STATE OF WISCONSIN
IN SUPREME COURT

Case No.: 2018AP1346-CQ

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

DENNIS FRANKLIN and SHANE SAHM,

Defendants - Appellants.

ON CERTIFICATION OF QUESTION AND ACCEPTANCE OF APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PLAINTIFF-APPELLEE

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ISSUE PRESENTED

Whether the different locational subsections of the Wisconsin burglary statute, Wis. Stat. § 943.10(1m)(a)-(f), identify alternative elements of burglary, one of which a jury must unanimously find beyond a reasonable doubt to convict, or whether they identify alternative means of committing burglary, for which a unanimous finding beyond a reasonable doubt is not necessary to convict.

This Court should answer: The nature of the proscribed conduct, the statutory structure, the legislative history of the Wisconsin burglary statute, as well as this Court's case law and the Wisconsin judgments of conviction, support the conclusion that § 943.10(1m) is divisible by its different locational subsections in (a) – (f), one of which a jury must unanimously find beyond a reasonable doubt to convict.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case merits oral argument and publication.

INTRODUCTION

The question for the Seventh Circuit in *United States v. Franklin and Sahm,* 7th Cir. Nos. 16-1872 and 16-1580, was whether convictions under Wis. Stat. § 943.10(1m)(a), burglary of a building or dwelling, qualified as convictions for violent felonies under the federal Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1). The ACCA is a statutory tool that removes the most dangerous criminals from the community for a significant period. Under the ACCA, a person who violates federal law by unlawfully possessing a firearm "and has three previous convictions by any court . . . for a violent felony" faces a mandatory minimum of fifteen years in prison. Burglary is specifically listed as a "violent felony" for purposes of the ACCA. 18 U.S.C. § 924(e)(2)(B)(ii).

Under the ACCA, while a conviction for "burglary" counts as a violent felony, in *Taylor v. United States,* 495 U.S. 575, 598 (1990), the Supreme Court held that the federal statute requires a conviction for "generic burglary," which is defined, regardless of labels under state law, as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." In evaluating a conviction under this definition, "a sentencing court must use the 'categorical approach,' which focuses on the elements of the statutory offense, not the particular facts of the defendant's crime." *Taylor* at 601–02. Accordingly, if a state burglary statute is broader than "generic

burglary," a conviction does not count under the ACCA definition unless the statute is divisible. *Id*. This is the path that led the parties to this Court.

There is no dispute that the defendants each have three prior convictions for violating Wis. Stat. § 943.10(1m)(a) (or its identically worded predecessor § 943.10(1)(a)),[1] Burglary-Building or Dwelling. There is also no dispute that burglary of a building or dwelling under that section of the Wisconsin burglary statute meets the definition of generic burglary as set forth in *Taylor v. United States*, 495 U.S. 575, 598 (1990), that is "unlawful or unprivileged entry into, or remaining in, a building or other structure with the intent to commit a crime."

Contrary to defendants' contentions, the nature of the proscribed conduct, the statutory structure, the legislative history of the Wisconsin burglary statute, as well as this Court's case law and Wisconsin judgments of conviction all support the conclusion that § 943.10(1m) is divisible by its subsections. This conclusion is also consistent with the Seventh Circuit's decision in *United States v. Edwards,* 836 F.3d 831 (7th Cir. 2016). *Edwards* held only that subsection (a) of § 943.10(1m) was not itself divisible, noting that "the statute's text and structure suggest that the components of each subsection are merely 'illustrative examples'

[1] Wis. Stat. § 943.10(1) was renumbered in 2004 as § 943.10(1m). The statutory structure and text of that subsection were unchanged. (2003 Wis. Act 189, § 1, eff. April 22, 2004.) Accordingly, the government's brief refers to Wis. Stat. § 943.10(1m) and Wis. Stat. § 943.10(1) interchangeably as the "Wisconsin burglary statute."

of particular location types," and therefore not divisible, but leaving open the question at issue here of the divisibility of the statute by each subsection. *Edwards,* 836 F.3d at 837, citing *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016). One of the factors the *Edwards* court considered in reaching its conclusion was the "virtually synonymous" terms within the separate subsections. 836 F3d. at 837. Here, because each subsection represents distinct locational elements, and not "virtually synonymous" examples of location types, this Court should hold that the Wisconsin burglary statute is divisible by these separate and distinct subsections.

STATEMENT OF THE CASE

Both Sahm and Franklin pleaded guilty to violations of Title 18, United States Code, Section 922(g)(1), for possessing firearms after having been previously convicted of a felony. *United States v. Franklin,* 895 F.3d 954, 957 (7th Cir. 2018). Based on their prior Wisconsin burglary convictions, Franklin and Sahm were each sentenced as armed career criminals to a mandatory minimum of 15 years in prison, pursuant to Title 18, United States Code, Section 924(e)(1), the Armed Career Criminal Act (ACCA). *Id.*[2]

Both Franklin and Sahm objected to their status as armed career criminals, arguing that their convictions for burglary of a building or dwelling under the Wisconsin burglary statute could not qualify as a predicate violent felony, because the statute was broader than "generic burglary." The district court disagreed, and determined that both Franklin and Sahm were convicted of "generic burglary," and sentenced both men to 15 years in prison under the ACCA.

After Franklin and Sahm appealed, their cases were consolidated and stayed pending the Supreme Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016). The question presented in *Mathis* was whether a statute phrased in the disjunctive to include alternative "means" of committing an offense (as

[2] Without the ACCA enhancement, the statutory maximum for violating 18 U.S.C. § 922(g)(1) is ten years.

opposed to alternative elements) is divisible, and therefore amenable to use of the modified categorical approach to determine by which means the defendant violated the statute.

Mathis held that the Iowa burglary statute, which proscribes unlawful entry into "any building, structure, [or] land, water or air vehicle," Iowa Code Section 702.12, is not divisible because the statute creates alternative means of committing the offense, not alternative elements. *See* 136 S. Ct. at 2251, 2253 – 54. Therefore, the sentencing court erred in using the modified categorical approach to determine Mathis's burglary convictions were for the ACCA-qualifying offense of "generic burglary." *See id.* at 2253 – 54. *See also Taylor*, 495 U.S. at 599. Thus, the Court in *Mathis* held that the modified categorical approach may not be used for discovering whether a defendant's prior conviction for an overly broad crime under an indivisible statute "rested on facts (or otherwise said, involved means) that also could have satisfied the elements of a generic offense." *Mathis,* 136 S. Ct. at 2254.

Following the *Mathis* decision, the Seventh Circuit decided *United States v. Edwards,* 836 F.3d 831 (7th Cir. 2016), which determined that subsection (a) of Wisconsin's burglary statute, Wis. Stat. § 943.10(1m) lists alternative means rather than elements, and, therefore, that subsection (a) is indivisible. *Edwards,*

836 F.3d at 838. Accordingly, *Edwards* left open the question of whether the Wisconsin burglary statute as a whole is divisible by its subsections.[3]

The Seventh Circuit then considered the defendants' appeal, and in its now-vacated opinion in *United States v. Franklin,* 884 F.3d 331,336-37 (2018) ("*Franklin I*"), initially held that the locational subsections of the Wisconsin burglary statute were elements of different crimes, and, therefore, Franklin and Sahm's burglary convictions under § 943.10(1m)(a) for burglaries of buildings or dwellings counted as violent felonies under the ACCA. The defendants filed a petition for rehearing, and in *United States v. Franklin,* 895 F.3d 954, 955 (7th Cir. 2018)("*Franklin II*"), the court granted the petition, vacated its original opinion, and requested that this Court answer the relevant question of Wisconsin law.

This Court granted the certification and accepted the appeal.

[3] *Edwards* was not an ACCA case. Rather, it considered whether Wisconsin's burglary statute, as drafted, could qualify as "burglary of a dwelling," to be considered a crime of violence to enhance a sentence under the career-offender sentencing guidelines. USSG § 4B1.2(a)(2).

ARGUMENT

I. The Wisconsin Burglary Statute is Divisible by Subsection

A. Wisconsin Burglary Statute

There is no dispute that both defendants in this case were convicted multiple times under the "building or dwelling" subsection of the Wisconsin burglary statute, Wis. Stat. § 943.10(1m)(a), or its identically worded predecessor, § 943.10(1)(a). And, as the Seventh Circuit recognized, there is no doubt that what Franklin and Sahm actually did to earn those convictions was to burglarize buildings or dwellings, as prohibited by the Wisconsin burglary statute. *Franklin II,* 895 F.3d at 957. There is also no dispute that the specific statutory subsection appears on the face of the state court judgments, and that the district judge considering whether to apply the ACCA enhancement need look no further to determine that the defendants here were convicted of burglary of a building or a dwelling, that is, generic burglary. (*See, e.g.*, Appellants' Appendix, pp. 137 - 141).

Wis. Stat. § 943.10(1m) provides:

> 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

(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.

For ACCA purposes, the fact that defendants' burglary convictions were under subsection (a) is meaningful however, only if that subsection is an element divisible from the other subsections in the statute. *See Mathis,* 136 S.Ct. at 2253-54; *Edwards*, 836 F.3d at 832 (modified categorical approach applies only to divisible statutes).

Relying on *Mathis* and the Seventh Circuit's holding and reasoning in *Edwards*, and heavily relying on this Court's decision in *State v. Derango,* 2000 WI 89, 236 Wis.2d 721, 613 N.W.2d 833, the defendants maintain that the Wisconsin burglary statute is not divisible, and that the subsections describing distinct locations are simply means of committing burglary, rather than locational elements. The government disagrees and urges this Court to do the same. Contrary to defendants' argument, the language and structure of the statute, its context and legislative history, this Court's case law, Wisconsin's pattern jury instructions, and the nature of the proscribed conduct all lead to a conclusion that the statutory subsections are locational elements.

B. Wisconsin Burglary Case Law

Although this Court has not squarely addressed the issue of whether § 943.10(1m)(a) is an alternative locational element (and, therefore, divisible from other subsections), or merely one of multiple means of meeting a single locational element (and, therefore, not divisible), it has previously made statements supporting the conclusion that the locations are elements. In *State v. Hall*, for example, this Court in considering § 943.10(1)(a), "[t]he burglary statute under which the defendant was charged," explained that there "are three essential elements in the crime of burglary under the statute— (1) an intentional entry of the *building*, (2) without consent of the person in lawful possession, and (3) with an intent to steal." 53 Wis.2d 719, 720, 193 N.W.2d 653 (1972)(emphasis added).

Even more directly, in *Johnson v. State,* 55 Wis.2d 144, 148-49, 197 N.W.2d 760 (1972), this Court stated that "[t]he crime of burglary as defined in sec. 943.10(1)(a), Stats. contains *three essential elements*: (1) The intentional entry of a *building or dwelling*; (2) without consent of the person(s) in lawful possession thereof; and (3) with the intent to steal." (citing *Hall*, 53 Wis.2d at 720)(emphasis added). Similarly, in *Anderson v. State,* 66 Wis.2d 233, 251, 223 N.W.2d 879 (1974), this Court explained that the first of the "three essential elements to the crime of

burglary under [§ 943.10(1)(d)]" is the "intentional entry into the *locked enclosed portion of a truck or trailer*." (emphasis added).

More recently in *State v. Hendricks*, 2018 WI 15, ¶25, 379 Wis.2d 549, 906 N.W.2d 666, this Court discussed a prior burglary case in which the elements were identified as "(1) *entering a dwelling*; (2) intentionally; (3) without consent; (4) intending to commit a felony; (5) armed with a dangerous weapon." (referencing *State v. Steele*, 2011 WI App 34, ¶3, 241 Wis.2d 269, 625 N.W.2d 595) (emphasis added). This language, which is consistent with Wisconsin practice, again supports the conclusion that the locational aspect of Wisconsin burglary is an element, not a means.[4]

In considering a different portion of the burglary statute, the Wisconsin court of appeals in *State v. Hammer*, 216 Wis.2d 214, 220, 576 N.W.2d 285 (1997), described the elements without including a location and noted that "[t]he language of the [burglary] statute indicates that the crime here is one single offense with multiple modes of commission." While on its face, *Hammer* could be seen as undermining the conclusion that the burglary statute is divisible, when read in context of the issue and holding in that case, *Hammer* does no such thing. At issue was whether the trial court erred in not requiring the jury to

[4] The issue in *Steele* related to a different element, that is, whether the specific felony was an essential element. On that issue, the court in *Steele* ruled in the negative. 2001 WI App at ¶9.

unanimously agree on which felony Hammer intended to commit when he unlawfully entered the burgled dwelling. *Id.* at 218. The court of appeals concluded that "[i]t is clear from the statute that the legislature focused on the intent to commit a felony, not any particular type of felony. Therefore, all the felonies are conceptually similar for the purposes of unanimity because each and every felony provides the predicate intent element." *Id.* at 222. Accordingly, when describing the elements and referring to "multiple modes of commission," *Hammer* was referring solely to the intent element, not the statute as a whole.

This conclusion is supported by *Champlain v. State,* 53 Wis.2d 751, 756, 193 N.W.2d 868 (1972)("burglary with intent to steal" and "burglary with intent to commit a felony" under § 941.10(1) are two separate crimes.) *Champlain* makes clear that § 943.10(1m) text does not criminalize only "one single offense."

Rather than discussing these relevant Wisconsin burglary cases, the defendants instead rely almost exclusively on this Court's decision in *Derango*. This reliance on *Derango,* however, is misplaced. *Derango* considered a jury unanimity challenge related to the offense of child enticement under Wis. Stat. § 948.07. 2000 WI 89, ¶¶ 14-16. *Derango* concluded that the various intentions a defendant could have when enticing a child into a vehicle, building, room, or secluded place were multiple means of criminalizing a single offense. *Id.* at ¶17. To resolve the question, this Court examined the language of the child

enticement statute, the legislative history of the child enticement statute, the nature of the proscribed conduct in the child enticement statute, and the appropriateness of multiple punishment for the conduct prohibited by the child enticement statute. *Id.* at ¶¶ 17-21. Each part of the analysis depended upon the language of that specific statute, and this Court also relied on cases that had previously interpreted that same statute. *Id.* This is not an analysis that can be robotically applied to a completely different statute with different language, different proscribed conduct, and a different legislative history.[5]

Moreover, this Court in *Hendricks* recognized that the governing principle from *Steele, Derango,* and *Hammer,* is that "modes of commission following 'intends to commit' language within statutes do not constitute an element of the crime." 2018 WI 15, ¶26. Accordingly, at most, *Derango* is relevant to that portion of the burglary statute dealing with the intent to commit a felony, but not at all to the question of whether the separate locational subsections are themselves alternative elements. Significantly, *Edwards* itself, which addressed solely the divisibility of one subsection of Wisconsin's burglary statute, neither relies on, nor even mentions *Derango*. *Edwards* held only that subsection (a) of § 943.10(1m) was not itself divisible, noting that "the statute's text and structure

[5] For this same reason, *State v. Baldwin*, 101 Wis.2d 441, 304 N.W.2d 742 (1981), addressing a sexual assault statute, is not useful to decide the divisibility of the burglary statute here.

suggest that the *components* of *each subsection* are merely 'illustrative examples' of particular location types." *Edwards*, 836 F.3d at 837, citing *Mathis*, 136 S. Ct. at 2256 (emphasis added). [6] The burglary statute's text points to the opposite conclusion with regard to the subdivisions themselves.

C. Wisconsin Pattern Jury Instructions

Wisconsin's pattern jury instructions also offer guidance. According to these instructions, "building" is used as a model for all of the various places where entry may be made, with directions to modify the jury instructions to fit the particular case:

> The model jury instruction is drafted for a case involving entry into a "building." It **must be modified** if entry involved **any of the other places** listed in § 943.10(1m)(a) through (f); any building or dwelling; an enclosed railroad car; an enclosed portion of any ship or vessel; a locked enclosed cargo portion of a truck or trailer; 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 in any of the above.

Wis. J.I.—Crim. § 1424 n. 2 (emphasis added); *see also State v. Gonzalez*, 2011 WI 63, ¶27 n. 23, 335 Wis.2d 270, 802 N.W.2d 454, quoting I Wis JI—Criminal xi (in

[6] While defendants place significant reliance on certain comments that Judge Sykes made at the oral argument in *Edwards*, they ignore her later comments restricting her remarks to subdivision (a): "Building or dwelling is one category – the jury would not have to decide between building or dwelling, that's the sub (a) version of the offense . . . Dwelling is subsumed within building . . . for sub (a) offense . . . it's all burglary." (quoting Oral Argument, *United States v. Edwards,* No. 15-2373, at 25:32 – 26:53 (7th Cir. Dec. 10, 2015), *Available at* http://media.ca7.uscourts.gov/sound/2015/gw.15-2373.15-2373_12_10_2015.mp3.).

Wisconsin, pattern jury instructions "may often have to be modified to fit the needs of the particular case."). In other words, if the case involved a "locked enclosed cargo portion of a truck," the instructions must be modified to substitute the term "building" with the phrase "locked enclosed cargo portion of a truck."

D. Structure of Section 943.10(1m)

The structure of § 943.10(1m) further supports the conclusion that subsection (1m)(a) is divisible from subsections (1m)(b) through (1m)(e).[7] Admittedly, the burglary statute does not set forth different penalties based on which subsection of § 943.10(1m) a defendant violates. If it did, that would end the inquiry in favor of the conclusion that the statute is divisible. *See Mathis*, 136 S. Ct. at 2256 ("If statutory alternatives carry different punishments, then under *Apprendi*[8] they must be elements."). However, as previously discussed, this Court has held that "intent to steal" and "intent to commit a felony" in the burglary statute were alternative intent elements, albeit with the same penalty. *See Champlain v. State*, 53 Wis.2d at 756. Here, the separate subsections with

[7] The government does not contend that subsection (1m)(f)— "[a] room within any of the above"—creates a crime distinct from burgling a "building or dwelling," such that the state could charge a defendant not only with unlawful entry into a building or dwelling, but also with separate counts for each room within the building or dwelling the defendant entered while committing burglary. Subsection (1m)(f) is properly read as a subset or sub-category of each of the subsections that precede it.

[8] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

virtually synonymous terms, each of which sets forth a distinct category of locations as compared to the other subsections, counsel that the statute is divisible. *See Edwards*, 836 F3d. at 837 (in reaching its conclusion regarding the indivisibility of subsection (a), court noted as an important factor "virtually synonymous" terms within each of the separate subsections).

In contrast to Wisconsin's burglary statute, the Iowa statute at issue in *Mathis* criminalizes the burgling of "an occupied structure," Iowa Code § 713.1, defined as including "any building, structure, * * * [or] land, water or air vehicle," Iowa Code § 702.12. Consequently, under the Iowa burglary statute, a prosecutor can charge burglary by simply alleging the unlawful entry of "an occupied structure" with the requisite intent and prove that offense without concern as to the jury's unanimity as to what constitutes the "occupied structure."[9]

The structure of Wis. Stat. § 943.10(1m) does not afford a Wisconsin prosecutor or jury the same leeway. The Wisconsin legislature, unlike Iowa's, did not choose to include a single, broad locational element, such as "occupied structure," encompassing many different locations. Instead, the Wisconsin

[9] The use of separate subsections led the district court in *United States v. Jones*, 2016 WL 4186929, at *3 & n.2 (D. Minn. Aug. 8, 2016) (unpubl.) to conclude in an ACCA case that the Wisconsin burglary statute "is a textbook example of one with alternative elements," distinguishing the Wisconsin statute from the indivisible Iowa statute that used the term "occupied structure."

legislature chose to set forth alternative categories of locations in separate paragraphs, "lend[ing] plausibility to the interpretation that the legislature intended to define [distinct] crimes" within each subsection. *Manson v. State,* 101 Wis.2d 413, 422, 304 N.W.2d 729 (1981). This supports the conclusion that § 943.10(1m) is divisible and the unlawful entry into a "building or dwelling," in violation of subsection (1m)(a), is a distinct crime from, for example, the unlawful entry into "[a] locked and closed cargo portion of a truck or trailer," in violation of subsection (1m)(d). Therefore, each of the subsections is a locational element.

E. Legislative History

The legislative history of § 943.10(1m) supports this conclusion. In 1953, the Wisconsin legislature passed, and the governor signed into law, chapter 623 of the Laws of 1953. *See* 1953 Wis. Laws 623 (found at http://docs.legis.wisconsin.gov/1953/related/acts/623.pdf) (viewed Oct. 18, 2018). Chapter 623 defined burglary as the "[entry into] any structure without the consent of the person in lawful possession and with the intent to steal or commit a felony therein." *Id.*, § 343.10, p. 670. The term "structure" was defined as "any inclosed building or tent, any inclosed vehicle (whether self-propelled or not) or any room within any of them."). *Id.*, § 339.22(38), p. 661.

Chapter 623's effective date was to have been July 1, 1955, provided that chapter 623 was re-enacted during the 1955 session of the legislature. *See id.*, § 282, p. 698. The legislature, however, did not re-enact chapter 623 by July 1, 1955. Instead, in 1955 the legislature enacted chapter 696 and, in doing so, repealed § 343.10 of Chapter 623, among multiple other sections of that chapter. *See* 1955 Wis. Laws 696, p. 974 (found at http://docs.legis.wisconsin.gov/1955/related/acts/696.pdf) (viewed Oct. 18, 2018). Chapter 696 of the 1955 Laws included a version of the burglary statute that is materially the same as the version under which appellants Franklin and Sahm were convicted, including distinct subsections for the locational alternatives. *See id.*, § 943.10, p. 990.

There is a discernible difference between the offense of burglary found in the repealed Chapter 623 of the Laws of 1953 and that found in Chapter 696 of the Laws of 1955. By using the broadly defined term "structure," the former reads very much like the Iowa statute that *Mathis* found indivisible because of the broadly defined term of "occupied structure." By enacting Chapter 696 of the Laws of 1955, the Wisconsin legislature abandoned the broad, indivisible generic term of "structure" in favor of distinct subsections.

F. Distinct Subsections Are Locational Elements

Each subsection sets forth a category of locations that is distinct from the category of locations listed in each of the other subsections, and, therefore, the

subsections represent multiple crimes. *Cf. Manson v. State*, 101 Wis.2d 413, 426, 304 N.W.2d 729 (1981) ("If the [statutory] alternatives are similar, one crime was probably intended."). This is particularly true when one views subsection (1m)(a) in comparison to subsections (1m)(b) through (1m)(e). "Any building or dwelling" is not simply a term that is interchangeable with, for example, "[a]n enclosed railroad car," § 943.10(1m)(b), or "[a]n enclosed portion of any ship or vessel," § 943.10(1m)(c). This, in turn, reflects the legislature's intent to create a distinct offense for unlawful entry into a "building or dwelling," as compared to an unlawful entry into "[a]n enclosed railroad car," "[a]n enclosed portion of any ship or vessel," "[a] locked enclosed cargo portion of a truck or trailer," or "[a] motor home or other motorized type of home or a trailer home."

The defendants argue that the federal courts were likely confused by the way that Wisconsin statutes are drafted, as compared to federal statutes, and that in Wisconsin the subdivisions are meaningless. The defendants miss the point. It is not the fact that the burglary statute has separate subsections, but that each subsection sets forth distinctly different locations. That means something. *See Stapleton v. Advocate Health Care Network*, 817 F.3d 517, 529 (7th Cir. 2016) ("a statute should not be construed to render other statutory words or phrases redundant"). Wisconsin prosecutors must charge a specific subsection, the jury must be instructed on a specific subsection, and the evidence must support a

specific subsection. Under defendants' view, the separate subsections are redundant and the state would not be required to charge any particular location, and could presumably list them all.

Defendants also argue that the overlap between the subsections creates a danger of multiple punishments, particularly the term "dwelling." The United States disagrees. Given the different statutory alternatives, it is difficult to imagine a situation where a jury, in complete agreement on what a defendant did, blurs the line between a "building or dwelling" with, for example, "[a]n enclosed railroad car." *Cf. Manson*, 101 Wis.2d at 426-27 (holding that use of force and threatened use of force were alternative means of committing robbery, not alternative elements, and stating that "it is not difficult to imagine situations where the line between 'threat' and 'use' blurs, even where a jury may be in agreement as to what a defendant did."); *Edwards*, 836 F.3d at 837 (statutory structure does not suggest that each subsection creates multiple crimes, "a ship is a particular type of vessel, but a prosecutor couldn't charge two counts of burglary for a single act of breaking into a ship."). So while each distinct subsection is virtually synonymous and overlaps, the subsections do not overlap with each other.

A natural reading of § 943.10(1m) makes clear that the term "dwelling" used in subsection (1m)(a) refers to a particular category of dwelling, that is, a

fixed structure. *See* Webster's Third New International Dictionary 706 (1981) (defining dwelling as "a building or construction used for residence"). The word "dwelling" is properly read in connection with, and construed as being in the same general nature as, the word "building" found in the same subsection. When so read, the statutory structure strongly suggests that a "dwelling" is a particular type or subset of "building," that is, a fixed structure. *Cf. Edwards*, 836 F.3d at 837 ("the phrase 'building or dwelling' in subsection (a) is best understood as . . . providing two examples of *enclosed structures*") (emphasis added). This, in turn, makes clear that the statutory category of "building or dwelling" found in subsection (1m)(a) focuses on fixed structures, while, in contrast, the other locational categories in subsections (1m)(b) through (1m)(e) focus on conveyances and transportable structures.

Defendants also urge this Court to disregard as meaningless the fact that specific statutory subsections appear on the face of Wisconsin judgments. Again, the United States disagrees. This clarity of the offense of conviction on the face of the judgment ensures that only a defendant convicted of burglary of a building or dwelling, contrary to § 943.10(1m)(a), would be subject to an enhanced

sentence under the ACCA, while a defendant convicted of burglary of a ship or vessel, contrary to § 943.10(1m)(c), would not.[10]

Defendants' summarize their final argument by listing the reasons they believe that federal courts are wrong in concluding that the distinct subsections in the Wisconsin burglary statute are elements: "(1) there is no state case right on point (yet), (2) the burglary statute's location alternatives are subdivided, (3) the appellants' state circuit-court documents referred to the location subsection, and (4) state appellate opinions often refer to the location subsection." (Defendants-Appellants brief, p. 28). Yet each of these factors, along with the legislative history, and the pattern jury instructions, supports the conclusion that the separate subsections of § 943.10(1m), are in fact, locational elements. This Court's holding in *Derango* does not cast doubt on this conclusion.

[10] Defendants' suggestion that the PROTECT Case Management System is responsible for the reference to specific subsections falls flat when one considers that cases have been charged that way since at least 1972, long before any standardized computer software was available. *See e.g., State v. Hall,* 53 Wis.2d 719 (1972); *Johnson v. State,* 55 Wis.2d 144 (1972).

CONCLUSION

The government respectfully requests that based on the language and structure of the statute, its context and legislative history, this Court's case law, Wisconsin's pattern jury instructions, and the nature of the proscribed conduct, this Court conclude that the different locational subsections of the Wisconsin burglary statute, Wis. Stat. § 943.10(1m)(a)-(f), identify alternative elements of burglary, one of which a jury must unanimously find beyond a reasonable doubt to convict.

Dated this 18th day of October 2018.

Respectfully submitted,

SCOTT C. BLADER
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By:

_____

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,950 words.

_____

LAURA A. PRZYBYLINSKI FINN
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 18th day of October 2018.

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LAURA A. PRZYBYLINSKI FINN
Assistant United States Attorney