

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

TIMOTHY LAMAR THOMAS,	:	MOTION TO VACATE
Fed. Reg. No. 71927019,	:	28 U.S.C. §2255
Movant,	:	
	:	CRIMINAL NO.
v.	:	1:18-CR-36-ELR-JSA
	:	
UNITED STATES,	:	CIVIL ACTION NO.
Respondent.	:	1:24-CV-4173-ELR-JSA

MAGISTRATE JUDGE’S FINAL REPORT AND RECOMMENDATION

Movant Timothy Lamar Thomas filed the instant *pro se* motion to vacate pursuant to 28 U.S.C. §2255, and seeks to challenge the constitutionality of his convictions and sentences in the Northern District of Georgia. (Doc. 120). The matter is before the Court on the §2255 motion [Doc. 120] and the Government’s response [Doc. 122]. Movant has not submitted a reply.

I. Relevant Law

A. Standard of Review

A federal prisoner may file a motion to vacate his sentence under 28 U.S.C. §2255 if “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. §2255(a). “[T]o obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal.”

United States v. Frady, 456 U.S. 152, 166 (1982) (footnote omitted). Because the record is sufficiently developed to determine the issues here, an evidentiary hearing is not necessary. *See, e.g., Dickey v. United States*, 856 F. App'x 809, 811 (11th Cir. 2021) (per curiam) (“A district court is not required to grant an evidentiary hearing in a §2255 proceeding if the case’s records conclusively show the prisoner is not entitled to relief or if his claims are patently frivolous.”).

B. The Armed Career Criminal Act (“ACCA”)

A defendant convicted of possession of a firearm by a convicted felon under 18 U.S.C. §922(g) is normally exposed to a maximum sentence of ten years. *See* 18 U.S.C. §924(a)(2). If a defendant convicted of a §922(g) conviction has three prior convictions for a “serious drug offense” or a “violent felony” committed on separate occasions, however, the ACCA increases the penalty to a mandatory minimum fifteen years. 18 U.S.C. §924(e)(1). And a defendant who qualifies under §924(e) of the ACCA is subject to the armed career criminal enhancement under the Sentencing Guidelines. *See* U.S.S.G. §4B1.4.¹

¹ Section 4.B1.4 of the Sentencing Guidelines provides that “[a] defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. §924(e) is an armed career criminal.” U.S.S.G. §4B1.4(a). Section 4B1.4(b) sets forth enhanced offense levels for such defendants. *United States v. Voltz*, No. 22-10733, 2024 WL 4891754, at *1 (11th Cir. Nov. 26, 2024) (per curiam).

II. Factual and Procedural History

A. Facts

The following facts were provided by the Government as the factual basis for Movant's guilty plea:

[O]n January 14, 2018 Atlanta Police Department officers responded to a 911 call reporting a domestic dispute. When officers arrived at the residence, which was located in the Northern District of Georgia, they were told that the defendant and other individuals locked themselves inside of the residence. One of the individuals who was at the scene informed police officers that the defendant had a firearm in the residence, but he had not used the firearm during the domestic dispute. Officers attempted to get the defendant to exit the residence, and they were initially unsuccessful; however, the defendant eventually exited the residence and was taken into custody without further incident.

Atlanta Police Department officers secured a search warrant to search the residence, and when they executed that search warrant, they located a backpack that contained two firearms and documents for a cell phone number and rental car with defendant's name on them. One of the individuals who was outside of the residence at the time of the response by the police had reported to the officers that the firearms would be stored in Mr. Thomas's backpack.

At the time the defendant possessed the firearms, he had been previously convicted of a crime punishable by a term of imprisonment exceeding one year. One of those convictions was that Mr. Thomas was convicted in 2011 of aggravated assault with a deadly weapon, and being a felon in possession of a firearm. He was sentenced to ten years imprisonment.

Mr. Thomas knew, when he possessed the firearms in this case, that he had previously been convicted of a crime punishable by a term of imprisonment exceeding one year. The firearms that were possessed by the defendant affected interstate commerce as they were both manufactured outside the state of Georgia and recovered in the state of Georgia.

(Doc. 95 (“Plea Tr.”) at 17-19).² After that factual recitation, the Court asked Movant if he agreed with the Government’s summary of what he did, to which Movant responded, “Yes ma’am, Your Honor.” (*Id.* at 19).

B. Procedural History

On August 6, 2019, a grand jury in the Northern District of Georgia entered a superseding indictment against Movant and charged him with one count of possession of a firearm as a convicted felon in violation of 18 U.S.C. §§922(g) and 924(e)(1). (Doc. 30). Specifically, the indictment charged that on January 14, 2018, Movant knowingly possessed a Smith & Wesson, model M&P, 9 mm handgun, and a Springfield Armory, model XD-45, .45 caliber handgun, after having been previously convicted of at least one of the following offenses in the Fulton County Superior Court:

- Possession of marijuana with the intent to distribute in or about 2001 in the Fulton County Superior Court (Case #01-SC-4845);
- Aggravated assault with a deadly weapon in or about 2001 in the Fulton County Superior Court (Case #01-SC-6036); and

² The title page of the plea hearing transcript mistakenly indicates that it is the sentencing transcript. (*See* Doc. 95 at 1). The sentencing transcript, however, can be found at Doc. 93 (“Sentencing Tr.”).

- Aggravated assault with a deadly weapon in or about 2012 in the Fulton County Superior Court (Case #11-SC-102586).³

(*Id.*).

On February 12, 2020, Movant entered a guilty plea to the felon-in-possession charge pursuant to a negotiated plea agreement. (Doc. 46-1 (“Plea Agreement”)). The plea agreement contained an appellate and collateral waiver⁴ which provided that Movant waived the right to file an appeal and collaterally attack his convictions and sentences in any post-conviction motion – including a motion under §2255 – on any ground, except for an upward departure or variance from the guideline range, the Court’s finding as to Section 4B1.4 of the Sentencing Guidelines if that finding was contrary to that which the parties agreed, or for an ineffective assistance of counsel claim. (*Id.* ¶30; Plea Tr. at 15-16).

Because Movant entered a plea to §924(e)(1) of the ACCA, the Presentence Investigation Report (“PSR”) [Doc. 88] included the armed career criminal enhancement under U.S.S.G. §4B1.4. (PSR ¶19). To that end, the PSR listed the following qualifying predicate offenses, including the three convictions that were set forth in the indictment: (1) possession of marijuana with the intent to distribute on

³ These dates in the indictment apparently refer to the date of conviction rather than the date of the offense. (*See* PSR ¶¶27, 28, 31).

⁴ For ease of reference and discussion the Court will use the terms “appellate waiver” and “collateral waiver” interchangeably.

September 7, 2000; (2) aggravated assault with a deadly weapon and possession of MDMA⁵ with intent to distribute on February 22, 2001; (2) aggravated assault with a deadly weapon on March 12, 2011; and (3) aggravated assault with a deadly weapon and armed robbery on November 22, 2017. (*Id.* ¶¶19, 28, 31, 34). As relevant here, the criminal history portion of the PSR also listed, *inter alia*, possession of cocaine with the intent to distribute, which constituted part of the events associated with Movant’s 2011 aggravated assault with a deadly weapon offense. (*Id.* ¶31).

Movant objected to the PSR’s application of the armed career criminal enhancement because, according to Movant, it was an open question in the Eleventh Circuit whether aggravated assault qualifies as a predicate ACCA offense.⁶ (PSR ¶19). Movant, however, did not object to any of the other qualifying predicate offenses.

Movant had three or more prior violent felony and/or serious drug convictions and faced a mandatory minimum sentence of fifteen years under the ACCA. *See* 18

⁵ MDMA, or methylenedioxy-methamphetamine, also is known as Ecstasy. *United States v. Morris*, 486 F.3d 853, 854 (11th Cir. 2012) (per curiam).

⁶ The undersigned notes that while some aggravated assault offenses may not be considered a “violent felony,” there is no question that aggravated assault with a deadly weapon qualifies as such. *See United States v. Hood*, No. 21-13903, 2025 WL 1454356, at *3 (11th Cir. May 21, 2025) (per curiam) (“Hood possessed ammunition in connection with aggravated assault with a deadly weapon, a crime of violence.”).

U.S.C. §924(e). When Movant entered into the negotiated plea to §922(g) and §924(e)(1) as set forth in the indictment, he was aware of, and agreed, that he was subject to that fifteen-year mandatory minimum. (Plea Agreement ¶7(b); Plea Tr. at 12; PSR at 1).

Before sentencing and during the sentencing hearing, Movant withdrew his objection to the armed career criminal enhancement and did not object to the PSR's calculations, conceding that he had at least three qualifying predicate offenses even without the aggravated assault convictions. (Sentencing Tr. at 9, 19). On April 15, 2021, the Court sentenced Movant to 121 months of imprisonment to be followed by three years of supervised release. (Doc. 84). Thereafter, Movant filed a direct appeal with the Eleventh Circuit and raised a claim that he received a substantively unreasonable sentence. *See* Eleventh Circuit Docket Search, *available at* <https://ecf.ca11.uscourts.gov/n/beam/servlet/TransportRoom> (last visited Sept. 8, 2025). On February 28, 2022, the Eleventh Circuit dismissed Movant's appeal because it was prohibited by the appellate waiver, and issued its mandate on March 29, 2022. *See id.*; (*see also* Docs. 113, 114).

Movant executed the instant *pro se* §2255 motion to vacate his sentence on August 29, 2024. (Doc. 120). Therein, he argues that his conviction and sentence should be vacated based on the Supreme Court's decision in *Erlinger v. United States*, 602 U.S. 821 (2024), which held that a jury must determine beyond a

reasonable doubt, or that a defendant freely admit in a guilty plea, that a defendant's prior offenses were committed on separate occasions for ACCA purposes. (*Id.*). According to Movant, his Fifth and Sixth Amendment rights were violated because neither a jury found, nor did Movant admit, that he committed at least three predicate offenses on separate occasions to be considered an armed career criminal as required by *Erlinger*.

The Government responds that the collateral waiver in the plea agreement prohibits Movant from raising this claim, the claim is procedurally defaulted and Movant has not demonstrated cause or prejudice to overcome the procedural default, *Erlinger* does not apply retroactively on collateral review, and Movant is not entitled to relief. (Doc. 122). The undersigned agrees.

III. Discussion

A. Movant Waived the Right to Challenge His Sentence.

First, Movant's claim that his sentence should be vacated based on *Erlinger* is precluded by the collateral waiver in his plea. Movant does not argue that his plea was involuntary. Regardless, during the plea colloquy and in the plea agreement, Movant affirmed, *inter alia*, that he had read the agreement in its entirety, carefully reviewed every part of it with his attorney, understood and voluntarily agreed to the terms and conditions in the agreement, and was fully satisfied with counsel's representation. (*see generally* Plea Tr.). After the Government set forth the factual

basis for the plea, Movant told the Court that he agreed with that summary and that he was, in fact, guilty of the offense to which he was entering a plea. (*Id.* at 17-19). Finally, Movant's counsel confirmed to the Court that after conferring with Movant she believed that Movant was knowingly, voluntarily, and intelligently waiving his constitutional rights, and the Court accepted Movant's guilty plea. (*Id.* at 5, 11, 19-20).

Movant's testimony during the plea colloquy carries a presumption of truth, *see Blackridge v. Allison*, 431 U.S. 63, 74 (1977), and demonstrates that Movant did, in fact, enter into the plea knowingly and voluntarily. Because Movant knowingly and voluntarily entered into the plea agreement containing the collateral waiver, that alone renders the appellate waiver valid and enforceable. *See United States v. Youngblood*, 803 F. App'x 352, 353-54 (11th Cir. 2020) (per curiam) (finding waiver knowingly and voluntarily given and enforceable where defendant testified he understood the charges against him, knew he was giving up his right to appeal, made the plea voluntarily, and none of the exceptions to the waiver applied).

Perhaps more importantly, however, the collateral waiver should be enforced here since the record unequivocally demonstrates that Movant specifically knew that he had the right to appeal and was giving up that right. *See United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993) ("[O]ne of the keys to enforcing a sentence appeal waiver is that the defendant knew he had a 'right to appeal his sentence and

that he was giving up that right.”) (citations omitted); *see also United States v. Boyd*, 975 F.3d 1185, 1192 (11th Cir. 2020) (explaining that the “touchstone for assessing” if a sentence appeal waiver “is whether ‘it was clearly conveyed to the defendant that he was giving up his right to appeal under *most* circumstances.’”) (alterations and emphasis in original) (quoting *Bushert*, 997 F.2d at 1352-53).

Indeed, as part of the Government’s summary of the plea agreement the Government read into the record the paragraph containing the appellate and collateral waiver. (*Id.* at 7-8). The Court also went into great detail about the appellate and collateral rights Movant was waiving, after which Movant stated that he understood. (*Id.* at 8, 15-16). The collateral waiver, therefore, is valid and enforceable, and precludes Movant from raising his *Erlinger* claim. *See United States v. Powell*, No. 23-12565, 2025 WL 618816, at *1 (11th Cir. Feb. 26, 2025) (per curiam) (finding appellate waiver enforceable where the district court specifically questioned the defendant about the waiver, and that it was “manifestly clear from the record that the defendant otherwise understood the full significance of the waiver.”) (internal quotation marks and citations omitted); *see also Daniels v. United States*, No. 22-13509, 2023 WL 7149105, at *1 (11th Cir. July 6, 2023) (denying certificate of appealability for defendant’s claim that his guilty plea was invalid based on new case law, as any such claim was waived by his guilty plea and appellate waiver); *United States v. Wyche*, No. 21-14301, 2022 WL 17883935, at *5

(11th Cir. Dec. 23, 2022) (per curiam) (affirming dismissal of claim based on new case law as barred by appellate waiver); *see also King v. United States*, 41 F.4th 1363, 1367 (11th Cir. 2022) (“[E]ven when a new constitutional rule might provide a strong basis for collateral attack, we enforce an appeal waiver according to its terms.”); *United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir. 1999) (“While it may appear unjust to allow criminal defendants to bargain away meritorious appeals, such is the necessary consequence of a system in which the right to appeal may be freely traded.”).

C. Movant’s *Erlinger* Claim Is Procedurally Defaulted.

Even if the collateral waiver does not bar Movant’s *Erlinger* claim, however, it is procedurally defaulted. “A claim is procedurally defaulted, such that the prisoner cannot raise it in a collateral proceeding, when a defendant could have raised an issue on direct appeal but did not do so.” *Hill v. United States*, 569 F. App’x 646, 647 (11th Cir. 2014) (per curiam); *see also Black v. United States*, 373 F.3d 1140, 1142 (11th Cir. 2004) (“Generally, if a challenge to a conviction or sentence is not made on direct appeal, it will be procedurally barred in a 28 U.S.C. §2255 challenge.”).

The movant can “avoid the procedural bar by establishing that either of the following exceptions applies: (1) cause and prejudice, or (2) a miscarriage of justice based on actual innocence.” *Hill*, 569 F. App’x at 648. “[T]o show cause for

procedural default [a §2255 movant] must show that some objective factor external to the defense prevented [the movant] or his counsel from raising his claims on direct appeal and that this factor cannot be fairly attributable to [the movant's] own conduct.” *Lynn v. United States*, 365 F.3d 1225, 1235 (11th Cir. 2004) (per curiam). “Actual prejudice means more than just the possibility of prejudice; it requires that the error worked to [the movant's] actual and substantial disadvantage[.]” *Ward v. Hall*, 592 F.3d 1144, 1179 (11th Cir. 2010). “Fundamental miscarriages of justice occur only when ‘a constitutional violation has probably resulted in the conviction of . . . [an] innocent person.’” *Carruth v. Comm’r, Ala. Dep’t of Corr.*, 93 F.4th 1338, 1355 (11th Cir. 2024) (alterations in original) (quoting *Schlup v. Deno*, 513 U.S., 298, 327 (1995)).

Movant did not raise his *Erlinger* claim in this Court or on appeal; nor does he attempt to show cause, prejudice, or actual innocence to overcome the procedural default thereof.⁷ This claim, therefore, is procedurally defaulted.

⁷ The fact that *Erlinger* had not been decided when Movant filed his appeal would not constitute cause to overcome his procedural default, since before Movant was convicted and sentenced the Supreme Court already had determined that a jury must decide any fact that could increase the statutory penalty beyond the statutory maximum or mandatory minimum. See *Alleyne v. United States*, 580 U.S. 99 (2013) (plurality opinion); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Thus, the question raised in *Erlinger* – *i.e.*, if a jury should decide whether ACCA predicate convictions occurred on different occasions so as to increase the mandatory minimum from ten to fifteen years – was not “so novel that its legal basis [was] not reasonably available to counsel[.]” *Howard v. United States*, 374 F.3d 1068, 1072 (11th Cir. 2004); see

D. Movant's *Erlinger* Claim Fails.

1. *Erlinger* is not Retroactively Available on Collateral Review.

Movant's claim also fails because *Erlinger*, decided three years after Movant was convicted and sentenced, does not apply to Movant's sentence. A new rule is only applicable retroactively if it is substantive, that is, if it changes the elements of the offense and alters the range of conduct or class of persons the law penalizes. *Schiro v. Summerlin*, 542 U.S. 348, 351-53 (2004). Where the rule only regulates the manner of determining the defendant's culpability, however, it is procedural and does not apply retroactively. *Id.*; *Edwards v. Vannoy*, 593 U.S. 255, 276 (2021).

When the Supreme Court previously has announced rules that a jury, not a judge, must decide any facts that could increase a defendant's prescribed range of penalties, those rules were considered "prototypical procedural rules" and, therefore, were not retroactively available. *See Shiro*, 542 U.S. at 353 (finding procedural the rule that a jury must determine whether aggravating circumstances exist to impose the death penalty); *see also United States v. Jackson*, 995 F.3d 1308, 1311 (11th Cir. 2021) (Pryor, J., opinion respecting denial of an en banc hearing) (referring to the "settled rule" that neither *Apprendi* nor *Alleyne* has retroactive effect"); *McCoy v.*

also Erlinger, 602 U.S. at 835 (stating that the separate occasions determination was "nearly on all fours with *Apprendi* and *Alleyne* as any we could imagine").

United States, 266 F.3d 1245, 1256-57 (11th Cir. 2001) (finding *Apprendi* rule was procedural and not retroactively available on collateral review).

Like *Schriro*, *Apprendi*, and *Alleyne*, *Erlinger* also announced a rule that a jury and not a judge should decide facts that could increase a defendant’s statutory penalty – this time, to determine whether a defendant’s previous violent felony or serious drug offenses occurred on separate occasions so as to qualify as an armed career criminal and increase the statutory maximum under the ACCA. It necessarily follows that *Erlinger*, which the Supreme Court considered to be “nearly on all fours with *Apprendi* and *Alleyne* as any we might imagine[,]” also is procedural and also would not be retroactively applicable on collateral review. *See, e.g., Erlinger*, 602 U.S. at 869 n.3 (Kavanaugh, J., dissenting) (noting that “the *Teague* rule will presumably bar the defendant from raising today’s new rule in collateral proceedings.”)⁸ (citing *Edwards v. Vannoy*, 593 U.S. at 258); *Schriro*, 542 U.S. at 351-53; *see also Byron v. United States*, No. 1:21-CR-20553, 2025 WL 786282, at *8 (S.D. Fla. Mar. 12, 2025) (“The Supreme Court has not made *Erlinger* retroactively applicable to cases on collateral review.”); *accord Pressey v. United States*, No. 8:17-CR-435-MSS-NHA, 2025 WL 1456600, at *2 n.3 (M.D. Fla. May

⁸ In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court set forth a test to determine whether a new rule of constitutional law would be retroactively applicable on collateral review.

21, 2025). Consequently, *Erlinger* is not retroactively available to Movant here.

2. *Erlinger* Does Not Apply to Movant.

Finally, even if none of the other reasons applied, Movant's claim nonetheless fails because Movant admitted that he committed three predicate offenses on different occasions. As the basis for what Movant claims is the *Erlinger* violation, Movant appears to focus on the offenses for aggravated assault with a deadly weapon in 2000 and 2011, and argues that a jury did not find, nor did he admit during his guilty plea, that those offenses occurred on different occasions. (*See* Doc. 120 at 1-2). Movant does not even attempt to show how these offenses – separated by a span of eleven years – could possibly be considered to have occurred on the same occasion, and his argument is dubious at best.

Indeed, when Movant entered his plea to the charge in the indictment, he admitted that he was convicted of the three offenses listed therein – that is, possession of marijuana with the intent to distribute in 2001, aggravated assault with a deadly weapon in 2001 (which occurred in 2000), and aggravated assault with a deadly weapon in 2012 – all of which qualify as predicate convictions. *See, e.g., United States v. Hood*, No. 21-13903, 2025 WL 1454356, at *3 (11th Cir. May 21, 2025) (per curiam) (“Hood possessed ammunition in connection with aggravated assault with a deadly weapon, a crime of violence.”); *United States v. Bradley*, 566 F. App'x 868, 870 (11th Cir. 2014) (per curiam) (“[T]he district court did not err,

plainly or otherwise, in concluding the conviction [for possession with intent to distribute marijuana] qualified as a ‘serious drug offense’ under the ACCA.”). That concession alone defeats his argument. *See, e.g., United States v. Reid*, No. 23-10619, 2025 WL 2399780, at *8 (11th Cir. Aug. 19, 2025) (per curiam) (“The court did not plainly err by finding that the different occasions requirement was satisfied because Reid conceded that he was convicted of three predicate offenses on three separate occasions.”); *United States v. Edwards*, 142 F.4th at 1281 n.6 (“Here, Edwards at least arguably admitted in his plea that his three convictions satisfied ACCA’s different-occasions requirement. . . . And by pleading to the whole – *i.e.*, ACCA applicability, writ large, based on those three convictions, one could argue that he implicitly pleaded to the constituent parts, including the applicability of the different-occasions requirement.”).

What’s more, Movant swore during the plea hearing and in the plea agreement that he was aware that he faced the ACCA mandatory minimum fifteen-year sentence pursuant to §924(e). (Plea Tr. at 16; Plea Agreement at 3). Based on these admissions, *Erlinger* would not apply. *See Erlinger*, 602 U.S. at 834 (stating that whether the predicate convictions occurred on separate occasions must be decided by a jury *or* freely admitted in a guilty plea); *United States v. Williams*, No. 20-13184, 2024 WL 4948575, at *1 (11th Cir. Dec. 3, 2024) (“In *Erlinger*, the Supreme Court held that the Fifth and Sixth Amendments require that any fact used to increase

the range of penalties to which a criminal defendant is exposed, including whether a defendant's past offenses were committed on different occasions, *must be either admitted by the defendant in a guilty plea* or resolved by a jury beyond a reasonable doubt.") (emphasis added).

Although Movant argues that in the PSR he "refuted and made objection" to his "ACCA categorization and status," Doc. 120 at 1-2, as discussed previously herein in Section I.B., he withdrew that objection before sentencing and did not object to the PSR's calculations during the sentencing hearing. (Sentencing Tr. at 9, 19). Because Movant did not object to those calculations, he "effectively admitted to the recited facts for sentencing purposes." *United States v. Harris*, 941 F.3d 1048, 1053 (11th Cir. 2019). As a result, no *Erlinger* violation occurred. *See Reid*, 2025 WL 2399780, at *8; *Edwards*, 142 F.4th at 1281 n.6.

3. Any *Erlinger* Violation Did Not Affect Movant's Proceedings.

Finally, even if an *Erlinger* violation occurred, Movant still would not be entitled to relief. When reviewing *Erlinger* violations, the Eleventh Circuit has applied a harmless error standard based on the concurrent and dissenting opinions in *Erlinger*. *See Erlinger*, 602 U.S. at 850 (Roberts, J., concurring) ("[A]s Justice Kavanaugh explains, [*Erlinger* violations] are subject to harmless error review."); *id.* at 859-60 (Kavanaugh, J., dissenting) (indicating that failure to have a jury decide whether predicate offenses were committed on different occasions would be subject

to harmless error review); *United States v. Rivers*, 134 F.4th 1292, 1305 (11th Cir. 2025) (“[W]e hold, as all our sister circuits to address the issue have, that we review *Erlinger* errors for harmlessness); *United States v. Voltz*, No. 22-10733, 2024 WL 4891754, at *4 (11th Cir. Nov. 26, 2024) (per curiam) (“We are, in short, persuaded that the harmless error standard applies to an *Erlinger* error.”), *cert. denied*, ___ U.S. ___, 145 S. Ct. 1463 (Mar. 24, 2025). Under harmless error review, “the government bears the burden of showing beyond a reasonable doubt that a rational jury would have found that the defendant’s prior drug offenses all were ‘committed on occasions different from one another.’” *Rivers*, 134 F.4th at 1306.

In another line of cases, however, the Eleventh Circuit also has held that *Erlinger* errors should be reviewed under a plain error standard, placing the burden on the movant to show that any such error affected his substantial rights. *See, e.g., United States v. Piatt*, No. 23-13197, 2025 WL 2156749, at *6 (11th Cir. July 30, 2025) (per curiam); *accord Edwards*, 142 F.4th at 1281; *United States v. Bryant*, No. 19-12283, 2025 WL 987735, at *2 (11th Cir. Apr. 2, 2025) (per curiam), *petition for cert. docketed*, No. 25-5258 (Aug. 1, 2025). Movant’s *Erlinger* claim fails under either standard.

To determine whether qualifying predicate offenses under the ACCA occurred on different occasions, courts consider “a ‘range of circumstances [that] may be relevant to identifying episodes of criminal activity’ – *e.g., the offenses’*

timing, location, and character.”” *Edwards*, 142 F.4th at 1279 (alteration in original) (citation omitted); *see also Erlinger*, 602 U.S. at 840 (stating that factors to consider include whether predicate offenses occurred on separate occasions whether the “offenses differed enough in time, location, character, and purpose[.]”); *Wooden v. United States*, 595 U.S. 360, 369 (2022) (“[O]ffenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events.”). Although there is “no particular lapse of time or distance between offenses [that] automatically separates a single occasion from distinct ones[,] *Erlinger*, 602 U.S. at 841, courts “have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart.” *Wooden*, 595 U.S. at 370; *see also United States v. Bryant*, No. 19-12283, 2025 WL 987735, at *2 (11th Cir. Apr. 2, 2025) (per curiam) (“‘[O]ffenses separated by substantial gaps in time or significant intervening events’ will ordinarily not count as part of one occasion.”) (quoting *Wooden*, 595 U.S. at 369).

Movant’s predicate offenses listed in the PSR included: Movant’s possession of marijuana with the intent to distribute on September 7, 2000 [PSR ¶¶19, 27]; aggravated assault with a deadly weapon on February 22, 2001 [*Id.* ¶¶19, 28]; and

aggravated assault with a deadly weapon on March 12, 2011⁹ [*Id.* ¶¶19, 31].¹⁰ These predicate offenses were separated by months or years and clearly differed in character and purpose. Consequently, “[n]o reasonable jury could conclude that his prior offenses were not committed on at least three different occasions,” *Bryant*, 2025 WL 987735, at *2, and any *Erlinger* error was harmless, and/or did not affect his substantial rights under the plain error standard. *See id.* (finding *Erlinger* error was harmless where prior convictions in 1988, 1993, and 1999 were separated by spans of years); *see also United States v. Piett*, No. 23-1397, 2025 WL 2156749, at *6 (11th Cir. July 30, 2025) (per curiam) (finding movant failed to show *Erlinger* error affected his substantial rights because his past convictions were temporally remote from each other, no jury could conclude otherwise, and the movant failed to explain how there could be a reasonable probability of a different outcome); *Voltz*, 2024 WL 4891754, at *4 (“Here, we conclude that the district court’s *Erlinger* error was harmless because none of the evidence in the record could rationally support a

⁹ During the February 2001 offense, Movant shot the victim with a handgun, and when he committed the March 2011 offense Movant shot someone with an assault rifle while participating in gang activity. (PSR ¶¶19, 28, 31).

¹⁰ The Government does not include Movant’s convictions for aggravated assault with a deadly weapon when listing his qualifying predicate offenses under the ACCA. Instead, the Government lists Movant’s predicate convictions as possession with the intent to distribute marijuana in 2000, possession with the intent to distribute MDMA in February 2001 (during the same occasion as the aggravated assault with a deadly weapon in February 2001), and armed robbery in November 2017. (Doc. 122 at 5).

finding that Voltz’s ACCA predicate offenses [separated by years] were *not* committed on different occasions.”); *United States v. Campbell*, 122 F.4th 624, 632 (6th Cir. 2024) (finding because months separated each of the predicate offenses – “far more than the ‘day’ of separation the Supreme Court used as a benchmark in *Wooden*” – the record showed beyond a reasonable doubt that a jury’s failure to consider the different-occasions question had no effect on the defendant’s sentence).¹¹

III. Conclusion

Based on the foregoing reasons, **IT IS RECOMMENDED** that Timothy Lamar Thomas’s motion to vacate his sentence [Doc. 120] be **DENIED WITH PREJUDICE**.

IV. Certificate of Appealability

Pursuant to Rule 11 of the Rules Governing §2255 Cases, “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific

¹¹ Moreover, the record indicates that Movant had several other qualifying offenses; therefore, any determination by the Court that his predicate offenses occurred on different occasions did not affect his status as an armed career criminal. *See United States v. Brown*, 805 F.3d 1325, 1328 (11th Cir. 2015) (per curiam) (finding harmless the court’s treatment of two prior convictions for selling cocaine as having occurred on separate occasions, since even if doing so constituted error the defendant’s record still would have included three qualifying predicate offenses and thus did not affect his status as an armed career criminal).

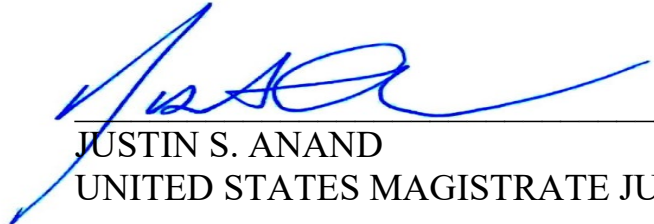
issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).” 28 U.S.C. §2253(c)(2) provides that a certificate of appealability (“COA”) may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” In order for the certification requirement to fulfill its function of weeding out frivolous appeals, a court should not automatically issue a COA; rather, the applicant must prove “something more than the absence of frivolity” or “the existence of mere ‘good faith’ on his or her part.” *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (citations omitted).

Movant need not prove, however, that some jurists would grant the §2255 motion. *See id.* “The question is the debatability of the underlying constitutional claim, not the resolution of that debate.” *See Lamarca v. Secretary, Dep’t of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009) (citing *Miller-El*, 537 U.S. at 325). In other words, Movant need only demonstrate that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Based on the foregoing discussion, reasonable jurists would not find “debatable or wrong” the undersigned’s determination that Movant’s claims are barred by the collateral waiver, are procedurally defaulted, and/or fail on the merits. *See Slack*, 529 U.S. at 484.

Accordingly, **IT IS FURTHER RECOMMENDED** that a COA be denied.

The Clerk is **DIRECTED** to terminate the reference to the undersigned Magistrate Judge.

IT IS SO RECOMMENDED this 26th day of September, 2025.



JUSTIN S. ANAND
UNITED STATES MAGISTRATE JUDGE