

Nos. 16-1872 & 16-1580

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

SHANE SAHM,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DENNIS FRANKLIN,

Defendant-Appellant.

Both Appeals from the United States District Court
for the Western District of Wisconsin,
the Honorable James D. Peterson Presiding

**CONSOLIDATED BRIEF AND APPENDICES OF
DEFENDANT-APPELLANTS SHANE SAHM & DENNIS FRANKLIN**

Joseph A. Bugni
Shelley M. Fite
Federal Defender Services of
Wisconsin, Inc.
22 East Mifflin Street, Suite 1000
Madison, WI 53703
(608) 260-9900
joseph_bugni@fd.org

Counsel for Defendant-Appellants

DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, counsel informs the Court that Federal Defender Services of Wisconsin, Inc., represented both defendant-appellants, who are natural persons, in the district court. On appeal, Federal Defender Services of Wisconsin, Inc., continues to represent the defendant-appellants in this Court.

Date: November 15, 2016

Joseph A. Bugni
Counsel for Defendants Appellants,
Shane Sahm and Dennis Franklin

TABLE OF CONTENTS

	Page
Disclosure Statement	
Table of Contents	-i-
Table of Authorities	-iii-
Jurisdictional Statement	1
Statement of the Issue	2
Statement of the Case	3
Summary of the Argument	5
Argument	6
I. <i>Mathis</i> clarified that a statute is only divisible if it contains alternative elements of distinct criminal offenses, and under this formulation, Wisconsin’s seven location-related subsections are not divisible.	6
A. Under <i>Mathis</i> , a statute containing disjunctive alternatives is divisible only if those alternatives are legal elements of distinct crimes	8
B. Wisconsin burglary’s alternative locations are not elements of distinct crimes – they are means of committing a single crime	10
C. <i>Edwards</i> gave further guidance, and makes it even clearer that Wisconsin burglary is not divisible	12
D. The fact that the statute contains enumerated subdivisions, rather than a simple list, has no legal effect – it’s just a matter of style	16
Conclusion	21

Circuit Rule 31(e) Certification

Certificate of Compliance

Certificate of Service

Appendix

TABLE OF AUTHORITIES

CASES	Page
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	9
<i>Blockburger v. United States</i> , 284 U.S. 299 (1932)	15
<i>Descamps v. United States</i> , 133 S. Ct. 2276	1
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016)	<i>Passim</i>
<i>Shepard v. United States</i> , 544 U.S. 13 (2005)	8
<i>State v. Derango</i> , 613 N.W.2d 833 (Wis. 2000)	17, 18, 19, 20
<i>State v. Kuntz</i> , 467 N.W.2d 531 (Wis. 1991)	13
<i>Taylor v. United States</i> , 495 U.S. at 598.....	1, 6, 7
<i>United States v. Edwards</i> , 836 F.3d 831 (7th Cir. 2016)	<i>Passim</i>
<i>United States v. Haney</i> , ___ F.3d ___, 2016 WL 6298695 (7th Cir. October 27, 2016)	20
<i>United States v. Larsen</i> , 615 F.3d 780 (7th Cir. 2010)	15
<i>United States v. Thorne</i> , ___ F.3d ___, 2016 WL 4896375 (8th Cir. Sept. 15 2016)	1

United States v. White,
 No. 15-4096, ___F.3d___, 2016 WL 4717943 (4th Cir. Sept. 9, 2016) .1

United States v. Woods,
 576 F.3d 400 (7th Cir. 2009)6

STATUTES AND OTHER AUTHORITIES

18 U.S.C. § 924(e)6

18 U.S.C. § 924(e)(2)(B)(ii)7

Iowa Stat. § 702.121

Wis. Stat. § 943.10(1m)8, 10, 20

Wis. Stat. § 943.10(1m)(c)-(e)13

Wis. Stat. § 943.10(1m)(f)13

Wis. Stat. § 943.10(2)10

Wis. Stat. § 948.0718

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the Western District of Wisconsin for both defendant-appellants was founded upon 18 U.S.C. § 3231.

The district court sentenced Dennis Franklin on March 1, 2016, and entered its judgment March 3, 2016. On March 15, 2016, Mr. Franklin filed a timely notice of appeal. The United States Court of Appeals for the Seventh Circuit has jurisdiction pursuant to 28 U.S.C. § 1291.

The district court sentenced Shane Sahm on April 14, 2016, and entered its judgment April 18, 2016. On April 21, 2016, Mr. Sahm filed a timely notice of appeal. The United States Court of Appeals for the Seventh Circuit has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

The Armed Career Criminal Act's definition of "violent felony" covers only burglary offenses involving a "building or structure." Both Franklin and Sahn had convictions for Wisconsin burglary, which criminalizes unlawful entry of not just buildings but also, inter alia, ships and railroad cars. The district court determined that Wisconsin's burglary statute is "divisible" and consulted state-court documents to find that the defendants had in fact burglarized buildings. After sentencing, the Supreme Court in *Mathis v. United States* held that a statute can only be considered divisible, permitting reliance on state-court documents, if it contains alternative elements that define distinct crimes. These appeals present one issue:

Are Wisconsin burglary's list of places that can be burgled, which significantly overlap and carry the same penalty, alternative elements of distinct crimes?

STATEMENT OF THE CASE

After pleading guilty to firearm offenses, Dennis Franklin and Shane Sahm were each sentenced as armed career criminals to the mandatory-minimum term of 15 years' imprisonment. F.R.82; S.R.48.¹ Each defendant's designation was based on the district court's finding that Wisconsin burglary was a "violent felony" as that phrase is statutorily defined—each had at least three prior convictions for that crime. F.R.70:9; S.R.31:9.

Both Franklin and Sahm objected to the armed-career-criminal status, and both argued that Wisconsin burglary isn't a violent felony—it extends beyond unlawful entry into a building or structure and covers entry into other places, including railroad cars and ships. And the various places covered by the burglary statute simply provide alternative means of committing one single offense: burglary. In other words, the statute is (in parlance of the categorical analysis) indivisible. The government countered that the Wisconsin statute is divisible, and state-court documents indicated that Franklin and Sahm were convicted of burglary of a "building or dwelling." The district court agreed with the government.

¹ Citations to the record in Franklin's case are identified by F.R., in Sahm's case by S.R. Each reference to F.R. or S.R. is followed by the district court record number and, if relevant the page number.

After the district court entered judgment and Franklin and Sahn appealed, the cases were consolidated and then stayed pending the Supreme Court's decision in *Mathis v. United States*, 136 S. Ct. 2243(2016). In June, 2016, the Supreme Court in *Mathis* held that a state statute can only be considered divisible, permitting the district court to rely on state-court documents regarding the nature of the offenses, if it has alternative elements of distinct criminal offenses that jurors would have to unanimously agree on at trial. *Id.* at 2249. If a statute merely lists alternative means of committing a single offense, then the details of a defendant's commission are mere facts. *Id.* at 2251. And a judge's reliance on state-court documents illuminating those details would amount to fact-finding, potentially violating the Sixth Amendment. *Id.* at 5525.

After *Mathis* came down, this Court decided *United States v. Edwards*, holding that a single subsection of Wisconsin burglary (the same burglary statute addressed here) was not divisible under the *Mathis* formulation. 836 F.3d 831, 837-38 (7th Cir. 2016). Although the issue resolved in *Edwards* was narrower than the one presented here, that opinion is highly relevant, so this consolidated appeal was stayed until the mandate issued in *Edwards*.

SUMMARY OF THE ARGUMENT

This case can be reduced to a syllogism. The Supreme Court provided the major premise in *Mathis*: a statute is not divisible if it sets out alternative means of committing a single crime. This Court then supplied the minor premise in *Edwards*: Wisconsin's "burglary statute . . . criminalizes the act of intentionally entering certain types of locations" and its subsections just "describe the various locations" to be entered. That is, Wisconsin burglary provides a variety of means (including entering a ship or railroad car) of committing a single offense: burglary. With that, the conclusion is inescapable: Wisconsin's burglary statute is not divisible. Hence, it extends beyond generic burglary and cannot count as a predicate offense under the Armed Career Criminal Act.

This brief goes beyond that simple syllogism and tracks how Wisconsin burglary has to be read in light of the factors considered in *Mathis* and this Court's observations in *Edwards* concerning the peculiarities of Wisconsin law, the statute's penalty structure, and double-jeopardy principles. But the bottom line remains that Wisconsin burglary is an indivisible, overbroad offense that cannot serve as a predicate for the armed career criminal act's enhanced penalties. Thus *Sahm* and *Franklin* are entitled to resentencing.

ARGUMENT

- I. ***Mathis* clarified that a statute is only divisible if it contains alternative elements of distinct criminal offenses, and under this formulation, Wisconsin’s seven location-related subsections are not divisible.**

For over 20 years, courts have had to tackle whether a crime fits within Congress’s definition of a violent felony in the Armed Career Criminal Act. 18 U.S.C. § 924(e).² While the challenges and the decisions keep coming, the foundational points sketched in *Taylor* remain both the starting point and guiding principle for the entire analysis. *Taylor v. United States*, 495 U.S. 575 (1990). Whether an offense is a “violent felony” under the Act is determined as a categorical matter; a court looks at the statutory crime, not the defendant’s conduct. *See, e.g., Mathis*, 136 S. Ct. at 2248; *United States v. Woods*, 576 F.3d 400, 403 (7th Cir. 2009). If state law defines a particular offense more broadly than the Act, the prior conviction doesn’t qualify as a predicate offense “even if the defendant’s conduct satisfies all of the elements of” the Act’s offense. *United States v. Edwards*, 836 F.3d 831, 833 (7th Cir. 2016). This assessment involves a purely legal matter, so the Court’s review is de novo. *See id.* at 834.

² Since this appeal doesn’t discuss any “act” other than the Armed Career Criminal Act, hereinafter, this is referenced as “the Act.”

Among the enumerated crimes that the Act defines as a violent felony is “burglary.” 18 U.S.C. § 924(e)(2)(B)(ii). But, of course, every state burglary statute doesn’t qualify.³ The only burglary convictions that count are those limited to what the Supreme Court has termed generic burglary: “unprivileged entry into a building or structure with intent to commit a crime.” *Taylor*, 495 U.S. at 598. Thus, a burglary statute that covers entry into, say, a boat or a car would not amount to generic burglary, and hence it doesn’t count as a violent felony. *Mathis*, 136 S. Ct. at 2250.

In this case, the parties and the district court agreed that Wisconsin burglary reaches beyond generic burglary – it extends to ships and railroad cars. The statute reads as follows:

Burglary.

(1m) Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony in such place is guilty of a Class F felony:

- (a) Any building or dwelling; or
- (b) An enclosed railroad car; or
- (c) An enclosed portion of any ship or vessel; or
- (d) A locked enclosed cargo portion of a truck or trailer; or

³ See *Taylor*, 495 U.S. at 598 (Massachusetts burglary too broad); *Descamps*, 133 S. Ct. 2276, 2286 (California doesn’t count); *Mathis*, 136 S. Ct. at 2253 (Iowa either); *United States v. Thorne*, ___ F.3d ___, 2016 WL 4896375 (8th Cir. Sept. 15 2016) (Florida doesn’t count); *United States v. White*, No. 15-4096, ___F.3d___, 2016 WL 4717943, at *6-8 (4th Cir. Sept. 9, 2016) (same with West Virginia statute).

(e) A motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or

(f) A room within any of the above.

Wis. Stat. § 943.10(1m). The important (and contested) question comes next: whether the statute is divisible. If it is divisible, a court can look at the *Shepard* documents and determine whether the burglary took place in a ship or a building. *Shepard v. United States*, 544 U.S. 13 (2005). In the district court, the government used state-court documents to prove that Franklin and Sahm were convicted of burglary of a “building or dwelling.” And whether the statute is “divisible,” turns on the framework laid out by the Supreme Court in *Mathis*.

A. Under *Mathis*, a statute containing disjunctive alternatives is divisible only if those alternatives are legal elements of distinct crimes.

Under *Mathis*, a statute is divisible only if it sets out “alternative elements” defining “multiple offenses.” 136 S. Ct. at 2253–54. The term “elements” has a technical, legal meaning: the “constituent parts of a crime’s legal definition” about which jurors would have to unanimously agree at trial. *Id.* at 2248. Unless something is a legal element, it is a question of fact. And findings of that fact cannot be used as the basis for an elevated sentence—that would violate the Sixth Amendment. *Id.* at 2252 (“[O]nly a jury, and not a judge, may find facts that increase a maximum penalty[.]”);

see also Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). So it follows that if a state statute contains alternatives that are various “means of committing a single element,” rather than distinct elements, then the statute is not divisible. *Mathis*, 136 S. Ct. at 2249. And when it comes to indivisible statutes, courts cannot examine state-court documents to determine which “means” were employed. *Id.* So in *Mathis*, the statute criminalized unlawful entry of “any building, structure, or land, water, or air vehicle.” *Id.* at 2250–51. And although the state-court records made it clear that the defendant had entered a building, the statute was indivisible so those documents could not be considered and his penalties could not be enhanced. *Id.* at 2253–54.

The Supreme Court treated *Mathis* as an “easy” case: the Iowa Supreme Court had held that the burglary statute listed means, not elements. *Id.* at 2256. But the Supreme Court in *Mathis* provided guidance for harder cases, too – where a state supreme court hasn’t ruled on the issue. In those cases, federal courts look to the statute’s text and structure. *Id.* And if the alternatives function as “examples,” they are probably means, rather than elements; if, however, the statutory alternatives carry different penalties, then they must be elements. *Id.*

The focus on a statute's text and penalty structure, reflects Sixth Amendment concerns of what a jury would have to find at trial or a defendant would admit to in a plea. If a certain fact separates one crime from another and enhances a defendant's penalty options, then a jury would have to be instructed on it and make a unanimous finding on it. But if a fact didn't matter, then at "trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he may have good reason not to—or even be precluded from doing so by the court." *Id.* at 2253 (internal quotation marks omitted).

B. Wisconsin burglary's alternative locations are not elements of distinct crimes—they are means of committing a single crime.

Since the Wisconsin Supreme Court has never had to rule on whether the burglary statute is divisible, the focus here is on the statute's structure and penalties. In Wisconsin, whether a burglar enters a building or a vessel or a room within a houseboat, he or she has committed a Class F felony. Wis. Stat. § 943.10(1m). There is a distinct crime in subsection (2), for burglary committed under aggravating circumstances such as when a defendant steals a weapon—but that doesn't impact the location alternatives in subsection (1m). *See* Wis. Stat. § 943.10(2). So regardless of whether an actor breaks into a building or a ship, he has committed a Class

F felony; and regardless of whether the crime involves a building or ship, if the burglar steals a firearm from that location, he has committed a Class E felony. *Id.* That is, the enhancement applies equally to all of the locations covered by Wisconsin burglary – only some of which fall under the generic-burglary definition. Thus, the burglary statute’s penalty structure indicates that as a whole, the statute’s six location subsections do not spell out separate offenses. Rather, as this Court put it in *Edwards*, they simply “describe the various locations” that are covered by the single offense of “burglary.” 836 F.3d at 837.

Thus, in Sixth Amendment terms (and in determining a crime’s maximum potential penalties), when it comes to Wisconsin burglary there is no constitutional need to ask a jury to decide the location of a burglary. And relatedly, there’s no practical reason that a defendant might object to a complaint charging him with burglarizing a dwelling, although it was really a ship. After all, the locations are all means of committing the same crime, with the same penalty. So, just as it was the case in Iowa, in Wisconsin, the location of the burglary has no legal significance. And thus, the Wisconsin burglary statute’s structure and penalties suggest that the statute is not divisible.

C. *Edwards* gave further guidance, and makes it even clearer that Wisconsin burglary is not divisible.

Soon after *Mathis* was issued, this Court provided guidance in *Edwards* on how to apply *Mathis*—how to analyze whether a statute provided alternative elements or means. In that opinion, this Court stressed considering whether the listed alternatives are “similar.” *Edwards*, 836 F.3d at 837. If so, then one crime was probably intended because jurors wouldn’t be required to make a unanimous decision among synonymous terms—instead of competing elements, they would just stand as alternative and somewhat redundant means of violating the statute. *Id.*

In *Edwards*, this Court analyzed the Wisconsin burglary statute and found that there was significant overlap in the “building and dwelling” subsection; and in the course of making this finding, it noted that there is overlap in most of the statute’s subsections:

There’s no plausible argument that the Wisconsin legislature intended to create a distinct offense for entering a ‘ship’ as opposed to a ‘vessel,’ a ‘truck’ as opposed to a ‘trailer,’ or a ‘motor home or other motorized home’ as opposed to a ‘trailer home.’

Id. Returning to the question of what a defendant would have to admit or a jury would have to decide, it wouldn’t make sense for jurors to be required to unanimously agree on whether a particular burglar entered a “ship” or a “vessel,” because those terms aren’t mutually exclusive. *Id.*

And just as there is overlap within each subsection, there's significant overlap *among* the subsections. While sub. (1m)(a) covers any "building or dwelling," every other subsection involves locations that can potentially be used as dwellings – motor homes, ships, railroad cars, and truck trailers. Wis. Stat. § 943.10(1m)(c)-(e). And even "building" overlaps to some extent with the other subsections; for example, the Wisconsin Supreme Court has found that a mobile home is a "building." *State v. Kuntz*, 467 N.W.2d 531, 538 (Wis. 1991). What's more, the final subsection criminalizes entry into "any room within any of the above." Wis. Stat. § 943.10(1m)(f). That means that any violation of subsections (a)-(e) will necessarily involve at least one violation of sub. (f). The notion of treating these as legal elements – so that jurors would have to agree on whether, for example, a defendant burglarized a trailer home or a building or a room within a trailer home or a room within a building – is nonsensical.

Thus, to mirror the language in *Edwards*, just as there's "no plausible argument" that the legislature intended to create a distinct offense for entering a "ship" as opposed to a "vessel"; there's no plausible argument that the legislature intended to create a distinct offense for entering a dwelling that is also a ship; and there's just no plausible argument that the legislature intended to create a distinct offense for burglarizing each room

within any of the given locations. That is, to use the words of the Supreme Court, the locations are just “illustrative examples” of places that can be involved with a single, indivisible statute that is called burglary. *See Mathis*, 136 S. Ct. at 2256.

At this point, it should be clear that the Wisconsin burglary statute is not divisible. Yet much is riding on this point, and the *Edwards* discussion of double jeopardy drills the indivisibility point into the ground. Adding to the logic of *Mathis*, the *Edwards* court suggested that when distinguishing between elements and means courts could essentially check their work by looking at double-jeopardy principles. *Edwards*, 836 F.3d at 836 (“The Double Jeopardy Clause permits successive punishment or prosecution of multiple offenses arising out of the same conduct only if each offense contains a unique element.”). So if alternative terms are elements, then they define distinct crimes that happen to appear in the same statute. *Id.* at 836–37.

In that situation, a prosecutor could potentially charge a defendant with violating each of the distinct crimes. *Id.* If, however, the alternative terms simply describe the various ways of committing a single crime, then the Double Jeopardy Clause would bar a prosecutor from lodging multiple charges under the same statute for a defendant’s single act. *Id.* In other

words, a court can apply a *Blockburger* analysis and determine whether the locations are elements or means. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). If the listed places are elements, then they are separate crimes and could be charged in a subsequent prosecution. *Id.*; *United States v. Larsen*, 615 F.3d 780, 788 (7th Cir. 2010) (“In multiplicity challenges the *elements* of each offense—not the specific offense conduct—determine whether two offenses are the same for purposes of double jeopardy.”) (emphasis in original). But if they are simply different means, then there could not be multiple prosecutions.

Again, the *Edwards* court did the heavy lifting on this issue: when it comes to the Wisconsin burglary statute “the statutory structure does not suggest that each subsection creates multiple crimes.” 836 F.3d at 837. The court reasoned that if each subsection created two crimes a Wisconsin prosecutor could counter-intuitively charge “two counts of burglary for a single act” of breaking into a home or a ship. *Id.* This point is highly relevant to the statute as a whole: if the statute creates six crimes (sub. (a) through sub. (f)), then a prosecutor could charge two counts of burglary for a single act of breaking into a houseboat or a motor home or a room within a home or ship or railroad car. Indeed, a prosecutor could charge four (or more) crimes for entering various rooms of a single houseboat – some houseboats

are quite luxurious. Yet there is no case suggesting that multiple convictions under Wisconsin burglary, for a single act, could stand.

In sum, under the logic of *Mathis* and *Edwards*, the Wisconsin burglary statute is not divisible. Each of the listed locations is merely a means of committing the singular crime of burglary. That point is established by the statute's text and structure—each subsection has the same penalty. It is confirmed by the closely related alternatives that are listed in all the subsections—including the catch-all room in any of the above. And it is driven home by looking at double-jeopardy principles—no prosecutor could charge multiple violations for burglarizing a dwelling that is also a vessel. Everything relevant to determining whether a statute is divisible under *Mathis*, establishes what this Court in *Edwards* all but held: Wisconsin burglary is an indivisible statute.

D. The fact that the statute contains enumerated subdivisions, rather than a simple list, has no legal effect—it's just a matter of style.

Against the weight of the analysis set out above, there is a temptation to think of the burglary statute as divisible because the places are listed in enumerated subsections, with hard returns, rather than listed in a longer, undivided, run-on sentence. In fact, that is the biggest difference between the Iowa statute at issue in *Mathis* and the one being reviewed here. But

stylistic differences in statutory drafting are unimportant, at least for the purposes here.

Mathis couldn't have been clearer that it is only the legal distinction whether something is an "element" that matters; stylistic differences in legislative drafting are irrelevant. *Mathis* addressed a circuit split about statutory style: whether statutes that specified "alternative possible means" of committing a crime should be treated differently than statutes that omitted the possible means. 136 S. Ct. at 2249. And it held: "The itemized construction gives a sentencing court no special warrant to explore the facts of an offense, rather than to determine the crime's elements and compare them with the generic definition." *Mathis*, 136 S. Ct. at 2251.

The Supreme Court's instruction on the legal import—really, the lack of legal import—of a statute's structure mirrors Wisconsin case law on whether a statute creates multiple offenses or a single offense with multiple modes of commission. And as it happens, the relevant case, like this one, involved a subdivided statute: *State v. Derango*, 613 N.W.2d 833, 838–39 (Wis. 2000) (Sykes, J.). There, the Wisconsin Supreme Court examined the following child-enticement statute:

Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class BC felony:

- (1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02 or 948.095.
- (2) Causing the child to engage in prostitution.
- (3) Exposing a sex organ to the child or causing the child to expose a sex organ in violation of s. 948.10.
- (4) Taking a picture or making an audio recording of the child engaging in sexually explicit conduct.
- (5) Causing bodily or mental harm to the child.
- (6) Giving or selling to the child a controlled substance or controlled substance analog in violation of ch. 961.

Id. (citing Wis. Stat. § 948.07 (1999-2000)). This statute contains two sets of alternatives: the place where the child is lured (“vehicle, building, room or secluded place”) and the intent (sub. (1)–(6)). The first set of alternatives is contained in a single statutory phrase, and the second set is divided into distinct subsections.

And faced with the second, divided set of alternatives, the Wisconsin Supreme Court held:

The statute, by its straightforward language, *creates one offense with multiple modes of commission*. It criminalizes the act of causing or attempting to cause a child to go into a vehicle, building, room or other secluded place with any of six possible prohibited intents. *The act of enticement is the crime, not the underlying intended sexual or other misconduct.*

Derango, 613 N.W.2d at 839 (emphasis added). That is, despite the enumerated subsections, the Wisconsin Supreme Court looked at the statute as creating one offense. And that one offense could be committed through several alternative means.

Wisconsin burglary is comparable to the enticement statute at issue in *Derango*: there is a single crime (burglary or enticement) that can be committed in a variety of ways. The two statutes are, in fact, so similar that it's not surprising that no one in Wisconsin has ever raised a unanimity challenge on a burglary's location. With burglary, the act of breaking and entering is the crime, not the particular identity of the location. *See id.* ("The act of enticement is the crime, not the underlying intended sexual or other misconduct.") And that crime of breaking and entering into any of the possible locations is generally, and simply, known in Wisconsin as "burglary." *See Edwards*, 836 F.3d at 837 ("[t]he statute . . . criminalizes the act of intentionally entering *certain types of locations*" and the subsections "describe the various locations . . . *any one of which will satisfy the location requirement.*") (emphasis added). So under federal law, and consistent with state statutory-construction principles, just as an "itemized construction gives a sentencing court no special warrant to explore the facts of an offense," neither does Wisconsin burglary's enumerated construction permit a sentencing court to delve into the facts of a particular burglary offense. *See Mathis*, 136 S. Ct. at 2251.

As a final note, given that whether a statute is sub-divided is irrelevant for our purposes, it may be helpful to consider the burglary

statute without them. Using commas instead of hard returns and itemized letters, this is what the full statute looks like:

Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony is guilty of a Class F felony: any building or dwelling or an enclosed railroad car; or an enclosed portion of any ship or vessel, or a locked enclosed cargo portion of a truck or trailer, or a motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home, or a room within any of the above.

See Wis. Stat. § 943.10(1m). Written that way, Wisconsin burglary mirrors the Iowa burglary statute in *Mathis*⁴; it closely resembles the Illinois burglary statute at issue in *United States v. Haney*, ___ F.3d ___, 2016 WL 6298695 (7th Cir. October 27, 2016) (finding the statute too broad to count as generic burglary); and it's more obviously not divisible. Under the principles set out in *Mathis* (and the logic of *Derango*), that is the way Wisconsin burglary should be understood: as an indivisible statute setting out various means of committing a single offense – namely, burglary.

⁴ Iowa Stat. § 702.12 criminalized breaking into an occupied structure and defined it as: An “occupied structure” is any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value.

CONCLUSION

Wisconsin burglary is indivisibly broader than generic burglary – just like in *Mathis*, the statute includes not just buildings but also “water vehicles” (ships) and “land vehicles” (truck trailers). And all of these locations are part of a single offense – burglary – that is a Class F felony. Although the burglary statute lists various means by which burglary can be committed, a jury would not need to be unanimous as to which location a particular defendant burglarized, and a defendant could not be convicted under multiple subsections of the statute for a single act. Thus, the Sixth Amendment prohibits a sentencing judge from looking at the state-court record to determine which Wisconsin burglary subsection a particular defendant violated. And because that’s exactly what the district court did here, it erred and Sahm and Franklin are entitled to resentencing.

Dated at Madison, Wisconsin this November 15, 2016.

Respectfully submitted,

/s/ Joseph A. Bugni
Joseph A. Bugni
Federal Defender Services of
Wisconsin, Inc.
22 East Mifflin Street, Suite 1000
Madison, WI 53703
(608) 260-9900
joseph_bugni@fd.org
Counsel for Defendants Appellants,
Shane Sahm and Dennis Franklin

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d) (7th Cir.), counsel for the defendant-appellant certifies that all of the materials specified in Circuit Rules 30(a) and 30(b) are included in the appendix to this brief.

Date: November 15, 2016

Joseph A. Bugni
Counsel for Defendants Appellants,
Shane Sahm and Dennis Franklin

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), counsel for the defendant-appellant certifies that this brief complies with the type-volume limitations of Fed. R. App. P 32(a)(7)(B), because it contains no more than 14,000 words. Specifically, all portions of this brief other than the disclosure statement, table of contents, table of authorities, and certificates of counsel contain 4,585 words.

Date: November 15, 2016

Joseph A. Bugni
Counsel for Defendants Appellants,
Shane Sahm and Dennis Franklin

CERTIFICATE OF SERVICE

Counsel for the petitioner-appellant hereby certifies that on today's date a digital version of this brief was delivered via the Court's CM/ECF system to opposing counsel for the government in this action.

Date: November 15, 2016

Joseph A. Bugni
Counsel for Defendants Appellants,
Shane Sahm and Dennis Franklin

APPENDIX

INDEX TO SHORT APPENDIX

Page

Judgment in a Criminal Case (Sahm)
Dated 4/18/16.....App. 1 - App. 7

Judgment in a Criminal Case (Franklin)
Dated 3/3/16.....App. 8 - App. 14

Transcript of Sentencing Hearing (Franklin)
Dated 3/1/16.....App. 15 - App. 36

Transcript of Sentencing Hearing (Sahm)
Dated 4/14/16.....App. 37 - App. 82

AO 245 B (Rev. 3/01)(N.H. Rev.) DEFENDANT: SHANE SAHM
CASE NUMBER: 0758 3:15CR00110-001 Judgment - Page 1

United States District Court

Western District of Wisconsin

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE
(for offenses committed on or after November 1, 1987)

V.

Case Number: 0758 3:15CR00110-001

SHANE SAHM

Defendant's Attorney: Joseph Aragorn Bugni

The defendant, Shane Sahn, pleaded guilty to Count 1 of the indictment.

The defendant has been advised of his right to appeal.

ACCORDINGLY, the court has adjudicated defendant guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. §§ 922(g) and 924(e)	Felon in Possession of Firearm, a Class A Felony	May 4, 2015	1

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.

IT IS FURTHER 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 United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Date of Birth:	May 12, 1979	April 14, 2016
Defendant's USM No.:	09169-090	Date of Imposition of Judgment
Defendant's Residence Address:	c/o Sauk County Jail 1300 Lange Court Baraboo, WI 53913	/s/ James D. Peterson
Defendant's Mailing Address:	Same as above.	James D. Peterson District Judge April 18, 2016
		Date Signed:

AO 245 B (Rev. 3/01)(N.H. Rev.) DEFENDANT: SHANE SAHM
CASE NUMBER: 0758 3:15CR00110-001 Judgment - Page 2

IMPRISONMENT

As to Count 1 of the indictment, it is adjudged that the defendant is committed to the custody of the Bureau of Prisons for a term of 14 years and 41 days, as I am reducing his term of imprisonment by the 324 days he has served in primary state custody. This will satisfy the requirement that the defendant serve a total period of 15 years incarceration. The defendant is in primary state custody. Pursuant to the U.S. Supreme Court ruling in *Setser v. United States*, 132 S. Ct. 1463 (2012), I order that the federal sentence is to run concurrent with any sentences imposed in Eau Claire County, Wisconsin, Circuit Court Case Nos. 14CF494, 14CT472, 15CF08, 15CF201, 15CF406, 15CF405, 15CF404, 15CF438, and 15CF536; and Chippewa County, Wisconsin, Circuit Court Case Nos. 15CF329 and 15CF328. The defendant's federal sentence begins today.

I recommend that the defendant receive the opportunity to participate in substance abuse and mental health treatment and educational and vocational training. I also recommend that the defendant be afforded prerelease placement in a residential reentry center with work release privileges.

The U.S. Probation Office is to notify local law enforcement agencies, and the state attorney general, of defendant's release to the community.

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 Marshal

SUPERVISED RELEASE

A term of supervised release is not required by statute. The term of imprisonment is to be followed by a five-year term of supervised release subject to the standard conditions. In light of the nature of the offense and the defendant's personal history, I adopt conditions 2 through 9, and 11 through 16, proposed and justified in the presentence report. Neither party has raised any objections to the proposals.

Although the instant offense is not drug-related, the defendant has a history of drug use. The mandatory drug testing as set forth at 18 U.S.C. § 3583(d) is not waived. This will be explained further when imposing the special conditions of supervised release.

Pursuant to the Sentencing Reform Act of 1984, the primary goals of supervised release are to assist defendants' transition into the community after a term of imprisonment and to provide rehabilitation. Supervision in this case will provide the defendant with needed correctional programming, including rehabilitative programs, to assist with community reintegration; afford adequate deterrence to further criminal conduct; and to protect the public from further crimes perpetrated by the defendant.

The defendant is a 36-year-old man who qualifies as an armed career criminal. He has spent the majority of his adulthood in custody or on supervision. He began abusing drugs as an adolescent. He reportedly suffers from mental health disorders. He was on conditions of bond in a number of cases at the time that he committed the instant offense. The defendant has sporadic employment history and was supporting himself and his drug addiction through residential burglaries and thefts. The defendant has outstanding child support obligations. He has a history of non-compliant behavior while on work release from jail and while on state supervision. He has accumulated adult convictions for theft or retail theft (three occasions); criminal trespass to dwelling; burglary of a building or dwelling (three occasions); criminal damage to property; operating after revocation (six occasions); operating while intoxicated (three occasions); disorderly conduct (three occasions); battery (two occasions); and resisting or obstructing an officer (five occasions). The defendant stole the three firearms from a man who had posted cash bond on one of the defendant's pending cases. The defendant has a history of aggressive conduct towards girlfriends and others.

If, when the defendant is released from confinement to begin his term of supervised release, either the defendant or the supervising probation officer believes that any of the conditions imposed today are no longer appropriate, either one may petition the Court for review.

Defendant is to abide by the statutory mandatory conditions.

Statutory Mandatory Conditions

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

Defendant shall not commit another federal, state, or local crime.

Defendant shall not illegally possess a controlled substance.

If defendant has been convicted of a felony, defendant shall not possess a firearm, destructive device, or other dangerous weapon while on supervised release.

Defendant shall cooperate with the collection of DNA by the U.S. Justice Department and/or the U.S. Probation and Pretrial Services Office as required by Public Law 108-405.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that 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 Financial Penalties sheet of this judgment.

Defendant shall comply with the standard and special conditions that have been adopted by this court.

Standard Conditions of Supervision

- 4) ~~Defendant shall not leave the judicial district in which defendant is being supervised without the permission of the Court or probation officer;~~
- 2) Defendant is to report to the probation office as directed by the Court or probation officer and shall submit a complete written report within the first five days of each month, answer inquiries by the probation officer, and follow the officer's instructions. The monthly report and the answer to inquiries shall be truthful in all respects unless a fully truthful statement would tend to incriminate defendant, in violation of defendant's constitutional rights, in which case defendant has the right to remain silent;
- 3) Defendant shall maintain lawful employment, seek lawful employment, or enroll and participate in a course of study or vocational training that will equip defendant for suitable employment, unless excused by the probation officer or the Court;
- 4) Defendant shall notify the probation officer within seventy-two hours of any change in residence, employer, or any change in job classification;
- 5) Defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 6) Defendant shall not visit places where defendant knows or has reason to believe controlled substances are illegally sold, used, distributed, or administered;
- 7) Defendant shall not meet, communicate, or spend time with any persons defendant knows to be engaged in criminal activity or planning to engage in criminal activity;
- 8) Defendant shall permit a probation officer to visit defendant at home, work, or elsewhere at any reasonable time and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 9) Defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 40) ~~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;~~
- 11) As directed by the probation officer, defendant shall notify third parties of risks that may be occasioned by defendant's criminal record or personal history or characteristics. The probation officer may also take steps to confirm defendant's compliance with this notification requirement or provide such notifications directly to third parties.

Special Conditions of Release

12. Provide the supervising U.S. probation officer any and all requested financial information, including copies of state and federal tax returns;
13. Submit person, property, residence, papers, vehicle, or office to a search conducted by a U.S. probation officer at a reasonable time and manner, whenever the probation officer has reasonable suspicion of contraband or of the violation of a condition of release relating to substance abuse or illegal activities; failure to submit to a search may be a ground for revocation; defendant shall warn any other residents that the premises defendant is occupying may be subject to searches pursuant to this condition;

14. Participate in mental health referral, assessment and treatment as approved by the supervising U.S. probation officer and comply with all rules, regulations and recommendations of the mental health agency or its representative to the extent approved by the supervising U.S. probation officer. If defendant is eligible for funding from any source to cover the cost of treatment, defendant is to make reasonable efforts to obtain such funding. Participation in treatment does not require payment by defendant unless it is clear defendant can afford it;

15. Participate in substance abuse treatment. If defendant is eligible for funding from any source to cover the cost of treatment, defendant is to make reasonable efforts to obtain such funding. Participation in treatment does not require payment by defendant unless it is clear defendant can afford it. Defendant shall submit to drug testing beginning within 15 days of defendant's release and 60 drug tests annually thereafter. The probation office may utilize the Administrative Office of the U.S. Courts' phased collection process; and

16. Abstain from the use of alcohol.

ACKNOWLEDGMENT OF CONDITIONS

I have read or have had read to me the conditions of supervision set forth in this judgment, and I fully understand them. I have been provided a copy of them. I understand that upon finding a violation of probation or supervised release, the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

Defendant

Date

U.S. Probation Officer

Date

CRIMINAL MONETARY PENALTIES

Defendant shall pay the following total financial penalties in accordance with the schedule of payments set forth below.

<u>Count</u>	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
1	\$100.00	\$0.00	\$0.00
Total	\$100.00	\$0.00	\$0.00

It is adjudged that the defendant is to pay a \$100.00 criminal assessment penalty to the Clerk of Court for the Western District of Wisconsin immediately following sentencing.

The defendant does not have the means to pay a fine under § 5E1.2(c) without impairing his ability to support himself upon release from custody.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order:

- (1) assessment;
- (2) restitution;
- (3) fine principal;
- (4) cost of prosecution;
- (5) interest;
- (6) penalties.

The total fine and other monetary penalties shall be due in full immediately unless otherwise stated elsewhere.

Unless the court has expressly ordered otherwise in the special instructions above, if the judgment imposes a period of imprisonment, payment of 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 made to the clerk of court, 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.

In the event of a civil settlement between victim and defendant, defendant must provide evidence of such payments or settlement to the Court, U.S. Probation office, and U.S. Attorney's office so that defendant's account can be credited.

United States District Court

Western District of Wisconsin

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE
(for offenses committed on or after November 1, 1987)

V.

Case Number: 0758 3:14CR00128-001

DENNIS M. FRANKLIN

Defendant's Attorney: Peter Moyers

The defendant, Dennis M. Franklin, pleaded guilty to Count 1 of the indictment.

The defendant has been advised of his right to appeal.

ACCORDINGLY, the court has adjudicated defendant guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. §§ 922(g)(1) and 924(e)	Felon in Possession of Firearm, a Class A Felony	November 27, 2014	1

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.

IT IS FURTHER 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 United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Date of Birth:	May 17, 1971	March 1, 2016
Defendant's USM No.:	08953-090	Date of Imposition of Judgment
Defendant's Residence Address:	c/o Sauk County Jail 1300 Lange Court Baraboo, WI 53913	/s/ James D. Peterson
Defendant's Mailing Address:	c/o Dodge Correctional Institution P.O. Box 661 Waupun, WI 53963	James D. Peterson District Judge
		March 3, 2016
		Date Signed:

IMPRISONMENT

As to Count 1 of the indictment, it is adjudged that the defendant is committed to the custody of the Bureau of Prisons for a term of 15 years. Pursuant to the U.S. Supreme Court ruling in *Setser v. United States*, 132 S. Ct. 1463 (2012), I order that the federal sentence is to run concurrent with the remainder of the sentences imposed in Dane County Circuit Court Case Nos. 15CF78 and 04CF81, and in any sentence imposed in the pending Jefferson County Circuit Court Case No. 13CF21. The defendant's federal sentence begins today.

I recommend that the defendant receive the opportunity to participate in substance abuse treatment and educational and vocational training. I also recommend that the defendant be afforded prerelease placement in a residential reentry center with work release privileges.

The U.S. Probation Office is to notify local law enforcement agencies, and the state attorney general, of defendant's release to the community.

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 Marshal

SUPERVISED RELEASE

A term of supervised release is not required by statute. The term of imprisonment is to be followed by a five-year term of supervised release. The defendant is subject to conditions 2 through 9 and 12 through 16. Neither party has raised any objections to the proposals.

Pursuant to the Sentencing Reform Act of 1984, the primary goals of supervised release are to assist defendants' transition into the community after a term of imprisonment and to provide rehabilitation. Supervision in this case will provide the defendant with needed correctional programming, including rehabilitative programs, to assist with community reintegration; afford adequate deterrence to further criminal conduct; and to protect the public from further crimes perpetrated by the defendant.

The defendant is a 44-year-old man who qualifies as an armed career criminal. He has spent the majority of his adulthood in custody or on supervision. The defendant began abusing drugs at age 18. Despite participating in substance abuse treatment, he has been unable to remain sober. The defendant reportedly suffers from depression; however, medical records do not appear to identify any mental health treatment needs. He has sporadic employment history and may have been supporting himself and his drug addiction through residential burglaries. The defendant was on extended supervision with the DOC at the time of the instant offense. The defendant has a history of non-complaint behavior while on supervision. He has accumulated convictions for operating while intoxicated, resisting or obstructing an officer (four occasions), armed burglary, two counts of burglary of a building or dwelling as a party to a crime, attempted burglary of a building or dwelling, disorderly conduct, burglary of a building or dwelling, theft of movable property special facts, possession of a firearm, and burglary arm self with a dangerous weapon. Witnesses identified the defendant as someone who preferred to carry a loaded firearm during residential burglaries. He has been identified as being involved in street gangs. The defendant owes a large amount of child support.

If, when the defendant is released from confinement to begin his term of supervised release, either the defendant or the supervising probation officer believes that any of the conditions imposed today are no longer appropriate, either one may petition the Court for review.

Defendant is to abide by the statutory mandatory conditions.

Statutory Mandatory Conditions

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

Defendant shall not commit another federal, state, or local crime.

Defendant shall not illegally possess a controlled substance.

If defendant has been convicted of a felony, defendant shall not possess a firearm, destructive device, or other dangerous weapon while on supervised release.

Defendant shall cooperate with the collection of DNA by the U.S. Justice Department and/or the U.S. Probation and Pretrial Services Office as required by Public Law 108-405.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that 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 Financial Penalties sheet of this judgment.

Defendant shall comply with the standard and special conditions that have been adopted by this court.

Standard Conditions of Supervision

- ~~1) Defendant shall not leave the judicial district in which defendant is being supervised without the permission of the Court or probation officer;~~
- 2) Defendant is to report to the probation office as directed by the Court or probation officer and shall submit a complete written report within the first five days of each month, answer inquiries by the probation officer, and follow the officer's instructions. The monthly report and the answer to inquiries shall be truthful in all respects unless a fully truthful statement would tend to incriminate defendant, in violation of defendant's constitutional rights, in which case defendant has the right to remain silent;
- 3) Defendant shall maintain lawful employment, seek lawful employment, or enroll and participate in a course of study or vocational training that will equip defendant for suitable employment, unless excused by the probation officer or the Court;
- 4) Defendant shall notify the probation officer within seventy-two hours of any change in residence, employer, or any change in job classification;
- 5) Defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 6) Defendant shall not visit places where defendant knows or has reason to believe controlled substances are illegally sold, used, distributed, or administered;
- 7) Defendant shall not meet, communicate, or spend time with any persons defendant knows to be engaged in criminal activity or planning to engage in criminal activity;
- 8) Defendant shall permit a probation officer to visit defendant at home, work, or elsewhere at any reasonable time and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 9) Defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- ~~10) 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;~~
- ~~11) As directed by the probation officer, defendant shall notify third parties of risks that may be occasioned by defendant's criminal record or personal history or characteristics. The probation officer may also take steps to confirm defendant's compliance with this notification requirement or provide such notifications directly to third parties.~~

Special Conditions of Release

12. Provide the supervising U.S. probation officer any and all requested financial information, including copies of state and federal tax returns;

13. Submit person, property, residence, papers, vehicle, or office to a search conducted by a U.S. probation officer at a reasonable time and manner, whenever the probation officer has reasonable suspicion of contraband or of the violation of a condition of release relating to substance abuse or illegal activities; failure to submit to a search may be a ground for revocation; defendant shall warn any other residents that the premises defendant is occupying may be subject to searches pursuant to this condition;

14. Participate in substance abuse treatment. If defendant is eligible for funding from any source to cover the cost of treatment, defendant is to make reasonable efforts to obtain such funding. Participation in treatment does not require payment by defendant unless it is clear defendant can afford it. Defendant shall submit to drug testing beginning within 15 days of defendant's release and 60 drug tests annually thereafter. The probation office may utilize the Administrative Office of the U.S. Courts' phased collection process;

15. Do not use alcohol to excess. (Excess is defined as alcohol use so extensive that it interferes with defendant's responsibilities to family or employer, or it impairs defendant to any degree while driving or on the job.); and

16. Not meet, communicate or spend time with any persons known by defendant to be a member of or affiliate of any known street gang.

ACKNOWLEDGMENT OF CONDITIONS

I have read or have had read to me the conditions of supervision set forth in this judgment, and I fully understand them. I have been provided a copy of them. I understand that upon finding a violation of probation or supervised release, the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

Defendant

Date

U.S. Probation Officer

Date

CRIMINAL MONETARY PENALTIES

Defendant shall pay the following total financial penalties in accordance with the schedule of payments set forth below.

<u>Count</u>	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
1	\$100.00	\$0.00	\$0.00
Total	\$100.00	\$0.00	\$0.00

It is adjudged that the defendant is to pay a \$100.00 criminal assessment penalty to the Clerk of Court for the Western District of Wisconsin immediately following sentencing.

The defendant does not have the means to pay a fine under § 5E1.2(c) without impairing his ability to support himself and his family upon release from custody.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order:

- (1) assessment;
- (2) restitution;
- (3) fine principal;
- (4) cost of prosecution;
- (5) interest;
- (6) penalties.

The total fine and other monetary penalties shall be due in full immediately unless otherwise stated elsewhere.

Unless the court has expressly ordered otherwise in the special instructions above, if the judgment imposes a period of imprisonment, payment of 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 made to the clerk of court, 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.

In the event of a civil settlement between victim and defendant, defendant must provide evidence of such payments or settlement to the Court, U.S. Probation office, and U.S. Attorney's office so that defendant's account can be credited.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

Case No. 14-cr-128-jdp

DENNIS M. FRANKLIN,

Madison, Wisconsin

March 1, 2016

Defendant.

1:45 p.m.

STENOGRAPHIC TRANSCRIPT OF SENTENCING
HELD BEFORE U.S. DISTRICT JUDGE JAMES D. PETERSON

APPEARANCES:

For the Plaintiff:

Office of the United States Attorney
BY: LAURA PRZYBYLINSKI FINN
222 West Washington Avenue, Suite 700
Madison, Wisconsin 53703

For the Defendant:

Federal Defender Services of Wisconsin
BY: PETER MOYERS
JOSEPH BUGNI
22 East Mifflin Street, Ste. 1000
Madison, Wisconsin 53703

Also appearing:

RHONDA FRANK-LORON, U.S. Probation
Officer
DENNIS M. FRANKLIN, Defendant

Jennifer L. Dobbratz, RMR, CRR, CRC
U.S. District Court Federal Reporter
United States District Court
120 North Henry Street, Rm. 520
Madison, Wisconsin 53703
(608) 255-3821

1 (Proceedings called to order at 1:45 p.m.)

2 THE CLERK: Case number 14-cr-128, the *United States of*
3 *America v. Dennis M. Franklin*. Called for sentencing. May we
4 have the appearances, please.

5 MS. PRZYBYLINSKI FINN: On behalf of the United States,
6 Laura Przybylinski Finn.

7 THE COURT: Good afternoon.

8 MS. PRZYBYLINSKI FINN: Good afternoon.

9 MR. MOYERS: Peter Moyers from Federal Defender
10 Services, and Mr. Franklin appears personally seated to my left.

11 THE COURT: All right.

12 MR. MOYERS: And with my boss, Joe Bugni --

13 THE COURT: All right.

14 MR. MOYERS: -- from the Federal Defender's Office.

15 THE COURT: Good afternoon to both of you. I'm going
16 to apologize. I grabbed the wrong file. So sit tight for as
17 long as it takes me to ride the elevator. I'll be right back.

18 (Recess taken 1:47-1:48 p.m.)

19 THE COURT: All right. Again, my apologies. Okay. So
20 let's just do a rundown of what I have looked at here. I have
21 got the presentence report. I have got defendant's objections
22 to the presentence report. There's docket number 66, and then a
23 clarification of the objections on docket number 68. And,
24 Mr. Moyers, just to confirm, you have clarifications, but I
25 don't understand you to be making an objection to the

1 calculation of the guideline range; am I right?

2 MR. MOYERS: Yeah, that's correct, not at all.

3 THE COURT: Okay. And I've got the government's
4 document which I believe just said their statement of no
5 objections, correct?

6 MS. PRZYBYLINSKI FINN: That's correct.

7 THE COURT: All right. Then I have got an addendum and
8 the revised presentence report. Let me just deal, first of all,
9 with the motion to stay the sentencing hearing. I'm not totally
10 deaf to your request, Mr. Moyers, but bottom line is I had to
11 dig into the file far enough to get to the point where I thought
12 I might as well go through the sentencing.

13 If I understand your position correctly, it's possible that
14 the case that the Supreme Court has taken and then also that the
15 Seventh Circuit cases might confirm what I believe to be kind of
16 this court's historical treatment of these Wisconsin
17 convictions, in which case we're going to have exactly the
18 sentence for Mr. Franklin that he would get under the new law.
19 But there's some possibility, a toss-up as far as I'm concerned,
20 that it might go the other way, in which case I'm going to have
21 to resentence Mr. Franklin. There's no way for me to do a
22 correct sentence if the law changes, so we're going to have to
23 recalculate.

24 So it seems to me that, you know, Mr. Franklin has a state
25 sentence, and so we will be able to resentence Mr. Franklin

1 anyway, but there's a chance we might do it right this time if
2 the Supreme Court approves this approach, so I think we'll go
3 ahead. I don't know if you have anything else you want to
4 share --

5 MR. MOYERS: I think as you may have gathered from the
6 language, it's a Mr. Bugni argument, and I think he can
7 illuminate you a little better on how this happened or how we
8 came to it and what's really at stake.

9 THE COURT: Sure. Mr. Bugni?

10 MR. BUGNI: I think given the Court's indication, if
11 you want to go through a sentencing -- the argument is
12 preserved, and it really would be more of one as soon as the
13 Supreme Court comes down in *Mathis*, there would be new law and
14 we would make it there before the Seventh Circuit, so if the
15 Court wants to go ahead with sentencing today, we'll come back.
16 Hopefully we're going to prevail.

17 THE COURT: Yeah. I recognize the strong possibility
18 of having to redo this with a correctly recalculated guideline,
19 and if we do, we do. So --

20 MR. BUGNI: I want to be clear, it will also change the
21 mandatory minimum. If we're correct it --

22 THE COURT: Oh, yeah. As we sit here today, he's got
23 to get 15 years, right?

24 MR. BUGNI: Yeah.

25 THE COURT: So I understand it's not a matter of small

1 consequence to Mr. Franklin. I understand that. But -- and
2 again because he's got a state -- if he were -- if there were
3 the possibility that he would be not convicted and he would be
4 sitting in jail unfairly, I would say that was -- that's a
5 different kind of matter, but he's got a state sentence, and so
6 I'm not going to interfere with Mr. Franklin's freedom by going
7 ahead with the sentencing today and then redoing it where he
8 doesn't have a mandatory minimum later on. So we'll go ahead
9 today, and Mr. Franklin will be one of many who gets resentenced
10 if the case falls in your favor.

11 MR. BUGNI: Thank you, Your Honor.

12 THE COURT: All right. So with that then, if I
13 understand -- is there anything else we need to address on the
14 guidelines then? Is that just a matter of making a record on
15 the guideline calculation?

16 MS. PRZYBYLINSKI FINN: I believe so, Your Honor, and
17 the way that I view the motion for stay is simply that
18 Mr. Franklin is preserving the issue.

19 THE COURT: Yes. And that's how I took it as well.

20 MR. BUGNI: Thank you.

21 THE COURT: All right. So in that case then let's just
22 walk through the guideline calculation. I'll deal with the
23 other clarifications on the subject of the substance of the
24 report as well but -- Okay. So the armed career criminal -- the
25 career offender guideline is not in play, so we're not going to

1 worry about that. And so we do have the guideline calculated in
2 light of the armed career criminal issue, and so he has
3 predicate convictions in Dane County which are the armed
4 burglary in the 94-CF-2229 case, three counts of burglary of a
5 building or dwelling in case 01-CF-2316, and the burglary of a
6 building or dwelling, theft of moveable property with special
7 facts, and possession of a firearm by felon in case number
8 04-CF-81. Two levels are added pursuant to Section (b) (4)
9 because the firearm was stolen. Specifically, the firearm had
10 been reported stolen during a residential burglary on October
11 20th. The defendant possessed the firearm in connection with
12 committing a burglary of a dwelling -- building or dwelling
13 while armed with a dangerous weapon of which he was later
14 charged and convicted in Dane County Circuit Court 15-CF-78.
15 Although that is not one of the predicate offenses because it's
16 the same underlying conduct. So four levels are added pursuant
17 to subsection (b) (6) (B). No other Chapter 2 adjustments apply.
18 And so I may have skipped the base level here. Calculate the
19 base level here.

20 The defendant is an armed career criminal, so pursuant to
21 Section 4B1.4(a), the defendant is subject to an enhanced
22 sentence under the provisions of 18 U.S.C. 924(e) as an armed
23 career criminal. The defendant has the prior felony convictions
24 which I have reviewed. So according to 4B1.4(b) (3) (B), the
25 offense level is 33. And I just want to make sure I'm clear on

1 the record on the predicate convictions. So those were the
2 violent felony offenses, Dane County Circuit Court armed
3 burglary in case 94-CF-2229, two counts of burglary of a
4 building or dwelling as a party to a crime, and one count of
5 attempted burglary of a building or dwelling as party to a crime
6 in case 01-CF-2316, and burglary of a building or dwelling in
7 case 04-CF-81. Okay. So the base offense level is then 33.

8 The defendant qualifies for three levels of downward
9 adjustment because he has demonstrated acceptance of
10 responsibility for his offense, and I believe the government is
11 prepared to move for the additional level, but I'll confirm.

12 MS. PRZYBYLINSKI FINN: Yes, sir.

13 THE COURT: Okay. So that's three levels of downward
14 adjustment for a total offense level of 30, criminal history
15 category of IV, producing a guideline range of 135 to 168
16 months, but the statutorily required mandatory minimum sentence
17 is 15 years. Therefore, the fully calculated guideline range is
18 180 months, which is the 15-year mandatory minimum.

19 So with that, let's hear what sentence I should impose. Ms.
20 Przybylinski Finn.

21 MS. PRZYBYLINSKI FINN: Thank you, Your Honor.

22 THE COURT: Go right ahead.

23 MS. PRZYBYLINSKI FINN: Mr. Franklin's career as a
24 criminal began in 1988 when he was 16 years old and was found
25 with unlawful use of a weapon. When he was 23, he was convicted

1 of receipt of stolen property and armed burglary, his first. He
2 was sent to prison and then paroled in 1997, and in that parole
3 he was discharged from parole in 2001, and three days later he
4 was picked up on an obstructing charge, and then just three
5 months later he committed two additional burglaries. He got
6 probation. He was revoked less than two years later, and then
7 he got four more years in prison. In 2003 Mr. Franklin again
8 burglarized a home. He was sent to prison. He was paroled in
9 2001, and then in October and November of 2014 he burglarized
10 yet two additional homes, and that's what his current charge
11 here is based on.

12 It was Thanksgiving 2014, and Mr. Franklin decided that it
13 would be a perfect time to burglarize someone's home because,
14 after all, that's when people are out with family and friends
15 celebrating and they wouldn't be there. So at about 7:00 that
16 night the defendant armed himself with a loaded gun, and he and
17 his then-girlfriend drove through a neighborhood. And what were
18 they looking for? They were looking for a house that was dark,
19 for someone who wasn't home, and they found their target.

20 And Mr. Franklin and his girlfriend got out of the car.
21 While his girlfriend acted as a lookout, he pried open the door
22 of the house. He began to ransack the home. But before he was
23 finished, one of the residents came home. He saw a light on.
24 He saw that something was going on inside the house and went to
25 a neighbor's home and called the police. Unfortunately for

1 Mr. Franklin, the police got there fairly quickly, not much else
2 going on on Thanksgiving. He ran out the back door and
3 eventually was caught in a neighboring yard.

4 The gun that he had was not only loaded, but it was the one
5 that he stole a month earlier from another home burglary. In
6 all but one of the burglaries that Mr. Franklin has committed
7 throughout his life, he either had a gun or he stole guns. For
8 20 years he's armed himself and burglarized people's homes.
9 He's had sporadic employment. He owes \$110,000 in child
10 support.

11 Mr. Franklin is not just statutorily, not just based on the
12 guidelines, but he is, in fact, an armed career criminal. The
13 15-year statutory mandatory minimum is absolutely appropriate in
14 this case. It's absolutely warranted in this case, and
15 Mr. Franklin has worked for the last 20 years for that sentence.

16 The United States does recommend that that sentence be
17 served concurrently with his state sentence in case number
18 15-CF-78 because as the Court pointed out, he was charged,
19 convicted, and sentenced in state court of the underlying
20 offense, the offense underlying this possession of a firearm in
21 this case, and we believe that that was -- that's an appropriate
22 way to sentence the defendant. But the fact is that 15 years is
23 not draconian here. It's absolutely necessary to do something
24 to stop this cycle that Mr. Franklin has engaged in all these
25 years.

1 THE COURT: Okay. Thank you, Ms. Przybylinski Finn.
2 Mr. Moyers.

3 MR. MOYERS: I guess what I will begin with is, yeah,
4 his history speaks for itself, and for him to throw a heroin
5 addiction on top of that didn't help at all. I wish you had
6 seen him way back when he was arrested. He looks a lot better
7 now than he did way back then. It's amazing what a year or more
8 of not doing heroin can do for you.

9 And, look, he's going to sit for a long time to think about
10 it, and he is going to sit for a long time and ask himself, when
11 I get out in my late 50s or around 60, do I want to kill myself
12 with heroin or do I want to make something of my life? And he
13 got a pretty stern talking to that I think I'm going to read
14 into the record. It's from Judge Hanrahan who is not
15 unsympathetic to Mr. Franklin's concerns or his situation, but
16 also would probably join the government with saying, yeah, he
17 earned -- I mean, he earned this.

18 And so I'm quoting Judge Hanrahan now from his plea and
19 sentencing hearing, Mr. Franklin's, in 15-CF-78 which is on
20 December 14th of 2015. The judge says, quote, "Having said
21 that, you stepped up. You admitted responsibility. Obviously
22 they had you between a rock and a hard place. I just re-read
23 your letter from September 30th, 2015, and correct me if I'm
24 wrong, paraphrasing, you think it's not fair that both the state
25 and the feds are prosecuting you for the same crime basically.

1 I don't disagree with you.

2 I have had a handful of cases where the federal government
3 steps in as if they have no confidence in the state government
4 to handle street crimes. Yes, indeed, there's some federal
5 offense to be found everywhere from taking off your
6 mattresses -- taking tags off your mattresses to involving
7 yourself in armed burglaries. I just don't understand it. It's
8 almost as if they want to climb onto the battlefield and shoot
9 the wounded for some reason. I don't understand it. And,
10 indeed, I thought that the circuit court involvement in your
11 life of crime would have been sufficient, but needless to say, I
12 don't need to tell you at this point that there are dual
13 sovereigns, and they can do that kind of thing, which is all the
14 more reason why a guy like you with the record you had should
15 have really thought long and hard about your involvement in this
16 kind of crime. You took some calculated risks here, and on this
17 occasion you lost." And I think that encapsulates it fairly
18 well.

19 And, look, based on what the law says now, he's going to do
20 at least 15, and my hope is that when he goes into federal
21 custody, that he'll be able to take advantage of some of the
22 superior programming and drug treatment that they have there.
23 But as it stands now, he's going to be in state custody for
24 about the next eight years, so whatever the Court does with its
25 sentence today, it's a little difficult to look eight years into

1 the future and predict what his needs might be, but they
2 certainly are drugs because that's always going to be an issue
3 for him. And I guess I really don't have anything more other
4 than what I talked about from the circuit court, so I'll leave
5 it at that.

6 THE COURT: All right. Thank you, Mr. Moyers.
7 Mr. Franklin, you've got the opportunity to -- you don't have to
8 talk to me, but if you want to add anything to Mr. Moyers'
9 comments, now is your chance, and I'd be happy to hear whatever
10 you have to tell me.

11 MR. FRANKLIN: Basically I just want to say that I
12 accept full responsibility for my actions. I want to take
13 advantage of the situation as far as getting the treatment that
14 I need and dealing with my issues and continuing to better
15 myself, and that's pretty much where I stand with that right
16 now.

17 THE COURT: All right. All right. Thank you. Well,
18 normally I take a recess at this point, but nobody is making --
19 the government is not making an argument and I don't see an
20 argument for a sentence that exceeds the statutory mandatory
21 minimum which is a long period of time, so I don't feel like at
22 this point under the law and the case that's presented to me
23 there's any need to deliberate any further on this.

24 I do think, Mr. Franklin, I have -- you know, I have hope
25 for you. It seems to me that your criminality is driven to a

1 significant degree -- how much, I don't know; my guess is not
2 entirely -- driven by your heroin addiction because there are
3 plenty of heroin addicts that don't have nearly the criminal
4 resume that you have. Ms. Przybylinski Finn is right. You are,
5 literally, not just by a common sense definition, you're an
6 armed career criminal. You've, you know, starting in 1988, you
7 know, if this were a regular job, you were about at the point
8 where they give you a gold watch and say time to retire.

9 So -- but I think -- you know, I look at your background,
10 and obviously you had a rough start in life. You have had a lot
11 of trauma in your life, but you're old enough now where you just
12 have to kind of decide whether you're going to take control of
13 it or not. I recognize you have a burden of a drug addiction,
14 that it will be a lifetime battle for you. I expect you'll stay
15 clean while you're in prison. It won't be impossible to use
16 drugs, but it will be a lot harder. I hope you stay clean, and
17 I hope you enjoy that state, and I hope that it becomes to be
18 your sobriety is meaningful enough to you that you can make
19 something of yourself, and not just when you get out. But, you
20 know, you're going to be in prison probably for 15 years.
21 Maybe, you know, the developments in the law will cause you to
22 be resentenced and things will be different for you in terms of
23 your sentence, but, you know, even under the guidelines without
24 the mandatory minimum, it's still a pretty stout guideline
25 sentence.

1 So I hope you can find some meaningful existence while
2 you're in prison as well and that you'll think that that is a
3 suggestion to you that life is worth living in some way other
4 than what you have done so far. And so, you know, I'll rely on
5 the stern talking to that Judge Hanrahan gave you and kind of
6 just express my encouragement to you that you think that there's
7 got to be a better way. Because no matter how much recognition
8 I have that you have a drug addiction that drives a lot of your
9 criminality, I just have to look out for the public because it
10 just seems like so far there's been nothing that has interfered
11 with your decisions to commit crimes. And I mean no disrespect
12 to the state system. There are fine judges there, but I do
13 think the federal system has better programming for our inmates,
14 so that's to the federal system's credit. But nevertheless,
15 whatever the state judges have done for you or the state system,
16 it just hasn't worked, and so out of desperation, if nothing
17 else, you know, this is where you are.

18 So I hope that you can -- you have half your life ahead of
19 you. I hope you can find a way to make it meaningful because
20 you haven't so far. So I wish you good luck. So let's deal
21 with the formality of the sentence.

22 I am persuaded that the custodial sentence of a mandatory
23 minimum term of imprisonment of 15 years -- I'm required to
24 impose that. I will decline to say that it is exactly the
25 amount that I think is reasonable and not less -- or not an

1 excessive amount of punishment, but it's within shouting
2 distance of what a reasonable amount would be. And so I'm
3 required to impose it anyway.

4 So as to Count 1 of the Indictment, it is adjudged that the
5 defendant is committed to the custody of the Bureau of Prisons
6 for a term of 15 years. Pursuant to the authority that I have
7 under *Setser v. United States*, I will follow the recommendation
8 of the government and order that the federal sentence run
9 concurrent with the remainder of the sentences imposed in Dane
10 County Circuit Court cases 15-CF-78 and 04-CF-81 and in any
11 sentence imposed in the -- in my notes it says pending, but that
12 case is now resolved; is that correct, Mr. Moyers?

13 MR. MOYERS: Yes, 78 has been -- he's had his plea and
14 sentencing on that.

15 THE COURT: Okay. All right.

16 MS. FRANK-LORON: Jefferson County case is not.

17 THE COURT: The Jefferson County case, 13-CF-21; is
18 that still pending?

19 MS. FRANK-LORON: Yes.

20 MR. MOYERS: Yes.

21 THE COURT: Okay. So I'm accurately describing it.
22 The result is that the defendant's sentence -- the federal
23 sentence will begin today, and it's concurrent to all of those
24 state charges.

25 I will recommend that the -- and I will say this too. There

1 are dual sovereigns. You committed two separate crimes. The
2 law is crystal clear that the two sovereigns can exact their own
3 penalties for even essentially the same crime. I do think it
4 would be excessive to tack the mandatory minimum sentence on top
5 of the sentences you're serving in the state system, so that to
6 my mind would be clearly in excess of what you deserve and
7 what's necessary to protect the public. I mean, I have some
8 hope that after 15 years or whatever chunk of that you serve
9 that you decide that you're going to, you know, make a better
10 life. I feel some day sooner or later you're coming out of
11 prison, and so I don't think I want you to come out of prison
12 when you're 70 years old.

13 I do recommend that the defendant receive the opportunity to
14 participate in substance abuse treatment and as well as
15 educational and vocational training. I recommend that the
16 defendant be afforded prerelease placement in a residential
17 re-entry center with work release privileges.

18 A term of supervised release is not required by statute, but
19 I think it's appropriate here to follow your incarceration with
20 a five-year term of supervised release. I do that primarily
21 because of such an insistent pattern of a criminal lifestyle
22 that after a very long period of incarceration, you're going to
23 need some assistance in figuring out how to make your way in the
24 world without committing crimes and without the structure that
25 prison provides to you.

1 So let's talk about the conditions. I didn't receive any
2 objections to the conditions that were proposed. It's proposed
3 that conditions 2 through 9 among the standard conditions and 12
4 through 16 of the special conditions are imposed. Are there any
5 objections to those conditions, Mr. Moyers? Do you want to be
6 heard on those?

7 MR. MOYERS: No, Your Honor.

8 THE COURT: All right. Okay. And I will invite the
9 waiver of the reading of the conditions. I'm prepared to read
10 them into the record if Mr. Franklin would like but --

11 MR. MOYERS: No, we'd waive them. It's not very useful
12 today.

13 THE COURT: All right. Very good. All right. At this
14 point I will tell you, Mr. Franklin, that the conditions will be
15 written out in the Judgment and Commitment document, and you
16 should review those, review them now when you see the Judgment
17 and Commitment document and talk them over with your counsel.
18 It's more productive for you to go through them in writing and
19 have the opportunity to ask some questions rather than have me
20 drone on and read them to you. But in particular look at them
21 when you get out of prison and they go into effect because that
22 will be some time in the future, and those conditions might not
23 be appropriate for you then. So if more conditions are required
24 or different conditions are required, please feel free to raise
25 that with the Court, too. The government and the probation

1 office can do the same thing. But for now we do our best to
2 come up with appropriate conditions, and so I will impose
3 conditions 2 through 9 and 12 through 16 as proposed in the
4 presentence report.

5 There's a mandatory \$100 criminal assessment penalty which I
6 will impose. That penalty is to be paid to the Clerk of Court
7 for the Western District of Wisconsin immediately following
8 sentencing. I will find that the defendant does not have the
9 means to pay a fine under Section 5E1.2(c) without impairing his
10 ability to support himself and his family upon release from
11 custody, and the probation office is to notify local law
12 enforcement agencies and the State Attorney General of the
13 defendant's release to the community.

14 I will adopt the presentence report as amended as the
15 findings in support of my sentencing. There are some
16 qualifications that are appropriately reflected in the
17 presentence report. In response to Mr. Moyers' objections, I
18 will note that there are some statements of Mr. Franklin's
19 co-conspirators regarding his past use of weapons that I have
20 not considered in sentencing. I don't think that those are
21 supported to the preponderance of the evidence, and so I'm not
22 considering those in sentencing, but I will leave that
23 information -- the information is accurately stated in the
24 report, but I'm not going to use hearsay statements from some of
25 your friends regarding your past use of weapons in considering

1 your sentence.

2 Okay. So with that I will very briefly offer an explanation
3 of the conditions. Many of the standard conditions 2 through 9
4 are really the ordinary requirements of effective supervision.

5 So condition 2, the requirement that you report to the
6 probation office, is just a necessary part of supervision.

7 Condition 3, the requirement of maintaining lawful
8 employment or an alternative course of study, is appropriate to
9 assist you in maintaining a lawful lifestyle.

10 Condition number 4 again is a requirement to provide
11 information. That's a normal incident of supervision.

12 Conditions 5 and 6 deal with restrictions on your exposure
13 to controlled substances. Those are appropriate in light of
14 your history of substance abuse.

15 Condition number 7 restricts your interactions with people
16 that you know are involved in criminal activity or planning to
17 engage in criminal activity, and that is appropriate given
18 your -- frankly, anybody on supervision but particularly in your
19 case with your criminal record.

20 Number 8 is the visitation condition, which I think is
21 appropriate here as a normal incident of supervision but also
22 particularly in your case since you have a history involving
23 dangerous contraband, particularly guns and drugs.

24 The condition number 9 requires you to keep the probation
25 officer informed if you are arrested or questioned by a law

1 enforcement officer. Again, that is appropriate given your
2 criminal history.

3 Special conditions 12 through 16. 12 is the financial
4 disclosure. You have significant child support obligations,
5 although you won't have ongoing obligations because your
6 children are likely to be beyond that age. You still have an
7 arrearage that you will be responsible for, but also the
8 financial information will assist the supervising officer in
9 ensuring that you're undertaking a lawful lifestyle.

10 The search report again -- or search requirement in 13 is
11 appropriate based on the guns and drugs that you have in your
12 past.

13 Substance abuse treatment requirement in 14 is appropriate.
14 You have expressed interest in substance abuse treatment, and so
15 it should continue not only while you're incarcerated but also
16 during your period of supervised release.

17 I have imposed condition number 15 which is recommended that
18 you not use alcohol to excess. I don't see a record here that
19 you have an alcoholism problem per se, but there is a pattern of
20 substance abuse, and so alcohol could be a substitute for some
21 of the other substances that you have abused, and so I think
22 some restriction is appropriate, and I have tried to provide a
23 reasonable explanation of excess in that condition as well.

24 And then you have somewhat conflicting but nevertheless I
25 think evidence in the presentence report or indications in the

1 presentence report that satisfy me that you have at least some
2 history of gang affiliation either with the Vice Lords or with
3 the P Stones, and so the restriction on communication with
4 members or affiliates of a street gang are appropriate.

5 So I think I have covered everything on my list. Is there
6 anything else that we -- besides the right to appeal, anything
7 else we need to address, Ms. Przybylinski Finn?

8 MS. PRZYBYLINSKI FINN: No, I don't believe so, Your
9 Honor.

10 THE COURT: Mr. Moyers?

11 MR. MOYERS: No. It's only the one count, so, yeah,
12 just the appeal.

13 THE COURT: I think nothing to be dismissed so -- all
14 right. Mr. Franklin, you have the right to appeal your
15 conviction if you think your plea was somehow unlawful or
16 involuntary, and you have the right to appeal your sentence if
17 you believe that it's contrary to law. If you want to appeal,
18 you must file a notice of appeal within 14 days of the entry of
19 judgment or within 14 days of any notice of appeal that would be
20 filed by the government.

21 If you cannot afford the filing fee, you can apply for leave
22 to appeal in forma pauperis, which means without paying the
23 filing fee. If you cannot afford an attorney, you may also
24 apply for court-appointed counsel to represent you in the
25 appeal. So with that, I think we are finished. Thank you, all.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE CLERK: This honorable court stands adjourned.
(Proceedings concluded at 2:19 p.m.)

I, JENNIFER L. DOBBRATZ, Certified Realtime and Merit Reporter in and for the State of Wisconsin, certify that the foregoing is a true and accurate record of the proceedings held on the 1st day of March, 2016, before the Honorable James D. Peterson, U.S. District Judge for the Western District of Wisconsin, in my presence and reduced to writing in accordance with my stenographic notes made at said time and place.

Dated this 15th day of March, 2016.

/s/ Jennifer L. Dobbratz

Jennifer L. Dobbratz, RMR, CRR, CRC
Federal Court Reporter

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

* * * * *

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Case No. 15-CR-110-JDP

SHANE SAHM,

Madison, Wisconsin

April 14, 2016

Defendant.

11:15 a.m.

* * * * *

STENOGRAPHIC TRANSCRIPT OF SENTENCING HEARING
HELD BEFORE THE HONORABLE JAMES D. PETERSON

APPEARANCES:

For the Plaintiff:

Office of the United States Attorney
BY: LAURA A. PRZYBYLINSKI FINN
Assistant United States Attorney
222 West Washington Avenue, Suite 700
Madison, Wisconsin 53703

For the Defendant:

Federal Defender Services of Wisconsin, Inc.
BY: JOSEPH A. BUGNI
Madison Branch Office
22 East Mifflin Street, Suite 1000
Madison, Wisconsin 53703

Also Present:

Shane Sahn, Defendant
Rhonda Frank-Loron, U.S. Probation Officer

CHERYL A. SEEMAN, RMR, CRR
Official Court Reporter
United States District Court
120 North Henry Street, Room 520
Madison, Wisconsin 53703
1-608-255-3821

1 (Called to order.)

2 THE CLERK: Case No. 15-CR-110, *United States of*
3 *America v. Shane Sahn*, called for sentencing. May we have
4 the appearances, please?

5 MS. PRZYBYLINSKI FINN: On behalf of the United
6 States, Laura Przybylinski Finn.

7 THE COURT: Good morning to you.

8 MS. PRZYBYLINSKI FINN: Good morning.

9 MR. BUGNI: Good morning, Your Honor. Joe Bugni
10 on behalf of Shane Sahn.

11 THE COURT: Mr. Sahn, Mr. Bugni, good morning to
12 you.

13 THE DEFENDANT: Good morning.

14 THE COURT: So we're here for sentencing and let
15 me just run down the materials that I've looked at. We've
16 got the presentence report. We've got the statement from
17 the government that there were no objections. Then we
18 have the defendant's objection to the presentence report.
19 Then we have an extensive series of filings. I'll just
20 run down the list here.

21 So we've got a letter saying that the government is
22 going to respond on the main objection. I've got a
23 sentencing memorandum from the government. I've got the
24 defendant's reply to the government's PSR objections.

25 Then I've got a sentencing memorandum from Mr. Sahn

1 that attaches several letters in support of Mr. Sahn. And
2 thanks to those who wrote the letters. I always
3 appreciate hearing from those.

4 And then I've got one last late-breaking letter from
5 the government on the main objection, which is the
6 application of the Armed Career Criminal Act. Did I miss
7 anything?

8 MR. BUGNI: Not that I know of.

9 THE COURT: All right. Okay. Good. So that's
10 what we've looked at. Let's find out who I'm going to
11 hear from today. Ms. Przybylinski Finn, anybody besides
12 you today?

13 MS. PRZYBYLINSKI FINN: No, Your Honor.

14 THE COURT: Okay. Very good. Are there any
15 witnesses that have been notified or are here?

16 MS. PRZYBYLINSKI FINN: No.

17 THE COURT: Okay. I'm sorry. Any victims? And
18 then for the defense.

19 MR. BUGNI: Just myself and Mr. Sahn.

20 THE COURT: All right. Very good. Okay.
21 Mr. Sahn, I need to make sure that you have read the
22 presentence report and that you've had a chance to discuss
23 the report and the addendum with your counsel. Have you
24 done that?

25 THE DEFENDANT: Yes.

1 THE COURT: Okay. And have all of your concerns
2 with what's in the report been addressed?

3 THE DEFENDANT: Yes.

4 THE COURT: Okay. So I will adopt the content of
5 the presentence report as my findings in support of a
6 sentencing here. And so we will, in a moment, address the
7 main objection that we've got here.

8 So I understand the government is prepared to move
9 for an additional level of reduction for acceptance of
10 responsibility; is that correct?

11 MS. PRZYBYLINSKI FINN: Yes, Your Honor.

12 THE COURT: Okay. I will grant that. And I will
13 accept the plea agreement on the basis of my findings that
14 the offense of conviction adequately reflects the
15 defendant's criminal conduct and that the plea agreement
16 does not undermine the statutory purposes of sentencing.

17 In determining the defendant's sentence I will take
18 into consideration the advisory sentencing guidelines and
19 the statutory purposes of sentencing that are set forth in
20 18 USC Section 3553(a).

21 Okay. So, Mr. Bugni, if I understand it right, the
22 only objection on the presentence report is the treatment
23 of the burglary convictions as predicate offenses to the
24 application of the Armed Career Criminal Act; is that
25 right?

1 MR. BUGNI: Correct.

2 THE COURT: Okay. All right. So I have all of
3 the submissions. I've read everything up even to the last
4 late-breaking letter from the government. I don't know if
5 there's anything anybody wants to add.

6 I'll start with the government. You have the last
7 word. I read it. I'm -- I will tell you, I'm not
8 inclined to adopt Mr. Bugni's position on this, but I
9 don't know if there's anything else you want to add. I'm
10 going to hear mostly from Mr. Bugni on this because I'm
11 leaning against him.

12 MS. PRZYBYLINSKI FINN: Right. I appreciate the
13 fact that this was late, that I filed a letter late. I
14 just felt it was better if I could put it down on paper
15 and it would be clearer than me trying to put that all
16 together just at this moment.

17 THE COURT: Yeah. As I understand it,
18 essentially that in Wisconsin, if there's a charge of
19 burglary of a building or dwelling, if it were anything
20 other than a building or dwelling the jury would have to
21 be specifically instructed about the location so that
22 there's no risk of a jury verdict being not unanimous on
23 the question of whether the location that was burgled was
24 a building or dwelling.

25 MS. PRZYBYLINSKI FINN: That's our position. And

1 in this case in particular it's clear that Mr. Sahm was
2 charged specifically with that statutory section --

3 THE COURT: Yeah.

4 MS. PRZYBYLINSKI FINN: -- and only that
5 statutory section. There's no confusion about it.
6 There's no need to look at *Shepard* documents. It's right
7 on the face of his conviction. There's nothing
8 accusing --

9 THE COURT: That is a *Shepard* document, isn't it?

10 MS. PRZYBYLINSKI FINN: Well, the conviction
11 itself is clear.

12 THE COURT: Yeah.

13 MS. PRZYBYLINSKI FINN: It's of that particular
14 statutory section. We don't have to look at the plea
15 colloquy or anything like that. It's just very clear.
16 It's consistent with *Taylor* and the counts don't do
17 anything to change that, in our view.

18 THE COURT: If I understand Mr. Bugni correctly,
19 he's not going to argue that there's some doubt once I
20 look at the *Shepard* documents or even the face of the
21 conviction; he's saying I can't even look at that. All I
22 can do is look at the statutory number. And if I only
23 look at the statutory number, then I can't tell.

24 MS. PRZYBYLINSKI FINN: Well, the statutory
25 number specifies the statutory section that is *building* or

1 dwelling.

2 THE COURT: Yeah. I think I understand your
3 position. And if I don't, I'm going to come back to you.
4 All right.

5 So, Mr. Bugni, now over to you. Like I said, I'm
6 disinclined. But I want to just -- by way of background,
7 let me say this; that I've encountered the issue before.
8 But I wasn't satisfied just doing what I had done before
9 because persisting in an error wouldn't be appropriate.
10 At least I'd have everybody in the same boat.

11 But I did review *Descamp* and then *Durango*, the
12 Supreme Court case on the enticement conviction. I looked
13 at that, too. And I guess the takeaway for me is that I
14 do understand your argument and it is -- it's a good
15 argument, but it's not persuasive to me. And I'll explain
16 why and I'll give you a chance to try to -- one last
17 chance to try to tip me.

18 But I understand the very significant concern about
19 the Sixth Amendment right that is risked -- that is at
20 risk here. And I think the Thomas dissent in *Descamp* -- I
21 don't know if we say *Descamp* here or *Descamp*; I'll go with
22 *Descamp* -- that Justice Thomas raised this concern if
23 there's some doubt about the unanimity of the jury verdict
24 in convicting somebody. You've got a Sixth Amendment
25 violation if the judge then backfills and finds the facts

1 that actually went to support the conviction. A very
2 serious concern, I get that. And maybe you'll prevail on
3 one or the other of these cases.

4 But it seems to me that *Descamp* really seems to give
5 very clear instructions, at the level that a district
6 judge can understand, to say, just as a practical matter,
7 when you have a divisible statute; and divisible in the
8 sense of just looking at whether it's broken out into
9 separate statutory subsections that can kind of tell you,
10 in a very practical level, whether you're being charged
11 with burglarizing a building or a railroad car; and that
12 when you have that kind of a statute you can look at the
13 *Shepard* documents and figure it out. And it's not hard in
14 this case, but I don't think you're challenging that,
15 right?

16 MR. BUGNI: No.

17 THE COURT: I mean, looking at the documents,
18 that's pretty clear. But that's not the same kind of
19 divisibility problem that was posed by the California
20 burglary statute that was at issue in *Descamp* because that
21 statute didn't even require the unlawful entry, and that's
22 just not our problem. We have the other more pedestrian
23 problem where you have to look at what subsection was
24 violated, and that seems to be the kind of divisibility
25 that we're talking about here.

1 I looked at the *Durango* case and I think that it
2 tells me in your memo -- your memo tells me two things:
3 One, there's no Wisconsin case that says that the burglary
4 statute has the problem that was identified in the *Durango*
5 case involving the enticement. So the Supreme Court of
6 Wisconsin hasn't told me that I've got a unanimity problem
7 with the burglary conviction.

8 And I think Ms. Przybylinski Finn has given me some
9 pretty good authority, again nothing really binding. But
10 the jury instruction business seems to suggest that that
11 kind of jury unanimity problem is just not going to arise
12 with a burglary conviction because the practice is that
13 the jury is presented with the question of whether the
14 person burgled a building and that's an element that
15 they're going to have to find.

16 And when the charging document identifies the
17 statutory subsection, even with a plea there's no doubt
18 that that is what's going on. I don't even have to drill
19 down as far as the plea colloquy to find out if there was
20 an admission of burgling the building.

21 And the problem with the enticement comparison -- and
22 so your argument is really that the structure of the
23 enticement statute is really just like the structure of
24 the burglary statute. And so if it's a unanimity problem
25 with enticement, it's one for burglary, but even that one

1 is a little bit different.

2 And, you know, like I said, the Supreme Court has
3 never engaged that issue with the burglary statute. But
4 even with the enticement you've got the subelements are
5 one of the various nasty intents that the enticer could
6 have. And so it doesn't seem to be a very direct analogy
7 of the -- with the burglary statute because that is part
8 of the act that is committed. Whether you enter a
9 building or a railroad car or a ship, it's part of the act
10 that you have to commit.

11 It's not the same as having the intent to do
12 something malevolent with the child that you are enticing,
13 so I don't think it's really a direct analogy. It's not a
14 complete disanalogy, but I don't think it's quite the same
15 kind of crime as the burglary.

16 So primarily because I think *Descamp* kind of gives me
17 the template for looking at a divisible statute, and it
18 just seems like when I look at *Descamp* it just seems to
19 be -- the burglary statute seems to be the prototype of
20 the divisible statute that they have in mind;

21 And they dealt with a very different problem with the
22 California statute, which didn't have the *unlawful entry*
23 component anywhere in the statutory elements, and so for
24 that reason that one didn't come up, because it didn't
25 require unlawful entry;

1 But Wisconsin has the more pedestrian problem of just
2 breaking out the locations to be burgled in subsections
3 and the charging documents resolve the issue when you look
4 at it;

5 So I'm going to do what I did in the *Franklin* case
6 under the Armed Career Criminal Act. We have the same
7 kind of conceptual problem, although it's in the career
8 offender guideline in the *Pouliot* case, but the same sort
9 of preliminary analysis. I'll do the same thing that I
10 did there. So tell me if there's anything that I'm
11 missing.

12 MR. BUGNI: Sure. I think that -- I mean, it's a
13 very good analysis. I think to dissect it is to say,
14 well, in one sense the Court and the government and
15 everybody wants to rely upon we have different
16 subsections. "Come on, Bugni, you've got to be kidding
17 me." And I understand in *Durango* you're looking at all
18 the different means broken out in subsections, but you
19 still have subsections.

20 THE COURT: Yep.

21 MR. BUGNI: And the Court is looking at it and
22 says, "Subsections don't dictate whether or not something
23 is a separate element; it really says nothing about that.
24 Those are just different means of violating the same
25 statute. We have one statute."

1 And the government actually gives me a little bit of
2 a layup in *State v. Taylor*, I should probably say a *tip*.
3 On page 2, at the bottom of it, the court explained that
4 "Whoever provides intentionally" -- sorry, provides that
5 "Whoever intentionally enters a building without consent
6 of the person in unlawful possession with intent to steal
7 or commit a felony in such place is guilty." That's what
8 they're trying to get at. And then you have these
9 different subsections, all right? Those are just the
10 small means.

11 And had they broken it out in a single sentence
12 versus using (a), (b), (c) and (d), would that really
13 change the analysis? I don't think it does at all. And
14 that would go back into the *Durango*.

15 And I understand, you know, the charging document
16 says this. The charging document has nothing to do with
17 jury unanimity. It's also this false fiction that, well,
18 he was charged with it, therefore we know it. It's really
19 what goes back to the jury. And just because sometimes
20 we'll modify the jury instruction doesn't mean that we're
21 going to -- the jury had to have that instruction.

22 We all sit through trials. Sometimes we say, "It's
23 Bob's house. Did he burglar Bob's house? Did he burglar
24 1425 Cherry Hill Lane?" What goes back to them in the
25 unanimity is not in that question going to be something

1 that's divisible. You just have to be unanimous; you
2 know, did he enter something and did he do it with intent
3 to steal.

4 And here's where it's falls apart -- there's two last
5 points in there and I appreciate you really thinking about
6 this -- is that you look at subsection (e), all right --
7 or sorry. Yeah, I believe it is "a motor home or other
8 motorized type of home or a trailer home, whether or not
9 any person is living in such a home." And then you go,
10 "All right. Well, that's for the trailer home." And of
11 course we don't want people to burglar trailer homes. We
12 don't want them to burglar anything. But is that a
13 building or dwelling? It seems like it could be under (a)
14 or it could be under (e). And guess what?

15 THE COURT: This is the dissent in *Descamp* where
16 it's bringing that up with the houseboat.

17 MR. BUGNI: And that's exactly what this is. And
18 the most intellectually, honest way to think about this is
19 that it wouldn't matter. You know, as much as a criminal
20 defense attorney might be able to pull the wool over the
21 jury's eyes, we're not going to be, like, "Ha-ha-ha, I'm
22 going to split you right down the middle: you on trailer
23 park, you on residence." And I'm going to walk him and
24 get my, you know, like get my mistrial. That's the first
25 part and it's staring us right in the face there.

1 The second is one this: let's talk about something
2 that is so common in federal court. Go *Blockburger*. You
3 know, what are the elements charged and am I going to be
4 able to recharge?

5 Can you imagine, let's say I do walk him, I walk Sahn
6 on a burglary in state court. Does the prosecutor then
7 get to go back and go, "Oh, ho ho ho, my friend, my
8 friend. That was charged as a building. But guess what?
9 We're now charging it properly as a trailer home."

10 They're different elements. Go ahead, government,
11 you can always recharge. But nobody would do that and no
12 court would stand for that. They'd say, "No, you lost."
13 What mattered was *intentionally entering a building*.
14 Those elements, those are just means.

15 So if *Blockburger* is going to protect him from a
16 retrial, which I think it would -- I looked and I thought
17 long and hard about this; I mean, you're constantly
18 percolating these issues -- *Blockburger* would dictate that
19 those are just separate means and that there could not be
20 a retrial on that if the elements are different, you know,
21 the elements are different. And that would be his Eighth
22 Amendment protection, his double jeopardy.

23 And if your double jeopardy would be -- the analysis
24 would be the exact same if this came before you on *habeas*,
25 then it has to be that he would not be armed career

1 criminal; that that doesn't matter, these are just small
2 means.

3 And I know that it's very pedestrian. Look, it's
4 broken out here. I don't contest it. But at the heart of
5 it you just have to look at this statute and that's all
6 you'd begin and end with. And there's ample reason to
7 find that this doesn't count; that these are just
8 alternate means of what the Wisconsin Legislature is
9 really trying to get at: unlawfully entering one of six or
10 seven places and taking stuff that doesn't belong to you.
11 That's it.

12 THE COURT: Well, let me ask you this then,
13 because I thought -- you know, this is why I give some
14 credit to this argument because I do think that lurking in
15 here is a potential Sixth Amendment issue.

16 MR. BUGNI: Yeah.

17 THE COURT: But what then are we to do with the
18 modified categorical approach? Your argument, it seems to
19 me, would preclude the application of the modified
20 categorical approach forever. There would be no case in
21 which that would apply.

22 MR. BUGNI: In *Durango* --

23 THE COURT: It always provides -- it always has
24 some risk of the Sixth Amendment violation if we use the
25 modified categorical approach.

1 MR. BUGNI: Yeah -- no, I don't believe that
2 there's always a risk if we use the modified categorical.
3 Oftentimes when we're using the modified categorical --
4 every state does statutes differently.

5 THE COURT: Yeah.

6 MR. BUGNI: I had one, not just speaking
7 anecdotally. I can't remember the cite. I think the
8 guy's name was *Williams*. It was a Texas statute and it
9 was whoever forcibly, you know, rapes a woman, whoever
10 does it this way, this way, whoever rapes a woman, whoever
11 entices a child, just very broad categories with (a), (b),
12 (c) and (d), and they were guilty of Class F felonies, all
13 right? All very distinct. And then last one was whoever
14 exposes his anus to somebody, you know, mooning somebody,
15 all right? Those are all separate elements. They were
16 separate elements and means or separate elements of
17 committing those offenses.

18 And in that case, even though the charging document
19 was, you know, Texas Statute 42, you can look and see
20 which one he was really charged with because those are all
21 separate elements. They had completely different elements
22 as to each offense, whether or not there was actual
23 penetration versus mooning versus enticement of a child
24 into some place. So I don't think it's getting rid of the
25 mod --

1 THE COURT: How do you know when that case goes
2 to a jury whether the jury has to be unanimous about
3 whether it was rape or mooning?

4 MR. BUGNI: By the charges given to the jury and
5 that's what matters. So that would be the jury unanimity
6 problem is what is the jury instruction really looking at.
7 If that jury instruction that goes back to them just said,
8 you know, "Do you guys find that he violated 941?" yeah,
9 that would be a real problem. That would be a jury
10 unanimity problem.

11 But if the jury instruction that goes back to them
12 says, do you find -- here are the three elements that you
13 must find -- you know, he wasn't wearing pants and that he
14 showed it to somebody and -- you know, great, then that's
15 what you found. And so that's where the Sixth Amendment
16 is protected, but it's also that's where you can use those
17 *Shepard* documents correctly.

18 THE COURT: That's the same thing we have here
19 though, isn't it? I mean, we look at the documents and we
20 see whether they charged 943.10(1m)(a), (b) or (c).

21 MR. BUGNI: No. Here we look and we see, all
22 right, what did the jury necessarily have to find? What
23 did he necessarily have to be charged with? You know,
24 let's say they left off the last subpoint. It's not like
25 he could get into the court and be like, all right,

1 jeopardy is attached, so I now move to dismiss because I
2 had no notice of what the charge was.

3 That was actually the last cite I provide to the
4 Wisconsin Supreme Court. That was the burglary argument.
5 "No, you don't get off that easy, defense attorney. You
6 know what you're charged with. That's just to provide you
7 with notice."

8 So that's the response there, is there's always going
9 to be -- the charging document is to give you notice, what
10 you need to show up to trial for. What's going back to
11 the jury and whether there has to be unanimity on it is
12 going back to what are the jury instructions.

13 So I don't think I've disturbed or, you know, asked
14 you, as a district court judge, to wipe away the Supreme
15 Court in *Shepard* and *Taylor*. Instead it leaves it really
16 in place and it's in place here because you have a statute
17 that has alternate means set forth, just like *Durango*,
18 though correctly in a different sort of context.

19 THE COURT: Yeah. Now, in that case, in *Durango*,
20 the Supreme Court has told me explicitly they are
21 alternate means, they don't require unanimity, and I'm not
22 confident that I have that same certainty of the answer as
23 between means and elements in the burglary statute.

24 MR. BUGNI: I agree. I think I've given you
25 enough support that would allow to you say, yeah, the way

1 Wisconsin would treat this. When it goes to the Seventh,
2 either in this case or *Franklin*, or I imagine the
3 government is going to appeal, that's going to be the
4 argument, but you need to certify this.

5 You can come back, you know, Wisconsin Supreme Court
6 and tell us which one it is because that's going to be a
7 big difference. But I will say, looking at both *Durango*
8 and -- I should know it off the top of my head -- but the
9 burglary statute, those are very clear that really, these
10 are different means. And what we're trying to get at the
11 core is, did you enter anything, did you do it to steal,
12 did you do it without permission.

13 THE COURT: Well, again, I'm not sure that
14 *Durango* is quite the same thing because, you know, when
15 you charge a burglary, you're going to charge that they
16 burgled. In fact usually the charging document says what
17 the address is.

18 But in the enticement context, all we know is that
19 the guy had some nastiness in mind for the child that he
20 enticed and it doesn't really matter which one it was.
21 It's just a set of malevolent acts that the person had in
22 mind and there's a great deal of uncertainty about what's
23 in the mind of the enticer. But as long as they had
24 something wrong, it satisfies, so it's a little bit
25 different.

1 I am going to overrule your objection. You've made a
2 very good argument. I'm going to, not for the purpose of
3 being consistent, but I'm going to go the same way that I
4 went in *Pouliot* and *Franklin* and find that the statute is
5 divisible.

6 I can look at the *Shepard* documents and the *Shepard*
7 documents are clear that in this case Mr. Sahn burglarized
8 a building or a dwelling. And so I will wait for further
9 clarification from either the Seventh Circuit or the
10 Supreme Court, but I will overrule the objection.

11 And, Mr. Sahn, I'm sure you understand the importance
12 of that discussion. It probably seems kind of abstract
13 and technical here where we're dealing with what your
14 experience is going to be as a result of the sentence that
15 I impose. But it's a very important issue. You have
16 great counsel who made a great argument, even though I
17 wasn't persuaded by it.

18 But, at any rate, let's proceed with the rest of the
19 sentencing now. More technicalities to come here for a
20 moment while I walk through the guidelines, as I'm
21 obligated to do. So the sentencing guidelines then, we
22 will walk through them.

23 The guidelines are calculated using the 2015 manual.
24 But the 2014 guidelines, which would be the ones that
25 would be in the -- in effect, would produce the same

1 result, so that there is no *ex post facto* concerns with
2 using the 2015 guidelines.

3 There's kind of two guideline calculations here;
4 first the one for the offense of conviction, which is
5 being a felon in possession of a firearm. I will walk
6 through that, although it ends up being superseded by the
7 Armed Career Criminal Act guideline. But just to make a
8 record of it, the guideline for being a felon in
9 possession, in violation of Title 18, United States Code,
10 Section 922(g)(1), is in Section 2K2.1.

11 It starts out with the base level of 14, because
12 Mr. Sahn committed the instant offense subsequent to
13 sustaining a felony conviction, and his predicate
14 convictions are two counts of burglary of a building or
15 dwelling in Eau Claire County, Wisconsin in Circuit Court
16 Case No. 08CF174.

17 Two levels are added pursuant to (b)(1)(A) because
18 the defendant possessed three firearms, so the number of
19 firearms gives two additional levels. And the three
20 firearms are the Beretta 9 millimeter, the Smith & Wesson
21 .357, and the Marlin 30-30.

22 Two levels are added pursuant to (b)(4) because the
23 firearms were stolen.

24 And a four-level increase is added because Mr. Sahn
25 possessed the firearms in connection with the three counts

1 of felony theft of movable property in which he
2 was charged -- in which he was -- that he was charged with
3 in the Eau Claire County case, which is 15CF536.

4 No other Chapter Two adjustments apply.

5 Now we do the calculation for the application of the
6 Armed Career Criminal Act. So pursuant to Section
7 4B1.4(a), a defendant who is subject to an enhanced
8 sentence under the provisions of 18 USC 924(e) is an armed
9 career criminal. And I find that Mr. Sahm meets those
10 conditions because I have considered his burglary
11 convictions to meet the definition of a violent felony
12 under that statute.

13 So the defendant has two counts of burglary in the
14 08CF174 case and burglary of a building or dwelling in
15 Case 97CF56. So according to Section 4B1.4(b)(3)(B), the
16 offense level then is 33. And so that is the offense
17 level that will govern here.

18 So the defendant qualifies for three levels of
19 downward adjustment because he has accepted responsibility
20 for his offense and the government has moved for the
21 additional reduction.

22 So the guideline calculation then is based on an
23 offense level of 30 with a criminal history category of
24 IV. That produces a guideline imprisonment range of 135
25 to 168 months. But the statutorily required mandatory

1 minimum sentence is 15 years, which is 180 months, as a
2 result of the Armed Career Criminal Act. So therefore the
3 defendant has an advisory guideline imprisonment range of
4 180 months.

5 And as I indicate, if I'm wrong, if I end up finding
6 out that Mr. Bugni's argument prevails, the Armed Career
7 Criminal Act would not apply and we'll be back here to do
8 this again under Mr. Bugni's approach. So with that, let
9 me get the comments from the government about what the
10 actual sentence I should impose is.

11 Ms. Przybylinski Finn.

12 MS. PRZYBYLINSKI FINN: Thank you, Your Honor.
13 I'll start my comments by saying that the government is
14 not requesting anything more than the mandatory minimum,
15 the 15 years in this case.

16 But I do take issue with a few of the things in
17 Mr. Bugni's sentencing memo and that is sort of the
18 offhanded way he refers to Mr. Sahn's really extensive
19 criminal history as if it's really no big deal; he's just
20 a beef; he's not really that bad of a guy.

21 And really, when I look at this it says "disorderly
22 conduct," that's to be expected; "battery," he's been in a
23 few bar fights; and then later indicates that this Court
24 is not confronted with a violent individual when we look
25 at Mr. Sahn. That is inconsistent with the presentence

1 report and inconsistent with Mr. Sahm's history.

2 What Mr. Sahm has been is an abuser of women kind of
3 time and again. I mean, we talk about a bar fight. Well,
4 one time he's getting escorted from the bar by the female
5 who owns the bar and he hits her and scratches her. He
6 was abusive to the mother of his children. That shows up
7 a few different places in the presentence report. He
8 broke into another woman's residence. He got in a fight
9 and hit his brother-in-law. It's time and again that he
10 he's been physically abusive towards women and family
11 members and I think that that really needs to be addressed
12 here.

13 I don't think that we can look at Mr. Sahm and think,
14 "Ah, gee-whiz, it's just no big deal." I think it is a
15 big deal. It's a big deal and that's why we're here today
16 and that's why he faces the really serious sentence he's
17 facing.

18 He needs to change some things. He's got a whole
19 courtroom full of people that are here to support him.
20 They wrote letters on his behalf. People talk about him
21 being a nice guy. And yet you've got this other person he
22 is when he's not in custody, it seems like.

23 He's angry. He steals stuff from -- not just people
24 he doesn't know, but from his friends. And it just
25 really -- it is very serious conduct and he has to

1 understand it's serious conduct because unless that
2 changes, he does not have a future outside of prison.

3 THE COURT: Thank you. Mr. Bugni.

4 MR. BUGNI: Sure. I probably should have
5 proofread it one more time for tone; I'll give you that.
6 I always have a hard time with these cases. My first case
7 was a guy whose name will go unnamed and he was not an
8 armed career criminal, though his priors were rape and
9 murder and then substantial battery that, because of
10 modified categorical, did not count as ACC. When I think
11 of armed career criminals, I always think of that man.

12 Mr. Sahm is a train wreck, an absolute train wreck
13 when he's using drugs, and that is patently obvious.
14 Almost all of his offenses speak to that. I think bar
15 fights, to the alcohol, to the stealing, to feeding the
16 drug habit, bad checks to feeding the drug habit; all of
17 that is in there.

18 There is not the sort of violence that portends with
19 some of the other people that we've -- actually all the
20 same parties have been with the same defendant, you know,
21 where you're like, "That's a bad man. That's a really
22 scary man." Is this somebody who's out of control?
23 Clearly. Is this somebody who needs some prison time?
24 Yeah, I'll give you that, no question.

25 But when you go from 30-day stints, 60-day stints, I

1 think he's got maybe a 90-day in there, the most you have
2 is 14 months. He's been out of the community a lot. He's
3 been in county jail a lot, but he's been out of the
4 community most of his life. He just has racked up a lot
5 of little problems. I don't mean *problems* in a pejorative
6 sense in like, you know, this is dismissal.

7 But he's a nuisance. He's an absolute nuisance. But
8 is he somebody who has to have the 15-year hammer? No,
9 he's not. Do you have to give it to him? You do.
10 There's no question, with your findings, you've got to
11 do it. I say, ameliorate it as much as you can.

12 The 320 -- I think 325 days that you can cut off,
13 this is the sort of guy that deserves that kind of cutoff.
14 You know, where is sufficient but not greater than
15 necessary? When this comes back from the Seventh Circuit,
16 we'll probably argue that. I think four years, I think if
17 he came back regardless, four years is about appropriate.

18 Even if I won the guideline arguments in front of you
19 I'd say this is really a guy who needs four years, maybe
20 five -- maybe he'll be convinced then -- but he doesn't
21 need 15. And whatever this court can do to give him --
22 get released a little bit sooner, I think that's
23 appropriate here.

24 THE COURT: Well, I will say this; that if not
25 for the mandatory minimum, I think that 15 years would

1 probably more -- be more than is necessary to serve the
2 purposes of sentencing. And I don't have to get into the
3 fine points here about whether it should be four years,
4 five years, six years or something more.

5 But I will say this: I regard Mr. Sahm as something
6 much more dangerous than a nuisance. I think that he is
7 not the kind of guy who's going to start arming himself
8 when he commits his next burglary so that he can shoot his
9 way out. He's not that person. That's not the danger
10 that he posed. But Mr. Sahm is substantially out of
11 control and goes way beyond being a nuisance, because
12 there is a real serious risk.

13 I appreciate and I think applaud the Sentencing
14 Commission's removal of the *burglary of a dwelling* from a
15 predicate offense for the career offender guideline
16 because I don't think it's the same kind of violence that
17 a bank robbery -- armed bank robbery is.

18 But at the same time, the burglary of someone's home
19 inherently poses a risk of violence. Something bad is
20 going to happen sooner or later other than just losing
21 some property. But it is also such an intentional
22 violation of somebody's home when somebody breaks in and
23 takes their property. You're just -- the one place where
24 you're supposed to feel most safe is violated and people
25 just never feel safe after that anymore. It's a horrible

1 offense to the person whose home is violated.

2 But that's not even all of it. Mr. Sahm has these
3 disorderly conduct convictions which seem like kind of
4 low-level, gettin-rowdy things, but they're actually kind
5 of batteries, in a lot of cases. I think there's actually
6 a battery conviction in there. I think it's a
7 misdemeanor, but still there actually is an element of
8 anger and violence that Mr. Sahm brings to his
9 interactions with other people. Maybe it's because he
10 drinks, maybe it's because he uses drugs, but the fact is
11 it's there. Not everybody who uses drugs gets violent;
12 Mr. Sahm does.

13 And then his drug use is so extensive that he is just
14 totally at risk of killing somebody out on the highway. I
15 mean, Mr. Sahm is somebody that I feel an obligation to
16 protect the public from Mr. Sahm. And so he goes way
17 beyond nuisance. And so he is quite an insistent
18 criminal. You know, he's a career criminal, there's no
19 question. He's not the prototype of what we think of as
20 an armed career criminal.

21 But he is not without his redeeming qualities. The
22 letters show that. You know, there is a person there
23 that's not just a career criminal, but he is a career
24 criminal.

25 So anyway, so my objection is -- now, you're

1 advocating for your client and I appreciate that, but it
2 is a substantial minimizing of what Mr. Sahm represents to
3 the rest of us to call him a *nuisance*. So with that,
4 let's hear from Mr. Sahm.

5 THE DEFENDANT: I --

6 THE COURT: Is there anything else, Mr. Bugni?
7 I'm not cutting you off.

8 MR. BUGNI: No, no. I can pivot, if you want,
9 like escalate it a little bit.

10 THE COURT: This is your opportunity.

11 MR. BUGNI: No. I mean, I will just add, you
12 know --

13 THE COURT: I shouldn't say this is your chance,
14 because if it does come back --

15 MR. BUGNI: Oh, yeah.

16 THE COURT: -- if we revise, we'll do this all --
17 everybody gets a fresh start and I'll listen again. But
18 these are my reactions.

19 MR. BUGNI: Sure.

20 THE COURT: And I'll also, just to tip my hand a
21 little bit, I'm not thinking about giving more than 15
22 years either. But as I said, if it weren't for the
23 mandatory minimum, we'd be debating more seriously what an
24 appropriate level would be here, but we're kind of stuck.
25 The government is not asking for more than 15 and I'm not

1 going to give more than 15. If we have to do this again,
2 we'll do it again starting from scratch.

3 MR. BUGNI: Sure. I will get a better tone on
4 the sentencing memo. But I do want to advocate hard for
5 this 320 days of credit. You know, it might seem like a
6 small thing except for Mr. Sahm, who will be 51.

7 THE COURT: It's a year in prison. It's not a
8 small thing.

9 MR. BUGNI: It's not a small thing. And I think
10 if you're going to give it -- all right, you know, he's
11 not a nuisance; he's really a bad dude; he's terrible,
12 he's the worst thing that we've seen -- all of that can be
13 taken care of by state court. There's another person
14 wearing black up in Eau Claire who -- that's I think part
15 of the anger. It's like we come into federal court, we're
16 like, "What have you guys been doing in Eau Claire?
17 What's been going on?"

18 Now we really -- you know, now justice finally has to
19 be done, when that's in their backyard. You know, that's
20 somebody else who's been -- he has been tried, convicted,
21 sentenced for each one of those. And the indignation that
22 everyone feels for that was rightly taken out on the
23 lowest level possible and that was there.

24 Now, here I honestly believe that every day that we
25 can save this man that there will come a point of

1 rehabilitation. There comes a point when he grows out of
2 his criminal behavior and every day past that is just
3 warehousing him. You know, is that year seven? I don't
4 know. Is it five? No clue. It's definitely past ten.
5 You know, is it year 14? He's a whole different person at
6 that point.

7 So I'd say, Your Honor, everything that you can do to
8 get him closer to year 14, year 13, that should be done
9 and that can be done with this *Campbell* credit. I'd ask
10 that you impose all of that credit -- or give all of that
11 credit to Mr. Sahn.

12 THE COURT: Mr. Sahn.

13 THE DEFENDANT: Listen, I don't know. I'm really
14 ashamed. I really don't know what to say. I'm really
15 ashamed. I apologize to my family. They're always here.
16 I know I'm a *fuck-up*. I don't know, that's just -- I
17 mean, I know. I don't know, I keep doing stuff. I
18 really -- it's very important, no matter what happens,
19 that the Court knows, everybody knows, that I do feel very
20 ashamed for the things I've done. I'm going to accept
21 whatever you -- I mean, obviously. But what's most
22 important to me is that people know that I really do feel
23 bad for the things that I've done and I'm ashamed for
24 that.

25 THE COURT: Let me ask you this: I can appreciate

1 the fact that you feel some shame for what you've done. I
2 think the letters indicate that there's more to you than
3 just your criminal record, as substantial as that is. But
4 surely you must have felt some shame or embarrassment
5 before. The shame apparently is not enough to get you to
6 straighten out and stop stealing from people and using
7 drugs.

8 So what -- I will tell you, a lot of people would
9 say, "Warehousing is exactly what that man needs. You
10 know, we just -- it's worth the \$30,000 a year to keep him
11 from doing what he has been doing. So justice be damned.
12 Let's just -- public safety requires it." So what are you
13 going to do that will be different next time?

14 THE DEFENDANT: Well, hopefully I learn
15 something. I mean, I really don't know what to expect
16 during these years I'm going to be incarcerated.
17 Hopefully -- out there I haven't been able to do anything,
18 so I'm hoping being incarcerated is going to do something.
19 I've never been locked up more than 14 months, so this is
20 a substantial long time. I don't want to be a screw-up.
21 I don't like doin' that. I don't like being here. I
22 don't like putting my family through this.

23 I hope that in the prison system there's programs,
24 something I can do to figure out why, I mean, because I
25 don't know why. Obviously I don't -- I mean, I don't know

1 why I do this stuff. I mean, I don't like being sitting
2 in jail, like my family coming here, you know. I mean,
3 it's kind of like I don't know why I do this *shit*, I
4 really don't, I don't.

5 I don't want to blame it on drugs because it seems
6 like a cop-out, so I'm not going to blame it on drugs.
7 But, I mean, I really don't know. And I'm just hoping
8 that when I'm incarcerated there's some programs or
9 something or the time alone. Like I say, I've been locked
10 up for 14 months at the most. I'm hoping -- I mean, you
11 know, I don't know.

12 Maybe if my family would have gave up on me a long
13 time ago or maybe if they would have -- something -- I
14 mean, I don't know, man, I really don't. It's just I'm
15 ashamed. I want the best. I want to do better and I'm --
16 being incarcerated, I'm glad. And here I'm not taking
17 from people, so I don't care if I'm incarcerated. It
18 sucks, but, I mean, I'm here right now. I'm glad.

19 I don't even want to be out there. I'm ashamed of
20 these things. I'm just hoping to learn whatever I can
21 learn. Hopefully within the prison system there's some
22 stuff I can learn to be better.

23 THE COURT: I hope so, too. I mean, I'm just
24 thinking, I'm going to impose long sentence, but I -- the
25 first factor in your redemption or rehabilitation or your

1 change when you come out, because sooner or later you're
2 coming out. I mean, a lot of people would say I should
3 make it as later as possible.

4 But sooner or later you're coming out and it's going
5 to be on you, you know. Ultimately it's on you. There's,
6 like, nothing that's going to happen in prison that's
7 going to just change who you are. It's just got to be --
8 somehow you've got to find something inside of yourself
9 that makes change.

10 You've got some people who love and care about you.
11 And if they mean anything to you, you'll try to find
12 whatever it is. So you'll have time to think about it. I
13 don't know if just thinking is enough to do it.

14 But, you know, like I say, you just really,
15 apparently kind of for the first time in your life, you're
16 just going to have to take responsibility for who you are.
17 And you can be the same guy you are, it's just not very
18 attractive, you know. There's something good inside of
19 you or these people wouldn't be here to write you a
20 letter. You've got to decide that that part of you is
21 more important than the part that apparently guides your
22 behavior most of the time.

23 So, Ms. Przybylinski Finn, do you have any comments
24 or consideration on Mr. Bugni's request about the 324 days
25 credit that he wants?

1 MS. PRZYBYLINSKI FINN: I will say a few things.
2 I agree that when he was arrested back in May of 2015 he
3 was arrested for things that are taken into account here.
4 He took the guns that he possessed and so that counts.
5 The problem is is that the time he spent in state custody
6 is not a state sentence and so I can't figure out where it
7 fits.

8 I understand *Campbell*. I understand what it says.
9 The Court can absolutely run this concurrently with
10 anything he gets in the state system for those. I just
11 don't see any support in the cases that tell us anything
12 about what you can do with custody that is not an actual
13 sentence.

14 THE COURT: Mm-mm.

15 MS. PRZYBYLINSKI FINN: That's not helpful.

16 THE COURT: Yeah. I understand there's a little
17 riddle here with respect to that. But I don't know if
18 you've got anything to add to that, Mr. Bugni.

19 MR. BUGNI: I think it's the total imprisonment.
20 And here we know that the BOP will not credit that
21 imprisonment to him.

22 THE COURT: Yeah.

23 MR. BUGNI: So I think the logic of *Campbell* --
24 and I forgot what the other two cases were from early
25 2000, it's the cumulative sentence. We're all conscious

1 of the fact that today starts -- unless you go
2 consecutive, which you have not indicated -- today starts
3 the clock, all right? If you've got to impose 15 total
4 years, then the clock can be done retroactive. That's
5 what *Campbell* and everything else means because he has
6 credit for a sentence that otherwise is not BOP
7 calculating towards this.

8 THE COURT: Right.

9 MR. BUGNI: So I think the logic of *Campbell* and
10 the logic of, I think it was, *Jones* all of those speak to
11 this and that's what empowers this court to use its
12 discretion and give him that credit now.

13 THE COURT: All right. Normally I would take a
14 break here to consider the sentence, but I just have so
15 little discretion here that I don't have to do that much
16 thinking. Let's -- before I impose the sentence, let me
17 just touch on the conditions of supervised release. I
18 don't think I got anything from either side. Do you have
19 any objections on the conditions?

20 MR. BUGNI: No. We're fine.

21 THE COURT: All right. Here's what I'm going to
22 do on the sentence: I've already more or less indicated
23 obviously I'm stuck with the 15-year mandatory minimum.
24 I'm going to craft a sentence to give the credit for the
25 324 days. If I'm wrong on that, I'll redo that as well,

1 but I have a way of articulating the sentence that I think
2 does the job.

3 I've already indicated my thoughts about the
4 sentence. I have an obligation obviously to do justice
5 here, to give you punishment that is appropriate but not
6 greater than necessary. 15 years I think is probably more
7 punishment than is warranted. I just don't have any
8 discretion on that. I'm not quite sure what the
9 appropriate kind of punishment is.

10 This really is a case in which my concern for public
11 safety is a really big driver of what sentence I would
12 impose. And as I said, Mr. Sahm, you go way beyond
13 nuisance. And again I'm not saying you're just a
14 resolutely bad man. You have good qualities and I hope
15 you find and expand those. You just -- there are
16 explanations for it -- it's drug abuse, it's a bad
17 upbringing; you know, it's just impulsiveness;
18 irresponsibility -- but you are a dangerous person, so
19 I've got to protect the public here.

20 But what I am going to do is I think that looking at
21 the whole thing, the 15 years is a really long time. It's
22 probably more than enough. We're getting into a period of
23 warehousing, as Mr. Bugni says. So I will do what I can
24 to ameliorate the mandatory minimum, which pushes me to a
25 sentence that's beyond what I would impose just under the

1 ordinary sentencing factors.

2 And so what I will do is I'm going to sentence
3 Mr. Sahm to a period of incarceration that is 14 years and
4 41 days. And I do that recognizing that he has spent 324
5 days in prison, so his federal sentence will begin today;
6 and that he has spent 324 days in jail not under a state
7 sentence, but in pretrial detention. But it is a period
8 of incarceration that contributes toward the 15 years.

9 So I will recognize that the BOP won't give him
10 sentence credit for it, but I can meet my obligations to
11 give him the 15 years by imposing a sentence of 14 years
12 and 41 days, recognizing that he has already served 324,
13 so that his total period of incarceration will end up
14 being 15 years. So that is what his sentence is.

15 I won't say that it is exactly the right number under
16 the 3553(a) factors. I think it's somewhat beyond that,
17 but it's what I've got to impose. And my reason for
18 giving him the credit is to ameliorate that.

19 I'm also going to -- in light of the fact that the
20 sentence is 15 years I will provide that my sentence will
21 run concurrently with whatever sentence the state imposes.
22 Ordinarily I would say that that sentence is the state's
23 business because it's not the same conduct as the sentence
24 for which I'm sentencing Mr. Sahm here today. But in view
25 of the fact that it is a 15-year-long sentence, I want to

1 guard against a sentence that I think on the whole would
2 just be counterproductive to Mr. Sahm's reentry into
3 society.

4 And so I am going to say, look, we've got the -- kind
5 of the nuclear option of this federal prosecution with an
6 armed career criminal conviction so that it's 15 years. I
7 think that that will be an adequate punishment for not
8 only why he's here, but also what he's got in the state.
9 So I think that it will facilitate Mr. Sahm's
10 rehabilitation to know exactly what he's got coming here.
11 And so because the sentence is so long, I will provide
12 that it's concurrent to the state sentence even though
13 those state sentences are yet to be imposed.

14 So as to Count 1 of the indictment, it is adjudged
15 that the defendant is committed to the custody of the
16 Bureau of Prisons for a term of 14 years, 41 days, and is
17 currently in primary state custody.

18 I will order that the federal sentence runs
19 concurrent with any sentences imposed in the Eau Claire
20 County, Wisconsin Circuit Court cases. And those are
21 14CF494, 14CT472, 15CF08, 15CF201, 15CF406, 15CF405,
22 15CF404, 15CF438 and 15CF536; on Chippewa County,
23 Wisconsin Circuit Court Cases 15CF329 and 15CF328. The
24 federal sentence will begin today.

25 I will recommend that the defendant receive the

1 opportunity to participate in substance abuse and mental
2 health treatment and educational and vocational training
3 while he is incarcerated. I also recommend that the
4 defendant be afforded prerelease placement in a
5 residential reentry center with work release privileges.

6 A term of supervised release is not required by
7 statute; however, I think it would be appropriate here
8 particularly for two reasons: one, Mr. Sahm has already
9 demonstrated a difficulty in operating while he's not
10 incarcerated, so I think supervised release would be
11 appropriate. In fact I think Mr. Sahm suggested that the
12 structure provided by supervision is actually something
13 that he has appreciated in the past. So I will impose a
14 five-year term of supervised release subject to the
15 conditions that are proposed and justified in the
16 presentence report.

17 Now, ordinarily it is suggested that I read those
18 conditions in court here, but I will ask Mr. Sahm if he
19 would waive the reading of those conditions.

20 THE DEFENDANT: Yeah, I do.

21 THE COURT: Okay. So I will impose Conditions 2
22 through 9 and 11 through 16 proposed and justified in the
23 presentence report. I will provide a couple of words of
24 justification here, as I'm required to do. But, Mr. Sahm,
25 I will tell you on these conditions that for me to drone

1 on and read them here would be, I don't know, tedious, to
2 say the least.

3 But also it's more important for you to see them in
4 writing, read them and go over them with your attorney
5 when you see them on a document called the *Judgment and*
6 *Commitment*. That would be more productive than having me
7 read them to you here.

8 Also, when these come to bear on you, which would be
9 at the end of your sentence, if any of these conditions
10 are not appropriate, you should ask your counsel or your
11 supervising officer to move the Court to modify those and
12 we can do that at the time. This would be at some point
13 in the future. And we'll do our best to come up with
14 conditions here, but we can change them later if they're
15 not appropriate. So I will do those conditions -- justify
16 the conditions in a minute.

17 Although the instant offense is not drug related, the
18 defendant has a substantial history of drug use, so the
19 mandatory drug testing that's set forth in 18 USC 3583(d)
20 is not waived and the special conditions will address that
21 as well.

22 It is adjudged that the defendant is to pay the \$100
23 mandatory criminal assessment penalty to the Clerk of
24 Court for the Western District of Wisconsin immediately
25 following the sentencing.

1 I will find that the defendant does not have the
2 means to pay a fine under Section 5E1.2(c) of the
3 guidelines without impairing his ability to support
4 himself upon release from custody.

5 So let me just offer a few words of justification for
6 the conditions. Many of the conditions are the ordinary
7 incidence of supervision, such as the requirement that you
8 report to the probation office.

9 You're required to maintain lawful employment or some
10 alternative approved by the supervising officer. That's
11 so that you can support yourself through lawful means.

12 You have to report changes in residence. That's
13 appropriate to maintain your supervision.

14 There are restriction on using drugs, possessing
15 drugs or being where drugs are sold. That of course is
16 appropriate here not only because it might constitute
17 another crime, which you're not to do, but also you have a
18 history of drug abuse and so that is to help you surmount
19 your drug abuse problems.

20 The restrictions on who you associate with in terms
21 of whether people are committing a crime; you've indicated
22 that you've made bad choices before because of your
23 associates, so that's an appropriate condition as well.

24 If you're arrested you have to report to your
25 supervising officer. If you're questioned you have to

1 report. That's appropriate here. If you have any scrapes
2 with the law, the supervising probation officer can help
3 address those as appropriate.

4 There's a condition that the probation officer visit
5 you at home or work. That's appropriate here because I
6 think close supervision is very warranted, given your
7 lengthy criminal history.

8 You also may be required by the probation officer to
9 notify third parties of any risks that are occasioned by
10 your criminal history. And that's appropriate here given
11 how extensive your criminal history is.

12 There's some special conditions, Conditions 12
13 through 16, that are appropriate for you. There's a
14 financial disclosure requirement which is appropriate
15 because it will help you maintain a lawful lifestyle and
16 to make sure that you're not supporting yourself through
17 unlawful means.

18 There's a search condition. Again you have a history
19 of drug use, so the search condition makes sure that
20 you're not -- that you don't have contraband around, which
21 would be stolen property or drugs.

22 There's a recommendation that you participate -- or a
23 requirement that you participate in mental health
24 referral. You have some issues with attention deficit
25 disorder and so it would be appropriate to make sure that

1 whatever mental health needs that you have are addressed.

2 You have a substance abuse history, so there's a
3 requirement that you participate in substance abuse
4 treatment. That seems highly appropriate for you.

5 There's also -- No. 16 is that you abstain from the
6 use of alcohol. Your primary drug of choice is not
7 alcohol at the moment. But you have a history of some
8 self-reported substance abuse and convictions for
9 operating while intoxicated, so the abstention condition
10 is warranted.

11 Again I'll remind you that if any of these conditions
12 are inappropriate when they come to bear, you should seek
13 modification of them.

14 So with that, I think the only thing remaining is to
15 inform Mr. Sahn of his right to appeal. Anything else
16 that --

17 MS. PRZYBYLINSKI FINN: No, I believe that's it.

18 THE COURT: Mr. Bugni?

19 MR. BUGNI: That's it.

20 THE COURT: How about with the probation office,
21 is there anything else that I need to address?

22 MS. FRANK-LORON: No.

23 THE COURT: Mr. Sahn, you have the right to
24 appeal your conviction if you think your plea was somehow
25 unlawful or involuntary. You have the right to appeal

1 your sentence if you think that it's contrary to law. If
2 you want to appeal, you must file a notice of appeal
3 within 14 days of an entry of judgment or within 14 days
4 of any notice of appeal that's filed by the government.

5 If you can't afford the filing fee, you can apply for
6 leave to appeal *informa pauperis*, which just means without
7 paying the filing fee. And if you cannot afford an
8 attorney, you may also apply for court-appointed counsel
9 to represent you in the appeal.

10 The probation office is to notify local law
11 enforcement agencies and the state attorney general of
12 Mr. Sahm's release to the community.

13 And with that, I think we're finished. So thank you
14 all. Mr. Sahm, use your time in prison wisely. Find a
15 good part and emphasize it.

16 THE DEFENDANT: Thanks.

17 THE COURT: Yep. Thank you.

18 (Adjourned at 12:11 p.m.)

19 ***

20

21

22

23

24

25

