colloquies might have included the times and locations of the offenses, but the transcripts were no longer available.⁷¹ Three bills of particulars, however, did contain the times and locations of the offenses, and they indicated that the three offenses occurred approximately twenty-five minutes apart from each other and at different locations in the same city.⁷²

In sentencing King, the United States District Court for the Northern District of Ohio relied on these three bills of particulars containing the times and locations of the offenses.⁷³ Through this evidence, the court determined that

Three Previous Convictions for Offenses Committed on Occasions Different from One Another for Purpose of Sentence Enhancement Under Armed Career Criminal Act, 18 U.S.C.A. § 924(e), 123 A.L.R. Fed. 397 (1995).

⁶⁵ DeLong, *supra* note 64.

⁶⁶ *Id.* For example, courts have held that defendants' three prior convictions were distinct criminal episodes because they were committed on three different days, even though the convictions were for the same type of offense. *See, e.g.,* United States v. Medina-Gutierrez, 980 F.2d 980 (5th Cir. 1992); United States v. Bolton, 905 F.2d 319 (10th Cir. 1990).

⁶⁷ *See King*, 853 F.3d at 269 (explaining information contained in several available evidentiary sources).

⁶⁸ *Id.*; Brief of Plaintiff-Appellee, *supra* note 18, at 6–10; Brief of Appellant, Errol King, *supra* note 18, at 7. A colloquy is “[a]ny formal discussion, such as an oral exchange between a judge, the prosecutor, the defense counsel, and a criminal defendant in which the judge ascertains the defendant’s understanding of the proceedings and of the defendant’s rights.” *Colloquy*, *supra* note 17. A plea colloquy, specifically, is “[a]n open-court dialogue between the judge and a criminal defendant, usu[ally] just before the defendant enters a plea, to establish that the defendant understands the consequences of the plea.” *Plea Colloquy*, *supra* note 17.

⁶⁹ *King*, 853 F.3d at 269; Brief of Appellant, Errol King, *supra* note 18, at 7–8.

⁷⁰ *King*, 853 F.3d at 269; Brief of Appellant, Errol King, *supra* note 18, at 7–8.

⁷¹ *King*, 853 F.3d at 269. Even though the journal entries memorializing King's guilty pleas were available, they did not include the times or locations of the offenses. *Id.*

⁷² *Id.* All three robberies took place on February 18, 2002, in Cleveland, Ohio. *Id.* The three bills of particulars stated that the first robbery happened at approximately 7:00 PM at 740 Euclid Avenue, the second robbery occurred at approximately 7:27 PM at 1000 Barn Court, and the third robbery took place at approximately 7:50 PM at East 21st and Euclid. *Id.*

⁷³ *Id.* at 270. The district court adopted the government's argument that the *Taylor*- and *Shepard*-evidentiary restrictions did not apply to the different-occasions inquiry based on a footnote in the Sixth Circuit's decision in *United States v. Thomas* in 2000 stating that the evidentiary restrictions in

King committed his three predicate offenses on different occasions, and thus the ACCA applied to him.⁷⁴ The district court sentenced King under the ACCA, and King appealed to the Sixth Circuit, arguing that no *Taylor-Shepard*-approved evidence supported that his prior offenses were committed on different occasions.⁷⁵

King based his appeal on the fact that the bills of particulars were the only documents containing the times and locations of the offenses, and neither *Taylor* nor *Shepard* approved a bill of particulars as an evidentiary source.⁷⁶ Further, the evidence that the court *could* properly consider did not contain sufficient information to demonstrate that his offenses were committed on different occasions.⁷⁷ In response, the government argued, first, that the *Taylor-Shepard* evidentiary restrictions apply only to the ACCA-predicate question.⁷⁸ Second, the government argued that, even if the restrictions apply, the bills of particulars fall within the enumerated classes of evidence.⁷⁹ Alternatively, the government argued that, even if the sentencing court could not rely on the bills of particulars, the indictments and journal entries supported the finding that King committed his prior offenses on different occasions.⁸⁰ Even though the district court agreed with the government's primary argument that the evidentiary restrictions do not apply to the ACCA-predicate question, the Sixth Circuit rejected all three of the government's arguments.⁸¹

II. CIRCUITS IN CONFLICT OVER EVIDENTIARY SOURCES RELIED UPON TO ANSWER THE ACCA'S DIFFERENT-OCCASIONS QUESTION

In *United States v. King*, the Sixth Circuit joined the Second, Fourth, Fifth, Seventh, Tenth, Eleventh, and D.C. Circuits in holding that the *United States v. Taylor* and *Shepard v. United States* evidentiary restrictions apply to the different-occasions inquiry.⁸² Consequently, in *King*, the Sixth Circuit held

Taylor did not apply to the different-occasions question. *Id.*; *United States v. Thomas*, 211 F.3d 316, 318 n.3 (6th Cir. 2000), *abrogated by King*, 853 F.3d 267.

⁷⁴ *King*, 853 F.3d at 270. The district court examined the bills of particulars and concluded that the ACCA applied to King because he committed his three prior robbery offenses at three different times and locations. *See id.* at 269–70.

⁷⁵ *Id.* at 268, 270.

⁷⁶ *Id.* at 270.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 270, 274–75.

⁸² *United States v. King*, 853 F.3d 267, 273 (6th Cir. 2017); *United States v. Dantzler*, 771 F.3d 137, 139 (2d Cir. 2014); *Kirkland v. United States*, 687 F.3d 878, 886, 886 n.9 (7th Cir. 2012); *United States v. Boykin*, 669 F.3d 467, 472 (4th Cir. 2012); *United States v. Sneed*, 600 F.3d at 1326, 1332–33 (11th Cir. 2010); *United States v. Thomas*, 572 F.3d 945, 950 (D.C. Cir. 2009); *United States v.*

that a sentencing court answering the different-occasions question cannot rely on bills of particulars, which were not approved in either *Taylor* or *Shepard*.⁸³ In contrast, the Eighth Circuit introduced the possibility of a circuit split when, in a per curiam decision in *United States v. Evans*, it followed an earlier decision allowing a sentencing court to rely on a presentence report (“PSR”) for the different-occasions inquiry.⁸⁴

A. Second, Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits Hold in Favor of Only Taylor-Shepard-Approved Evidentiary Sources

In *King*, the Sixth Circuit extended the Supreme Court’s *Taylor-Shepard* evidentiary restrictions on the ACCA-predicate question to the different-occasions inquiry.⁸⁵ In so doing, the Sixth Circuit joined the Second, Fourth, Fifth, Seventh, Tenth, Eleventh, and D.C. Circuits, all of which had previously reached the same conclusion that the *Taylor-Shepard* evidentiary limitations apply to the different-occasions question.⁸⁶ In *King*, the Sixth Circuit held that a sentencing court cannot rely on bills of particulars in deciding the different-occasions question because neither *Taylor* nor *Shepard* approved them.⁸⁷

In *King*, the Sixth Circuit reasoned that the *Taylor* Court’s analysis of the ACCA’s legislative history and the *Shepard* Court’s constitutional concerns re-

Fuller, 453 F.3d 274, 279 (5th Cir. 2006); *United States v. Harris*, 447 F.3d 1300, 1305 (10th Cir. 2006); *United States v. Taylor*, 413 F.3d 1146, 1157 (10th Cir. 2005).

⁸³ *King*, 853 F.3d at 275.

⁸⁴ See *United States v. Evans*, 738 F.3d 935, 936 (8th Cir. 2014) (following *United States v. Richardson* in rejecting Sixth Amendment challenges to the district court’s determination of the different-occasions question); *United States v. Richardson*, 483 F. App’x 304, 305, 305 n.3 (8th Cir. 2012) (affirming the district court’s reliance on a PSR to determine that the defendant committed his prior offenses on different occasions, and footnoting that *United States v. Shepard* does not apply to the different-occasions question).

⁸⁵ *King*, 853 F.3d at 273.

⁸⁶ *Id.* at 273–74; see, e.g., *Dantzler*, 771 F.3d at 139 (holding that a sentencing court cannot rely on a PSR for the purposes of the different-occasions inquiry because it is not a *Taylor v. United States-Shepard*-approved evidentiary source); *Kirkland*, 687 F.3d at 886, 886 n.9 (holding that sentencing courts deciding the different-occasions question can rely upon only evidentiary sources approved in *Taylor* and *Shepard*); *Boykin*, 669 F.3d at 472 (holding that the sentencing court erred when it relied on a PSR for the purposes of the different-occasions inquiry without first determining that the PSR derived from evidentiary sources approved in *Shepard*); *Sneed*, 600 F.3d at 1332–33 (holding that sentencing courts cannot rely on police reports to answer the different-occasions question because *Shepard* did not approve police reports as an evidentiary source); *Thomas*, 572 F.3d at 950 (holding that sentencing courts cannot rely on PSRs with potentially unreliable information in order to determine whether a defendant committed prior offenses on different occasions and that the sentencing court should have relied on two available indictments because indictments are one of the evidentiary sources that *Taylor* and *Shepard* approved); *Fuller*, 453 F.3d at 279 (holding that a sentencing court deciding the different-occasions question can rely on only *Shepard*-approved evidentiary sources); *Harris*, 447 F.3d at 1305 (noting that sentencing courts cannot rely on PSRs for the different-occasions inquiry if the PSRs do not comply with *Shepard*); *Taylor*, 413 F.3d at 1157 (noting that sentencing courts deciding the different-occasions question must comply with *Shepard*).

⁸⁷ *King*, 853 F.3d at 275.

garding the ACCA-predicate question also apply to the different-occasions question.⁸⁸ First, holding a (likely extensive) proceeding to answer the different-occasions question would amount to a “mini-trial,” that, according to the legislative history, Congress sought to avoid.⁸⁹ Second, and more importantly, the Sixth Circuit agreed with the Supreme Court’s concerns about the defendant’s Sixth Amendment right to a jury trial.⁹⁰ The *Shepard* Court was concerned that, if a judge found facts beyond the mere fact of a prior conviction, basing an ACCA sentence enhancement on this factual finding would violate the Sixth Amendment.⁹¹ The Supreme Court reaffirmed this concern in 2013 in *Descamps v. United States* and again in 2016 in *Mathis v. United States*.⁹² In *King*, the Sixth Circuit explained that this concern applies to the different-occasions question also—if a judge were the factfinder regarding dates, times, and locations of prior offenses, this would raise the same Sixth Amendment concerns.⁹³

B. Eighth Circuit Potentially Creates a Split by Suggesting in United States v. Evans That Taylor and Shepard’s Evidentiary Restrictions Do Not Apply to the Different-Occasions Inquiry

In 2014, in a per curiam decision in *Evans*, the Eighth Circuit held that the United States District Court for the Western District of Missouri did not violate the Sixth Amendment when it concluded that the defendant committed his prior offenses on different occasions.⁹⁴ In so deciding, the Eighth Circuit followed its per curiam decision in *United States v. Ramsey* in 2013.⁹⁵ In its *Evans* decision, the Eighth Circuit also followed its decision in *United States v. Richardson* in 2012, where it held that the United States District Court for the Eastern District of Missouri’s reliance on a PSR for the different-occasions

⁸⁸ *Id.* at 272–73.

⁸⁹ *Id.* at 273.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* See generally *Mathis v. United States*, 136 S. Ct. 2243 (2016) (explaining that a sentencing court deciding whether a prior offense is an ACCA predicate can look to the elements of the offense but not the underlying facts); *Descamps v. United States*, 570 U.S. 254 (2013) (explaining that a sentencing court deciding the ACCA-predicate question must use a categorical approach, comparing the elements of the offense, not a factual approach).

⁹³ *King*, 853 F.3d at 273.

⁹⁴ *Evans*, 738 F.3d at 936 (rejecting the defendant’s Sixth Amendment argument that the district court should not have decided the ACCA different-occasions question because it is a factual determination on the basis that the court has previously rejected similar arguments). The phrase “per curiam” means “[b]y the court as a whole.” *Per Curiam*, BLACK’S LAW DICTIONARY (10th ed. 2014). A per curiam opinion is “[a]n opinion handed down by an appellate court without identifying the individual judge who wrote the opinion.” *Opinion*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁹⁵ *Evans*, 738 F.3d at 936. See generally *United States v. Ramsey*, 498 F. App’x 653 (8th Cir. 2013) (per curiam) (holding that a judge’s decision that a defendant’s prior offenses were committed on different occasions for the purposes of the ACCA does not violate the defendant’s Sixth Amendment right to a jury trial).

inquiry did not violate the Sixth Amendment.⁹⁶ In *Richardson*, the Eighth Circuit footnoted that *Shepard*'s restrictions on evidentiary sources do not apply to the different-occasions question.⁹⁷ In relying on *Richardson*, the Eighth Circuit in *Evans* did not clearly hold, but at least strongly suggested, that, in this circuit, sentencing courts are not restricted to relying only on *Shepard*-approved evidentiary sources when deciding the different-occasions question.⁹⁸

III. CONGRESS SHOULD AMEND THE ACCA TO RESOLVE THE CONFLICT BETWEEN SUPREME COURT CASE LAW AND CONGRESSIONAL INTENT

The Sixth Circuit decided correctly in *United States v. King* because it properly followed the Supreme Court's precedent set forth in *United States v.*

⁹⁶ *Evans*, 738 F.3d at 936 (finding that "[m]oreover, we have rejected similar Sixth Amendment arguments challenging the information the district court considers when determining the specific dates on which the offenses occurred"); *Richardson*, 483 F. App'x at 305.

⁹⁷ *Richardson*, 483 F. App'x at 305 n.3. In *Richardson*, the Eighth Circuit explained:

Moreover, [*Shepard*], which *Richardson* cites, is not applicable here. In *Shepard*, the Supreme Court limited the materials that a district court could consider to determine whether a defendant who had been convicted under an overinclusive statute had been convicted of a predicate offense. *Richardson* has not alleged that the drug distribution and sales statutes under which he was convicted are overinclusive or that those prior convictions were for something other than a serious drug offense.

Id. The defendant argued that no *Shepard*-approved documents contained information supporting that he committed his prior offenses on different occasions, and thus, when the district court concluded that he committed his prior offenses on different occasions, it violated the Sixth Amendment. *Id.* at 305. Therefore, when the Eighth Circuit states in the footnote that *Shepard* "is not applicable here," the court means that *Shepard* does not apply to the ACCA's different-occasions inquiry. *See id.* at 305 & n.3 (explaining that *Shepard* is not applicable "here," meaning in this case, where the defendant argues that the court cannot sentence him under the ACCA because no *Shepard*-approved sources contain sufficient evidence to prove that he committed his prior offenses on different occasions).

⁹⁸ *See Evans*, 738 F.3d at 936 (explaining that the Eighth Circuit has allowed at least one sentencing court to rely on a PSR to determine that a defendant committed prior offenses on different occasions); *Richardson*, 483 F. App'x at 305, 305 n.3 (affirming the sentencing court's reliance on a PSR to conclude that the defendant committed prior offenses on different occasions and should be sentenced under the ACCA). Moreover, in *Richardson*, the Eighth Circuit affirmed the district court's judgment that the defendant committed his prior offenses on different occasions, and thus the ACCA applied to him. *Richardson*, 483 F. App'x at 303–05. The district court's conclusion that the defendant committed his prior offenses on different occasions relied on the PSR. *Id.* at 305. Thus, in allowing sentencing courts to rely on PSRs for the different-occasions inquiry, the Eighth Circuit is allowing sentencing courts to rely on an evidentiary source not approved in either *Taylor* or *Shepard*. *See Shepard v. United States*, 544 U.S. 13, 26 (2005) (listing charging documents, plea agreements, and colloquy transcripts, and not listing PSRs, as the evidentiary sources allowed for the ACCA-predicate question); *Taylor v. United States*, 495 U.S. 575, 602 (1990) (listing statutory definitions, charging papers, and jury instructions, and not listing PSRs, as the evidentiary sources sentencing courts can rely upon to decide whether a prior offense is an ACCA predicate); *Richardson*, 483 F. App'x at 305 (affirming the sentencing court's reliance on a PSR to conclude that the defendant committed prior offenses on different occasions).

Taylor and *Shepard v. United States*.⁹⁹ In the context of the ACCA's different-occasions question in *King*, however, the *Taylor-Shepard* reasoning leads to an absurd result that conflicts with Congressional intent.¹⁰⁰ To resolve this conflict, Congress should amend the ACCA to enumerate the evidentiary sources that sentencing courts can rely on for the different-occasions inquiry.¹⁰¹

In *King*, the Sixth Circuit had to decide which evidentiary sources a sentencing court can rely on for the different-occasions question because the ACCA's text does not enumerate these sources.¹⁰² In *Taylor* and *Shepard*, the Supreme Court had to make the same decision with respect to the ACCA-predicate question because the ACCA's text does not enumerate these sources either.¹⁰³ Even though the questions are different, in 2014, in *United States v. Dantzer*, the Second Circuit noted that the Supreme Court's reasoning in *Taylor* and *Shepard* controls a court's interpretation of the ACCA's different-occasions question.¹⁰⁴ Thus, in *King*, the Sixth Circuit was correct to follow

⁹⁹ See *United States v. Dantzer*, 771 F.3d 137, 145–46 (2d Cir. 2014) (holding that sentencing courts deciding the ACCA different-occasions question must follow the evidentiary restrictions in *United States v. Taylor* and *Shepard v. United States*).

¹⁰⁰ See *Shepard v. United States*, 544 U.S. 13, 30, 35–36 (2005) (O'Connor, J., dissenting) (arguing that the majority's restrictions on evidentiary sources make sentencing under the ACCA arbitrary and dependent on states' "record retention policies" and "lead[] . . . not only to an absurd result, but also to a result that Congress plainly hoped to avoid").

¹⁰¹ See *Shepard*, 544 U.S. at 35–36 (O'Connor, J., dissenting) (arguing that the majority's evidentiary restrictions on the ACCA-predicate question conflict with Congress's intent for the ACCA to "incapacitat[e] repeat violent offenders" and "lead[] . . . to an absurd result . . . that Congress plainly hoped to avoid"); Levine, *supra* note 2, at 549 (arguing that Congress should amend the ACCA to "bring[] it into conformity with the Sentencing Guidelines promulgated by the U.S. Sentencing Commission"); Marano, *supra* note 15, at 183 (arguing that Congress should amend the ACCA to define "occasions different from one another" so that sentencing courts do not have to analyze prior offenses' underlying facts); Poli, *supra* note 15, at 212 (arguing that the best solution to courts applying the ACCA residual clause inconsistently is for Congress to amend the ACCA to "enumerat[e] which crimes are violent felonies").

¹⁰² See Armed Career Criminal Act, 18 U.S.C. § 924(e) (2012) (not enumerating the types of evidence allowed under the different-occasions inquiry); *United States v. King*, 853 F.3d 267, 270–73 (6th Cir. 2017) (analyzing Supreme Court precedent, legislative history, and constitutional concerns and holding that the *Taylor* and *Shepard* evidentiary restrictions apply to the ACCA's different-occasions inquiry).

¹⁰³ See 18 U.S.C. § 924(e) (not enumerating the types of evidence allowed under the ACCA-predicate question). See generally *Shepard*, 544 U.S. 13 (holding that a sentencing court deciding whether a burglary offense is an ACCA-predicate cannot rely on police reports and is limited to "examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented"); *Taylor v. United States*, 495 U.S. 575 (1990) (holding that a sentencing court deciding whether a burglary offense is an ACCA-predicate can rely on the statutory definition, charging paper, and jury instructions).

¹⁰⁴ *Dantzer*, 771 F.3d at 143, 146. When deciding which evidentiary sources a sentencing court can rely on to answer the different-occasions question in *United States v. Dantzer*, the Eighth Circuit explained: "Although *Taylor* and *Shepard* involved the question of whether predicate offenses under the ACCA were 'violent felonies,' the reasoning underlying those decisions applies with equal force to the analysis of whether the offenses were committed 'on occasions different from one another.'" *Id.*

the *Taylor-Shepard* reasoning.¹⁰⁵ Furthermore, the Sixth Circuit followed the Supreme Court's reasoning precisely and accurately to reach its conclusion that the *Taylor-Shepard* evidentiary source restrictions apply to the different-occasions question.¹⁰⁶

Nevertheless, the Sixth Circuit's conclusion is inconsistent with congressional intent underlying the ACCA.¹⁰⁷ Congress intended for the ACCA to assist law enforcement in reducing the number of armed career criminals because these repeat offenders are highly dangerous to society.¹⁰⁸ Dissenting in *Shepard*, Justice O'Connor argued that the *Taylor-Shepard* evidentiary restrictions on the ACCA-predicate question risk that some of these dangerous habitual criminals will not be sentenced under the ACCA.¹⁰⁹ Rather than depending on whether defendants actually committed their prior offenses on different occasions, sentencing will hinge on whether state courts preserve records of approved evidentiary sources.¹¹⁰ When a defendant who should be sentenced under the ACCA does not receive the ACCA's mandatory minimum fifteen-year

at 143. Again, the court noted, "we are bound by the Court's opinions in *Taylor* and *Shepard* regarding the sources that may be consulted for purposes of sentencing under the ACCA." *Id.* at 146.

¹⁰⁵ *See King*, 853 F.3d at 271–73 (determining the types of evidence allowed for the ACCA different-occasions question by analyzing *Taylor* and *Shepard*); *Dantzler*, 771 F.3d at 145–46 (holding that sentencing courts deciding the ACCA different-occasions question must follow the evidentiary restrictions in *Taylor* and *Shepard*).

¹⁰⁶ *See King*, 853 F.3d at 271–73 (following the *Taylor* Court's analysis of legislative history and the *Shepard* Court's analysis of constitutional concerns).

¹⁰⁷ *See Shepard*, 544 U.S. at 35–36 (O'Connor, J., dissenting) (arguing that evidentiary restrictions on the ACCA-predicate question conflict with Congress's intent for the ACCA to "incapacitat[e] repeat violent offenders").

¹⁰⁸ *Taylor*, 495 U.S. at 581 (stating that "[t]he [ACCA] was intended to supplement the States' law enforcement efforts against 'career' criminals"); H.R. REP. NO. 98–1073, at 1 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3661, 3661 (stating that "[t]his bill is designed to increase the participation of the federal law enforcement system in efforts to curb armed, habitual (career) criminals"); Hooper, *supra* note 15, at 1952–53 (stating that the ACCA intends "to help state authorities more effectively prosecute 'career criminals'"); Lamprecht, *supra* note 15, at 1411 (noting that the ACCA intends to reduce habitual criminals' crimes); Levine, *supra* note 2, at 545–46 (explaining that the ACCA's purpose is to help law enforcement incapacitate dangerous repeat offenders); Marano, *supra* note 15, at 175 (stating that the ACCA intends to "reduce crimes committed by armed, career criminals"); Poli, *supra* note 15, at 203 (noting that the ACCA's purpose is "to protect society from violent habitual criminals" and "to aid law enforcement efforts against [these] criminals"); Runyon, *supra* note 2, at 450 (explaining that the ACCA's purpose is to assist law enforcement efforts to stop career criminals from reoffending); *see also* H.R. REP. NO. 98–1073, at 2 (stating that "[b]oth Congress and local prosecutors around the nation have recognized the importance of incapacitating [the small group of] repeat offenders [who are responsible for a large number of crimes]").

¹⁰⁹ *Shepard*, 544 U.S. at 30, 36–37 (O'Connor, J., dissenting).

¹¹⁰ *Id.* at 36–37 ("[T]he majority opinion today injects a new element of arbitrariness into the ACCA: A defendant's sentence will now depend not only on the peculiarities of the statutes particular States use to prosecute generic burglary, but also on whether those States' record retention policies happen to preserve the musty 'written plea agreement[s]' and recordings of 'plea colloquy[ies]' ancillary to long-past convictions.").

sentence merely because of the evidentiary restrictions, this is an absurd result that is inconsistent with Congress's intent and that Congress wanted to avoid.¹¹¹

Errol Dontes King exemplifies Justice O'Connor's concerns.¹¹² King is one of the armed habitual criminals that Congress wanted to remove from society because he embodies all of the concerns about dangerous repeat offenders that Congress raised in the ACCA's legislative history.¹¹³ First, King previously committed three robberies.¹¹⁴ Second, he committed these offenses on different occasions because the robberies happened at different times and locations.¹¹⁵ Also, King possessed a firearm—specifically, a semi-automatic pistol.¹¹⁶ Moreover, he continued to pose a danger to society, not only by possessing a firearm, but also by resisting arrest and fighting police officers.¹¹⁷ Despite all of this, King was not sentenced under the ACCA because the approved evidentiary sources did not contain sufficient details to conclude that he committed his prior offenses on different occasions.¹¹⁸ Had the state courts

¹¹¹ See *id.* at 30, 35–37 (arguing that the majority's restrictions on evidentiary sources make sentencing under the ACCA arbitrary and dependent on states' "record retention policies" and "lead[] . . . not only to an absurd result, but also to a result that Congress plainly hoped to avoid").

¹¹² See *id.* (arguing that evidentiary restrictions on the ACCA-predicate question make ACCA sentencing arbitrary and do not fulfill the ACCA's goal of "incapacitating repeat violent offenders"). See generally *King*, 853 F.3d 267 (holding that a sentencing court deciding the ACCA different-occasions inquiry could not rely on bills of particulars, which were the only documents showing that the defendant—who was a felon in possession of a firearm—committed his three prior robbery offenses on different occasions); Brief of Plaintiff-Appellee, *supra* note 18 (describing the defendant's three prior robbery offenses and his violent altercation with police officers, where he appeared to reach for a loaded semi-automatic weapon in his vehicle).

¹¹³ See H.R. REP. NO. 98–1073, at 2 (noting that "[b]oth Congress and local prosecutors around the nation have recognized the importance of incapacitating [the small group of] repeat offenders [who are responsible for a large number of crimes]"); Brief of Plaintiff-Appellee, *supra* note 18, at 4–6 (describing King's altercation with police and his possession of illicit drugs and a semi-automatic weapon); Levine, *supra* note 2, 545–46 (explaining that the ACCA's purpose is to help law enforcement incapacitate dangerous repeat offenders); Poli, *supra* note 15, at 203 (explaining that the ACCA's purpose is "to protect society from violent habitual criminals").

¹¹⁴ *King*, 853 F.3d at 269; Brief of Plaintiff-Appellee, *supra* note 18, at 6.

¹¹⁵ See *King*, 853 F.3d at 269 (describing the defendant's three prior robbery offenses, which occurred 25 minutes apart and at different locations in Cleveland, Ohio).

¹¹⁶ Brief of Plaintiff-Appellee, *supra* note 18, at 5. At the time of his arrest, King had a loaded semi-automatic pistol in his vehicle. *Id.*

¹¹⁷ See Brief of Plaintiff-Appellee, *supra* note 18, at 4–6 (describing King's altercation with police). During King's altercation with the two police officers, the officers feared that King was reaching for a weapon in his vehicle and in his waistband. *Id.* at 4–5. The loaded semi-automatic pistol in King's vehicle was located near the driver's seat, where King was reaching. *Id.* at 5. Furthermore, after his arrest, King told the police officers he would have a gun on him anytime they see him. *Id.* at 6 (noting that King stated "if you ever see my face, I will have a gun on me. You know how it is out there. I know the consequence.")).

¹¹⁸ *King*, 853 F.3d at 269. Bills of particulars contained the times and locations of King's offenses, but bills of particulars are not a *Taylor-Shepard*-approved evidentiary source. *Id.* at 269, 275, 278. Indictments are a *Taylor-Shepard*-approved evidentiary source, but King's three indictments did not contain the times or locations of his offenses. *Id.* at 269, 271.

kept better records, King might have been sentenced under the ACCA.¹¹⁹ Thus, evidentiary restrictions on the ACCA's different-occasions inquiry make sentencing under the ACCA arbitrary.¹²⁰ That King was not sentenced under the ACCA conflicts with Congress's intent and is an absurd result.¹²¹

The Supreme Court could grant certiorari to resolve the circuit split as well as the conflict between case law and legislative intent.¹²² The Supreme Court could allow sentencing courts more flexibility to rely upon different evidentiary sources for the different-occasions inquiry to achieve results that comply with congressional intent.¹²³ Allowing sentencing courts to rely on a greater variety of evidentiary sources would avoid the *King* result where sentencing is arbitrary and depends on whether the approved evidentiary sources

¹¹⁹ See *id.* at 269 (explaining that transcripts of King's plea colloquies were no longer available due to Ohio state courts' record-keeping practices).

¹²⁰ See *Shepard*, 544 U.S. at 36–37 (O'Connor, J., dissenting) (arguing that evidentiary restrictions on the ACCA-predicate question make sentencing under the ACCA arbitrary because sentencing will depend on whether state courts' "record retention policies preserve the [approved evidentiary sources, which are] ancillary to long-past convictions").

¹²¹ See *id.* at 30, 35–36 (stating that the ACCA's goal is to "incapacitat[e] repeat offenders," and arguing that evidentiary restrictions on the ACCA-predicate question make ACCA sentencing arbitrary and "lead[] . . . to an absurd result . . . that Congress plainly hoped to avoid"); H.R. REP. NO. 98–1073, at 1–2 (stating that the purpose of the ACCA is to incapacitate armed repeat offenders); Hooper, *supra* note 15, at 1952–53 (stating that the ACCA intends "to help state authorities more effectively prosecute 'career criminals'"); Lamprecht, *supra* note 15, at 1411 (noting that the ACCA intends to reduce habitual criminals' crimes); Levine, *supra* note 2, 545–46 (explaining that the ACCA's purpose is to help law enforcement incapacitate dangerous repeat offenders); Marano, *supra* note 15, at 175 (stating that the ACCA intends to "reduce crimes committed by armed, career criminals"); Poli, *supra* note 15, at 203 (stating that the ACCA intends "to protect society from violent habitual criminals" and "to aid law enforcement efforts against [these] criminals"); Runyon, *supra* note 2, at 450 (explaining that the ACCA's purpose is to assist law enforcement efforts to stop career criminals from reoffending).

¹²² See STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, *SUPREME COURT PRACTICE: FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES* 243 (10th ed. 2013) ("The Supreme Court often, *but not always*, will grant certiorari where the decision of a federal court of appeals, as to which review is sought, is in direct conflict with a decision of another court of appeals on the same matter of *federal* law or on the same matter of *general* law as to which federal courts can exercise independent judgments."); see, e.g., *Shepard*, 544 U.S. at 19 (granting certiorari to resolve conflict among Courts of Appeals regarding the application of the Supreme Court's decision in *Taylor* to cases where the defendant pleaded guilty to the prior convictions that could be ACCA predicate offenses); *Taylor*, 495 U.S. at 579–80 (granting certiorari to address Courts of Appeals' conflicting decisions regarding the definition of the term "burglary" for purposes of the ACCA).

¹²³ See *Shepard*, 544 U.S. at 30, 35–37 (O'Connor, J., dissenting) (arguing that the majority's evidentiary restrictions on the ACCA-predicate question conflict with congressional intent underlying the ACCA and lead to an absurd result, and, instead, the Court should adopt a rule that is consistent with the ACCA's goal of "incapacitating repeat violent offenders"); Marano, *supra* note 15, at 183 (arguing that Congress should amend the ACCA to define "occasions different from one another" so that sentencing courts do not have to analyze prior offenses' underlying facts).

are still available and sufficiently detailed.¹²⁴ This result would allow the Court to maintain its *Taylor* and *Shepard* precedents regarding the ACCA-predicate question and create a new analysis for the different-occasions question.¹²⁵

Alternatively, Congress should amend the ACCA to enumerate which evidentiary sources sentencing courts can rely upon for the different-occasions inquiry.¹²⁶ Congress could also use this opportunity to enumerate the evidentiary sources for the ACCA-predicate question as well.¹²⁷ Given that the goal is for sentencing courts to apply the ACCA consistent with Congress's intent, Congress is in the best position to reshape the ACCA to function as Congress intends.¹²⁸

¹²⁴ See *Shepard*, 544 U.S. at 30, 35–37 (O'Connor, J., dissenting) (arguing that the majority's evidentiary restrictions on the ACCA-predicate question conflict with congressional intent underlying the ACCA and lead to an absurd result, and, instead, the Court should adopt a rule that is consistent with the ACCA's goal of "incapacitating repeat violent offenders"); Marano, *supra* note 15, at 183 (arguing that Congress should amend the ACCA to define "occasions different from one another" so that sentencing courts do not have to analyze prior offenses' underlying facts).

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¹²⁷ See *Shepard*, 544 U.S. at 35–36 (O'Connor, J., dissenting) (arguing that the majority's evidentiary restrictions on the ACCA-predicate question conflict with congressional intent underlying the ACCA and lead to an absurd result, and, instead, the Court should adopt a rule that is consistent with the ACCA's goal of "incapacitating repeat violent offenders"); Levine, *supra* note 2, at 549 (arguing that Congress should amend the ACCA to "bring[] it into conformity with the Sentencing Guidelines promulgated by the U.S. Sentencing Commission"); Marano, *supra* note 15, at 183 (arguing that Congress should amend the ACCA to define "occasions different from one another" so that sentencing courts do not have to analyze prior offenses' underlying facts); Poli, *supra* note 15, at 212 (arguing that the best solution to courts applying the ACCA residual clause inconsistently is for Congress to amend the ACCA to "enumerat[e] which crimes are violent felonies").

¹²⁸ See Levine, *supra* note 2, at 549 (arguing that Congress should amend the ACCA to "bring[] it into conformity with the Sentencing Guidelines promulgated by the U.S. Sentencing Commission"); Marano, *supra* note 15, at 183 (arguing that Congress should amend the ACCA to define "occasions different from one another" so that sentencing courts do not have to analyze prior offenses' underlying facts); Poli, *supra* note 15, at 212 (arguing that the best solution to courts applying the ACCA residual clause inconsistently is for Congress to amend the ACCA to "enumerat[e] which crimes are violent felonies").

CONCLUSION

The ACCA imposes a lengthy fifteen-year mandatory minimum sentence on armed career criminals in order to reduce the number of these dangerous offenders in society. For the ACCA to apply, the defendant must have committed three prior violent felony or serious drug offenses on different occasions. In *King*, the Sixth Circuit joined the Second, Fourth, Fifth, Seventh, Tenth, Eleventh, and D.C. Circuits in holding that a sentencing court determining whether a defendant's prior convictions were committed on different occasions can consider only the evidentiary sources that the Supreme Court approved in *Taylor* and *Shepard*—statutory definitions, charging documents, jury instructions, written plea agreements, transcripts of plea colloquies, and trial judges' factual findings that the defendant agreed to. The Sixth Circuit decided correctly in *King* that a sentencing court may not rely on bills of particulars in answering the ACCA's different-occasions question because neither *Taylor* nor *Shepard* approved them. Nevertheless, the *Taylor-Shepard*-evidentiary restrictions resulted in *King*—who had three convictions for robbery and attempted robbery—not being sentenced under the ACCA, which is an absurd result that conflicts with Congress's intent for the ACCA to incapacitate dangerous repeat offenders. To resolve the conflict between Supreme Court precedent and Congressional intent, Congress should amend the ACCA to enumerate which evidentiary sources a sentencing court may rely upon for the different-occasions inquiry.

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