Oral argument not yet scheduled

Nos. 17-5904/17-5905/17-5906

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Stephen Murray Mitchell,
Defendant-Appellee/Cross-Appellant,

v.

United States of America,
Plaintiff-Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Western District of Tennessee

Nos. 2:99-cr-20272 / 2:17-cv-02341 (Mays, J.)

BRIEF OF APPELLEE/CROSS-APPELLANT STEPHEN MURRAY MITCHELL

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Introduction

This brief has two parts. *First*, as appellee, Stephen Murray Mitchell responds to the Government's appeal. In 2000, Mitchell was convicted under 18 U.S.C. § 922(g) for a crime that carried a 10-year maximum sentence. Under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), Mitchell's sentence was enhanced to 20 years and 10 months based on three prior Tennessee convictions. In 2015, Mitchell brought a habeas claim, arguing that the Tennessee convictions were not valid ACCA sentence enhancers. The court granted Mitchell's habeas petition and, recognizing that Mitchell had served 17 years for a sentence that should have been 10 years, ordered him released from prison. As shown below, this Court should affirm the district court's grant of habeas relief.

Second, as cross-appellant, Mitchell appeals from one aspect of the district court's otherwise correct decision. In ruling for Mitchell, the court resentenced him to time served and, without any explanation, imposed the same three-year supervised-release term that Mitchell had originally received in 2001 for his Section 922(g) offense. Reimposing that supervised-release term in 2017 was an abuse of discretion.

Request for Oral Argument

Mitchell requests oral argument. Argument would aid this Court in evaluating whether convictions under the relevant Tennessee statutes are valid sentence enhancers under the ACCA and whether the district court properly exercised its discretion in reimposing Mitchell's supervised-release term.

Statement of Jurisdiction

I. District-court jurisdiction

On October 23, 2015, Mitchell filed a motion in this Court requesting permission to file a successive habeas motion under 28 U.S.C. § 2255(h)(2) based on a new rule of constitutional law outlined in *Johnson v. United States*, 135 S. Ct. 2551 (2015), later made retroactive to cases on collateral review, *Welch v. United States*, 136 S. Ct. 1257 (2016). (CA6 No. 15-6178, RE 4-2: Corrected Habeas Motion, Page ID 4.) This Court granted Mitchell's request on June 23, 2016. (CA6 No. 15-6178, RE 16: Order, Page ID 2.) The district court granted Mitchell habeas relief on July 5, 2017, vacating his prior sentence and resentencing him to time served and three years of supervised release. Op. 44.[1] The district court had jurisdiction under 18 U.S.C. § 3231 and 28 U.S.C. § 2255(a).

II. Appellate jurisdiction

Mitchell filed a notice of appeal on July 17, 2017. (D. Ct. No. 2:17-cv-02341, RE 20: Notice of Appeal, Page ID 308.) That appeal was docketed in this Court as No. 17-5904. The United States filed a notice of appeal from the order granting Mitchell habeas relief on July 28, 2017. (D. Ct. No. 2:17-cv-02341, RE 17: Notice of Appeal, Page ID 303.) That appeal was docketed in this Court as No. 17-5905. The United States also filed a notice of appeal in Mitchell's underlying criminal case on July 28, 2017. (D. Ct. No. 2:99-cr-20272, RE 219: Notice, Page ID 530.) That appeal was docketed in this

[1] This brief cites the district court's opinion as "Op. __." *See* D. Ct. No. 2:17-cv-02341, RE 14: Order.

Court as No. 17-5906. On January 2, 2018, this Court consolidated these three appeals, designating Mitchell as appellee/cross-appellant. (CA6 No. 17-5904, RE 15-1: Order, Page ID 1.) This Court has jurisdiction under 18 U.S.C. § 3742(a), (b) and 28 U.S.C. §§ 1291, 2253(a), and 2255(d).

Statement of Issues

I. The Government's appeal

To qualify a defendant for an enhanced sentence under the ACCA, the prosecution must show that the defendant has three prior convictions for "violent felonies," as the ACCA defines that term. *United States v. Goodman*, 519 F.3d 310, 316 (6th Cir. 2008). Here, the district court granted Mitchell's habeas claim that his sentencing enhancement was improper, holding that he did not have three valid ACCA predicate convictions. On appeal, the Government argues that Mitchell has exactly three predicates: one for third-degree burglary and two for aggravated assault. The Government's appeal presents two issues:

A. Whether a conviction under Tennessee's 1982 third-degree burglary statute is a violent felony under the ACCA.

B. Whether a conviction under Tennessee's 1982 aggravated-assault statute is a violent felony under the ACCA.

II. Mitchell's cross-appeal

At most, Mitchell should have served 10 years in prison followed by three years of supervised release. But Mitchell spent over 17 years in prison. And yet, after the

district court granted Mitchell's habeas motion and vacated his sentence, it sentenced him to "time served" and reimposed the three years of supervised release that had originally been appended to Mitchell's sentence in 2001. The issue presented is whether the district court erred in doing so.

Statement of the Case

I. Mitchell's background

In 1986, Mitchell pleaded guilty in Tennessee state court to one charge of third-degree burglary and two charges of aggravated assault. (*See* CA6 No. 15-6178, RE 4-2: Corrected Habeas Motion, Page ID 5.) In 1999, the U.S. Attorney's Office for the Western District of Tennessee indicted Mitchell on one count of being a felon in possession of ammunition, in violation of 18 U.S.C. § 922(g). (CA6 No. 15-6178, RE 4-2: Corrected Habeas Motion, Page ID 12.) Also in 1999, Mitchell was arrested and imprisoned on that charge. (*Id.* at Page ID 6.) In 2000, Mitchell was convicted. (D. Ct. No. 2:99-cr-20272, RE 124: Order on Jury Verdict, Page ID 74.) That crime carries a maximum 10-year sentence. 18 U.S.C. § 924(a)(2). But Mitchell instead received 20 years and 10 months because, under the ACCA, his three prior Tennessee felony pleas enhanced his sentence. (CA6 No. 15-6178, RE 4-2: Corrected Habeas Motion, Page ID 30.) The sentencing court also sentenced him to three years of supervised release. (*Id.*)

II. The Armed Career Criminal Act and the categorical approach

The ACCA increases the penalty for being a felon in possession of ammunition, 18 U.S.C. § 922(g), from a 10-year maximum sentence to a 15-year mandatory-minimum

sentence if the defendant has "three previous convictions … for a violent felony." 18 U.S.C. § 924(a)(2), (e)(1). These previous convictions are known as predicate offenses, predicate convictions, or simply, predicates. *See, e.g.*, *Descamps v. United States*, 570 U.S. 254, 257 (2013). The ACCA defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. § 924(e)(2)(B), if it also satisfies one of three additional requirements:

- the conviction "has as an element the use, attempted use, or threatened use of physical force against the person of another," *id.* § 924(e)(2)(B)(i) (the "use-of-force clause");
- the conviction is for "burglary, arson, … extortion, [or] involves use of explosives," *id.* § 924(e)(2)(B)(ii) (the "enumerated-offense clause"); or
- the conviction "otherwise involves conduct that presents a serious potential risk of physical injury to another," *id.* (the "residual clause").

In *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), the Supreme Court struck down the residual clause as unconstitutionally vague, but it left intact the use-of-force and enumerated-offense clauses.

Earlier, in *Taylor v. United States*, 495 U.S. 575, 600 (1990), the Supreme Court had laid down the approach for determining whether a predicate offense falls into the ACCA's use-of-force or enumerated-offense clauses, the two clauses that *Johnson* later left intact. Under what is known as the "categorical approach," courts "look[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Id.* The categorical approach's touchstone is "elements, not facts." *Descamps*, 570 U.S. at 261.

Specifically, a defendant's conviction falls into the ACCA's *use-of-force clause* if an element of the statute forming the basis of the defendant's conviction requires "the use, attempted use, or threatened use of physical force against the person of another." *Descamps*, 570 U.S. at 258 (quoting 18 U.S.C. § 924(e)(2)(B)(i)). And to determine whether a defendant's conviction falls into the ACCA's *enumerated-offense clause*, a court compares the elements of the relevant predicate-offense statute with the elements of the "generic" version of that crime. *See id.* at 257. A crime is "generic" only when it carries its "commonly understood," "normal" meaning, and comprises only its "basic," familiar elements, and eschews local idiosyncrasies. *Id.* at 257-62; *see also Taylor*, 495 U.S. at 596 (holding that a generic offense carries its "generally accepted contemporary meaning"). Thus, "[i]f the relevant statute has the same elements as the 'generic' ACCA crime, then the prior conviction can serve as an ACCA predicate." *Descamps*, 570 U.S. at 261. But because the categorical approach focuses on "elements, not facts," "if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form." *Id.*

To illustrate, generic ACCA burglary is the "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor*, 495 U.S. at 598. But suppose a state statute defines burglary as the unlawful entry into things that are not "building[s] or other structure[s]"—such as, say, "booth[s]" or "vending machine[s]." *Id.* at 599. Or suppose that the state's court of last resort

interprets the statute to cover unlawful entry into those things. In those circumstances, the statute is overbroad and convictions under it cannot serve as ACCA predicates, *see id.*, even when the defendant in fact unlawfully entered a building. *See Descamps*, 570 U.S. at 259, 261 (holding that California's burglary statute "goes beyond the normal, 'generic' definition of burglary" based on California Supreme Court interpretation).

Sometimes, a statute will list alternative elements—that is, it will encompass "multiple, alternative versions of the crime." *Descamps*, 570 U.S. at 262. If so, examining the statutory text alone cannot reveal "which version of the offense [the defendant] was convicted of." *Id.* These statutes are called "divisible," and they require courts to apply the "modified categorical approach." *Id.* at 261. Under this approach, courts may consult a "restricted set of materials"—known as *Shepard* documents after a Supreme Court case on the topic—only to determine "which of a statute's elements formed the basis of the defendant's prior conviction." *Id.* at 262; *see Shepard v. United States*, 544 U.S. 13, 26 (2005).

For example, if the defendant had entered a guilty plea, a sentencing court may consult the indictment, the plea agreement, and the plea colloquy to determine which elements the defendant had "necessarily admitted" as part of the plea. *United States v. Medina-Almaguer*, 559 F.3d 420, 423 (6th Cir. 2009). Once the court has determined which elements the defendant admitted as part of the plea, it compares the elements of that conviction, "as the categorical approach commands," with elements of the crimes in the use-of-force and enumerated-offense clauses. *Mathis v. United States*, 136 S. Ct.

2243, 2249 (2016). The modified categorical approach "merely helps implement the categorical approach" and "retains the categorical approach's central feature: a focus on the elements, rather than the facts." *Descamps*, 570 U.S. at 263.

III. Procedural history and the district court's decision

In light of *Johnson*'s holding that the ACCA's residual clause is unconstitutional, this Court granted Mitchell permission to file a successive habeas motion under 28 U.S.C. § 2255. (CA6 No. 15-6178, RE 16: Order, Page ID 2.) Mitchell argued that, given *Johnson*, he no longer had three prior convictions that were ACCA predicates. (CA6 No. 15-6178, RE 4-2: Corrected Habeas Motion, Page ID 4-6.)

The Government's response to Mitchell's habeas motion noted that, according to Mitchell's presentence investigation report, he had pleaded guilty to six prior violent felonies. (D. Ct. No. 2:17-cv-02341, RE 6: Response to Motion, Page ID 23.) The Government conceded that two of those felonies were *nolle prossed*—abandoned by the prosecution—and thus could not be ACCA predicates. (*Id.* at Page ID 38.) And because two of the other pleas, for aggravated assault and kidnapping, arose out of the same "occasion," the Government conceded that it could rely only on one, and it chose aggravated assault. (*Id.* at Page ID 23, 38-39); *see* 18 U.S.C. § 924(e)(1) (requiring predicate convictions "be committed on occasions different from one another"). The Government argued that Mitchell's sentencing enhancement should still apply because, despite *Johnson* and the Government's concessions, three ACCA predicates remained: two aggravated-assault convictions and one third-degree burglary conviction. (D. Ct.

No. 2:17-cv-02341, RE 6: Response to Motion, Page ID 26, 33.)

The district court disagreed. It granted Mitchell's habeas motion, holding that his third-degree burglary conviction and at least one of his aggravated-assault convictions are not ACCA predicates. Op. 44.

A. Third-degree burglary conviction

The district court held that the Tennessee third-degree burglary statute under which Mitchell was convicted was overbroad because it criminalized more conduct than does generic ACCA burglary. Op. 37-38. At the time of Mitchell's conviction, the Tennessee statute provided:

> (a)(1) Burglary in the third degree is the breaking and entering into a business house, outhouse, or any other house of another, other than dwelling house, with the intent to commit a felony.
>
> (2) Every person convicted of this crime, on first offense, shall be imprisoned in the penitentiary for not less than three (3) years nor more than ten (10) years.
>
> …
>
> (b)(1) Any person who, with intent to commit crime, breaks and enters, either by day or by night, any building, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place by any means, shall be punished by imprisonment for a term of not less than three (3) nor more than twenty-one (21) years upon conviction for a first offense, and not less than five (5) years nor more than twenty-one (21) years upon conviction for a second or subsequent offense.

Tenn. Code Ann. § 39-3-404 (1982).

The court began by noting that Tennessee's third-degree burglary statute is divisible into a non-dwelling provision (Section 404(a)) and a safecracking provision (Section 404(b)). Op. 31. The court thus applied the modified categorical approach,

examined Mitchell's burglary indictment, and determined that he was indicted under the non-dwelling provision, not the safecracking provision. *Id.* at 32.

Based on this Court's decision in *United States v. Caruthers*, 458 F.3d 459, 476 (6th Cir. 2006), the district court concluded that Tennessee case law has established that the non-dwelling provision criminalizes more conduct than does generic ACCA burglary. Op. 33. The Tennessee Supreme Court held that "[d]efendants could lawfully enter [a] telephone booth … but by breaking into the money receptacle after lawful entry they would be guilty of burglary in the third degree." *Id.* at 34 (discussing *Fox v. State*, 383 S.W.2d 25, 27 (Tenn. 1964)). Given that holding, *Caruthers* held that the non-dwelling provision was overbroad, as "it permitted third-degree burglary convictions for unlawful entry into coin receptacles and the like." *Id.* at 37 (quoting *Caruthers*, 458 F.3d at 476). The district court concluded that "*Caruthers*'s holding that [the third-degree burglary statute] is overbroad because of *Fox* is binding on the court." *Id.* at 38.

The district court rejected the Government's argument that this Court has held that non-dwelling burglary is a violent felony under the ACCA. Op. 38-41. After holding that the non-dwelling provision is overbroad, *Caruthers* considered whether the defendant "actually committed a generic burglary" as demonstrated by the available *Shepard* documents for his conviction. *Id.* at 29 (quoting *Caruthers*, 458 F.3d at 476). *Caruthers* determined that the defendant's burglary conviction qualified as an ACCA predicate because the defendant's indictments showed that "he was actually convicted of burglarizing buildings, even though the statute permitted convictions for burglary of

non-buildings." *Id.* at 30 (quoting *Caruthers*, 458 F.3d at 476).

The district court reasoned that *Caruthers*'s use of a "fact-based analysis"—that is, looking to the defendant's actual conduct, rather than to the statutory elements—to determine that the defendant's conviction under the burglary statute's non-dwelling provision qualifies as a violent felony under the ACCA has been foreclosed by intervening Supreme Court precedent. Op. 39. The district court recognized that *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016), "rule out such a fact-based approach." *Id.* at 40. So, the district court concluded that "*Caruthers*'s holding that [Section] 39-3-404 is overbroad because of *Fox* remains good law," but *Caruthers*'s "pre-*Descamps* endorsement of a fact-based analysis in determining whether a prior conviction under an overbroad statute qualifies as a violent felony under the ACCA does not." *Id.* As a result, the district court held that the non-dwelling provision of Tennessee's third-degree burglary statute is "broader than generic burglary," and "Mitchell's 1986 Tennessee conviction for third-degree burglary is no longer a violent felony under the ACCA." *Id.* at 41.

B. Aggravated-assault convictions

The district court also held that although Mitchell had twice pleaded guilty to aggravated assault under Tenn. Code Ann. § 39-2-101 (1982), neither plea was for an ACCA predicate. Under this statute, a person commits aggravated assault if he or she:

> (1) Attempts to cause or causes serious bodily injury to another willfully, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;

> (2) Attempts to cause or willfully or knowingly causes bodily injury to another with a deadly weapon;
>
> (3) Assaults another while displaying a deadly weapon or while the victim knows such person has a deadly weapon in his possession; or
>
> (4) Being the parent or custodian of a child or the custodian of an adult, willfully or knowingly fails or refuses to protect such child or adult from an aggravated assault described in (1), (2), or (3) above.

Id. § 39-2-101(b).

The district court analyzed Mitchell's two aggravated-assault convictions under the ACCA's use-of-force clause. Op. 42. The court did not address whether the aggravated-assault statute is divisible. Rather, the court noted that, regardless of whether it applied the categorical or modified categorical approach, one of Mitchell's convictions could have rested on reckless conduct. *Id.*

The district court then recognized that, in *United States v. McMurray*, 653 F.3d 367, 375 (6th Cir. 2011), this Court had "conclude[d] that the 'use of physical force' clause of the ACCA … requires more than reckless conduct." Op. 42 (quoting *McMurray*). As a result, the district court held that this Court's precedent "preclude[d] [Mitchell's] aggravated assault conviction from qualifying as an ACCA predicate." *Id.*

The district court rejected the Government's assertion that *Voisine v. United States*, 136 S. Ct. 2272 (2016), dictates a different result. Op. 42. According to the district court, *Voisine* held that the phrase "misdemeanor crime of domestic violence" included "misdemeanor assault convictions based on reckless conduct." Op. 42 (citing *Voisine*,

136 S. Ct. at 2276). So, according to the Government, a "violent felony" under the ACCA may include convictions based on reckless conduct. *Id.* The district court rejected that argument, followed this Court's prior decision about reckless intent, and held that at least one of Mitchell's aggravated-assault convictions is not a violent felony under the ACCA. *Id.* at 43.

* * *

After concluding that Mitchell's burglary conviction and at least one aggravated-assault conviction are not violent felonies under the ACCA, the district court held that the Government could not prove that Mitchell had the requisite three ACCA predicates to qualify for the ACCA's sentencing enhancement. Op. 43-44. On July 5, 2017, it thus vacated Mitchell's enhanced sentence and ordered him released. *Id.* at 44. The district court stated:

> Mitchell is sentenced to time served, to be followed by a three-year period of supervised release. All other terms and conditions the Court imposed in its Judgment in Criminal Case No. 99-20272 are reimposed.

Id. In other words, the court reimposed a three-year term of supervised release, without providing reasoning or making reference to Mitchell's excess time served.

Ultimately, Mitchell should have served 10 years, but instead, he served from December 1999 to July 2017—that is, 17 years and seven months. He was thus imprisoned for more than seven years longer than he should have been.

Summary of Argument

I. The Government's appeal

To enhance a sentence under the ACCA, the Government must show that the defendant has three prior convictions for violent felonies. The Government cannot do so, as the district court held. On appeal, the Government relies on only three prior convictions: one conviction under Tennessee's 1982 third-degree burglary statute and two convictions under Tennessee's 1982 aggravated-assault statute. So, to gain reversal, the Government must show that all three convictions—Mitchell's burglary and both of his aggravated-assault convictions—are valid ACCA predicates. The Government has not shown that any of these convictions are valid ACCA predicates, and the district court's decision should be affirmed.

A. Mitchell's conviction under Tennessee's 1982 third-degree burglary statute is not a valid ACCA predicate because the statute is broader than the generic definition of burglary under the ACCA's enumerated-offense clause. The generic definition of burglary under the ACCA prohibits unlawful entry into only buildings or other structures. *Taylor v. United States*, 495 U.S. 575, 598 (1990). Under that definition, as this Court held in *United States v. Caruthers*, 458 F.3d 459, 475-76 (6th Cir. 2006), "[t]he Tennessee burglary statute [is] indeed nongeneric" compared to generic burglary's buildings-or-other-structures requirement because "it permitted third-degree burglary convictions for unlawful entry into coin receptacles and the like." Under the categorical approach articulated by the Supreme Court, the inquiry ends once it is determined that

the burglary statute is nongeneric on its face. *Descamps v. United States*, 570 U.S. 254, 261 (2013). The underlying facts of the defendant's conviction are irrelevant. *Id.* Because the burglary statute is not a valid ACCA predicate offense and the Government has challenged only three convictions, the Government cannot establish three predicate offenses regardless of the validity of the other convictions.

B. Mitchell's two Tennessee aggravated-assault pleas are not valid ACCA predicates. For both convictions, Mitchell could have pleaded guilty under Section 39-2-101(b)(3). That provision does not require the "use … of physical force" as defined in the ACCA. That provision can be violated whenever a defendant commits common-law battery. In *Johnson v. United States*, 559 U.S. 133 (2010), the Supreme Court held that common-law battery does not rise to the level of violent force required under the ACCA. *Id.* at 139-40. What is more, to come within the crosshairs of Section 39-2-101(b)(3), a defendant need not use or display a deadly weapon—the defendant need only possess a deadly weapon about which the victim knows. And simply possessing a deadly weapon about which the victim knows, while committing common-law battery, does not qualify as a violent felony under this Court's precedent.

Though presently foreclosed by this Court's precedent, Mitchell also preserves for further review his argument that crimes satisfied with reckless (as opposed to intentional) mens rea cannot be violent felonies under the ACCA.

II. Mitchell's cross-appeal

Although the district court correctly vacated Mitchell's prison sentence, it abused

its discretion in reimposing his three-year term of supervised release. In 2001, Mitchell should have been sentenced to no more than 10 years in prison followed by three years of supervised release, for a total of 13 years. He spent 17 years just in prison. Much has changed in the almost 20 years since Mitchell was first sentenced. The initial term was imposed in a context in which Mitchell was expected to serve 20 years in prison. Even if a three-year supervised-release term was appropriate in that context, that does not mean it is appropriate now, especially considering the equitable weight the district court should have given the many excess years Mitchell spent behind bars. If the court had considered whether a sentence handed down nearly two decades earlier remained appropriate following Mitchell's successful habeas motion, it did not say.

The court's failure to articulate any rationale, or to weigh any competing considerations about whether the sentence was the right one in this context, underscores its abuse of discretion.

Argument

I. The Government has not established that Mitchell has three valid ACCA predicate offenses.

This Court reviews de novo a district court's determination whether a prior conviction constitutes a violent felony under the ACCA. *Higdon v. United States*, 882 F.3d 605, 606 (6th Cir. 2018). The Government bears the burden of establishing that Mitchell has three prior convictions that are ACCA predicates. *United States v. Goodman*, 519 F.3d 310, 316 (6th Cir. 2008). As we now show, the Government has failed to carry that

burden here, and the district court properly vacated Mitchell's enhanced sentence.

A. A conviction under the non-dwelling provision of Tennessee's 1982 third-degree burglary statute is not a valid ACCA predicate.

To be a violent felony under the ACCA's enumerated-offense provision, the elements of the Tennessee burglary statute's non-dwelling provision must be "the same as or narrower than those of the generic [federal] offense." *Descamps v. United States*, 570 U.S. 254, 257 (2013). "[I]f the [state] statute sweeps more broadly than the generic crime, a conviction under [the state] law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form." *Id.* at 261.

Generic ACCA burglary requires "an unlawful or unprivileged entry into, or remaining in, *a building or other structure*, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990) (emphasis added). So, a burglary statute is overbroad for ACCA's sentence-enhancement purposes if it criminalizes unlawful entry into places such as "*booth*[s]," "automobiles," "boat[s]," "vessel[s]," or "vending machines"—that is, places that are not buildings or comparable structures. *Id.* at 599 (emphasis added) (citations omitted).

1. Tennessee's non-dwelling provision is overbroad because it criminalizes unlawful entry into *coin receptacles and the like*, while generic ACCA burglary criminalizes unlawful entry only into *buildings or other structures*.

a. As this Court and the district court have recognized, the Tennessee Supreme Court has interpreted the Tennessee burglary statute's non-dwelling provision to criminalize unlawful entry into a phone booth's coin receptacle. *United States v. Caruthers*,

458 F.3d 459, 476 (6th Cir. 2006); Op. 31; *see Fox v. State*, 383 S.W.2d 25, 27 (Tenn. 1964). In *Fox*, the Tennessee Supreme Court held that "by breaking into the money receptacle after lawful entry [into a phone booth, the defendants] would be guilty of burglary in the third degree." 383 S.W.2d at 27.[2]

Relying on *Fox*, this Court held in *Caruthers* that:

> a burglary statute may also be nongeneric if it includes places, such as automobiles and vending machines, other than buildings. *Taylor*, [495 U.S. at 599]. The Tennessee burglary statute was indeed nongeneric along the 'building or structure' dimension, as it permitted third-degree burglary convictions for unlawful entry into coin receptacles and the like. *Fox*, [383 S.W.2d at 27].

Caruthers, 458 F.3d at 475-76. Put differently, *Caruthers* held that, because generic burglary criminalized unlawful entry into buildings or comparable structures but not,

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[2] The non-dwelling provision under which Mitchell was convicted provides: "Burglary in the third degree is the breaking and entering into a business house, outhouse, or any other house of another, other than dwelling house, with the intent to commit a felony." Tenn. Code Ann. § 39-3-404(a)(1) (1982).

Fox addressed the non-dwelling provision's identical statutory predecessor: "Burglary in the third degree is the breaking and entering into a business house, outhouse, or any other house of another, other than dwelling-house, with the intent to commit a felony." Tenn. Code Ann. § 39-904 (1955).

Fox discussed *Page v. State*, 98 S.W.2d 98 (Tenn. 1936), which dealt with an even earlier predecessor statute that was materially identical to the 1982 non-dwelling provision. That statute provided: "Any person who shall break and enter into the business house, outhouse, or any other house of another, other than a dwelling house, with intent to commit a felony, shall be imprisoned in the penitentiary not less than three years nor more than ten years." Tenn. Code Ann. § 10913 (1934).

Because the three statutes are materially identical, this brief generally refers to the statutes interchangeably as the "non-dwelling provision."

say, vending machines, and because Tennessee's non-dwelling provision criminalized "unlawful entry into coin receptacles and the like," the Tennessee provision sweeps more broadly than the generic crime. *Id.*

This key holding of *Caruthers* remains good law. And because the Tennessee burglary statute sweeps more broadly than does the generic crime, "a conviction under that law cannot count as an ACCA predicate," regardless of whether "the defendant actually committed the offense in its generic form." *Descamps v. United States*, 570 U.S. 254, 261 (2013). So, under the categorical approach, this Court's reasoning in *Caruthers* is dispositive. This Court should thus affirm the district court's holding that Tennessee's non-dwelling provision cannot be an ACCA predicate.

b. *Caruthers* went on to conclude that the defendant there qualified for an enhanced sentence because he had engaged in conduct that matched the generic definition of burglary. 458 F.3d at 476 (explaining that defendant was "actually convicted of burglarizing buildings, even though the statute permitted convictions for burglary of non-buildings"). That mode of analysis—looking to the facts of the defendant's conviction—is exactly what the categorical approach prohibits and was rejected in *Descamps*. That is, under the categorical approach, "[t]he key … is elements, not facts." *Descamps*, 570 U.S. at 261.

And, recently, the Supreme Court clarified that a statute's divisibility does not give a court license to look past the elements of a statute to determine that a defendant's conduct in a particular case met the generic federal definition. *See Mathis v. United States*,

136 S. Ct. 2243, 2253 (2016). Where a statute is divisible, a court may "examine a limited class of documents to determine which of a statute's alternative elements formed the basis of the defendant's prior convictions," *Descamps*, 570 U.S. at 262, but only "to pinpoint the elements of the crime that the defendant necessarily admitted so the court can apply the categorical approach," *United States v. Ball*, 771 F.3d 964, 968 (6th Cir. 2014) (quotation marks omitted). The modified categorical approach may not "be repurposed as a technique for discovering whether a defendant's prior conviction, even though for a too-broad crime, rested on facts … that also could have satisfied the elements of a generic offense." *Mathis*, 136 S. Ct. at 2253.

So, *Caruthers* is not valid to the extent that it looked to the indictment to determine that the defendant had violated a nongeneric statute in a generic way. *Descamps* and *Mathis* recognized that courts, like the Sixth Circuit in *Caruthers*, had misapplied the Supreme Court's precedent on the modified categorical approach. Once the Court in *Caruthers* determined that the non-dwelling provision was categorically overbroad, the inquiry was finished, and convictions under the Tennessee third-degree burglary statute could not be valid ACCA predicates as to any defendant because it invariably sweeps more broadly than does the generic federal definition of burglary.

c. The cases on which the Government relies do not change this analysis. The Government is wrong that this Court "has consistently applied *Caruthers* to hold that pre-1989 Tennessee third-degree burglary qualifies as a generic burglary" under the

ACCA. Gov't Br. 15-16.[3] The decisions that it marshals either do not rely on *Caruthers* or do not even deal with the burglary statute at issue here.

In *United States v. Taylor*, 800 F.3d 701, 719 (6th Cir. 2015), this Court acknowledged that *Caruthers* "found that third degree burglary under the pre-1989 Tennessee statute was 'generic' burglary under the ACCA's enumerated offense clause … so long as the indictment shows that the defendant broke and entered into an actual building." Despite recognizing that *Caruthers* required looking to the defendant's indictment to determine whether a conviction under the non-dwelling provision is a valid ACCA sentence enhancer, *Taylor* neglected to address *Descamps*, and therefore failed to realize that the Supreme Court had expressly prohibited such an approach after *Caruthers* was decided. *Id.* at 719-20. "Although a prior decision by a panel of this Court is controlling authority in subsequent cases, an inconsistent decision of the United States Supreme Court requires modification of the earlier panel decision." *United States v. Lucido*, 612 F.3d 871, 876 (6th Cir. 2010) (quotation marks omitted). Nor is a prior panel decision binding if it fails to address relevant Supreme Court precedent. *See id.*

Further, *Taylor* considered *Caruthers* only in dicta—the decision explained that it was "not required" to determine whether Taylor's Tennessee burglary conviction qualifies as a violent felony under the ACCA "since it ha[d] already been determined … that Taylor has three predicate offenses for ACCA purposes." 800 F.3d at 719. "[O]ne

[3] This brief cites the Government's opening brief as "Gov't Br." *See* CA6 No. 17-5904, RE 25-1: Corrected Brief for Appellant/Cross-Appellee.

panel of this court is not bound by dicta in a previously published panel opinion." *United States v. Burroughs*, 5 F.3d 192, 194 (6th Cir. 1993).

The Government cites *United States v. Bailey*, 634 Fed. Appx. 473 (6th Cir. 2015), for the same proposition—that, since *Caruthers*, this Court has consistently held that the non-dwelling provision qualifies as a generic burglary under the ACCA. Gov't Br. 15-16. But as in *Taylor*, *Bailey* held that the defendant had three valid predicate offenses before even considering his prior burglary conviction. 634 Fed. Appx. at 477. And unlike *Taylor*, *Bailey* did not even address the burglary conviction or *Caruthers* in dicta. *Id.* at 476-77. Rather, *Bailey*'s only reference to *Caruthers* is in its description of the district court opinion. *Id.* at 474.

United States v. Jones, 673 F.3d 497 (6th Cir. 2012), which the Government also cites, is irrelevant because it involved a second-degree burglary conviction, which concerned a different statute from the third-degree burglary statute at issue in *Caruthers*. *Id.* at 505 n.3 ("Thus, *Caruthers* has no bearing on our decision today."). And to the extent that *Jones* does address *Caruthers*, it takes the exact opposite position from the Government in this case. *Id.* ("In *United States v. Caruthers*, … [w]e concluded the 'Tennessee burglary statute' was *non-generic* because *third degree* burglary included unlawful entry into 'any vault, safe, or other secure place,' meaning it went beyond a 'building or structure.'") (quoting *Caruthers*, 458 F.3d at 476) (first emphasis added).

2. The Tennessee Supreme Court addressed Tennessee's non-dwelling burglary provision, not Tennessee's safecracking burglary provision.

The Government misconstrues *Fox v. State*, 383 S.W.2d 25, 27 (Tenn. 1964). There, Fox was charged with burglarizing a coin receptacle in a phone booth, despite his lawful presence in the public phone booth itself. The Tennessee Supreme Court held that the "[d]efendants could lawfully enter the telephone booth, which is a business house within the meaning of [the non-dwelling provision], but by breaking into the money receptacle after lawful entry they would be guilty of burglary in the third degree." *Id.* Because Fox's presence in the phone booth was lawful, the court held that it was Fox's breaking and entering into the coin receptacle that was prohibited by the non-dwelling provision. *Id.*

The Government argues that the district court (and, implicitly and necessarily, *Caruthers*) erred in reading *Fox* to apply to the non-dwelling provision because "the *Fox* opinion never specified" whether the statute's non-dwelling provision or safecracking provision was at issue in the case. Gov't Br. 18. In other words, the Government argues that *Fox* could have expanded safecracking burglary to encompass unlawful entry into coin receptacles and the like and left non-dwelling burglary alone—which, according to the Government, means that non-dwelling burglary under the state statute still is coextensive with generic burglary. *Id.*

Not so. *Fox* explicitly stated that Section 39-904 "is the basis for the prosecution in this case." 383 S.W.2d at 27. That section is the predecessor to Section 39-3-404's

non-dwelling provision. At the time of *Fox*, the Tennessee Code also contained a predecessor to Section 39-3-404's safecracking provision, Tenn. Code Ann. § 39-902 (1955), but it was codified in a different section of the Code altogether.

Further, *Fox* characterized the phone booth as a "business house within the meaning of Section 39-904." 383 S.W.2d at 27. "Business house" appears only in Section 39-904 (the non-dwelling provision's predecessor), not in Section 39-902 (the safecracking provision's predecessor). The 1982 statute at issue here maintains this distinction: Section 39-3-404's non-dwelling provision refers to "business house," and its safecracking provision does not. So, *Fox* must have been addressing the non-dwelling provision.

Moreover, *Fox*, 383 S.W.2d at 26, relied on *Page v. State*, 98 S.W.2d 98 (Tenn. 1936), which was not a safecracking case. In *Page*, 98 S.W.2d at 99, the Tennessee Supreme Court affirmed a conviction under a predecessor of the non-dwelling provision, Tenn. Code Ann. § 10913 (1934). The defendants there had lawfully entered a hotel, but they broke into an office within the hotel and stole money from a drawer. *Page*, 98 S.W.2d at 98. The defendants argued that they had not committed the offense because they had lawfully entered the hotel. *Id.*

The Court disagreed. *Page*, 98 S.W.2d at 98. A separate dwelling-house provision provided that "[a]ny person who, after having entered [into a dwelling house], with the intent to commit a felony, … break[s] any such premises … shall receive the same punishment as if he had broken into the [dwelling house] in the first instance," Tenn.

Code Ann. § 10911 (1934). The Court held that the reasoning of the dwelling-house provision, Section 10911, applied to the non-dwelling provision, Section 10913, and that "one, although lawfully in a business house, commits the offense described in section 10913 … when he breaks and enters into a room of that business house, which he had no right to enter, for the purpose of committing a felony." *Page*, 98 S.W.2d at 99. So, *Fox* relied on *Page* for the proposition that a defendant may violate the non-dwelling provision despite having lawfully entered a premises if the defendant breaks into a compartment on that premises without permission. *Fox*'s reliance on *Page* would make no sense if *Fox* were interpreting the safecracking provision, as the Government contends.

3. Logic and precedent foreclose any attempt to shoehorn telephone booths and coin receptacles into generic burglary's building-or-other-structure element.

The Government also argues that, even if *Fox* expanded the definition of Tennessee non-dwelling burglary, the Tennessee offense is generic because (i) generic burglary criminalizes unlawful entry into buildings and other *structures*, and (ii) telephone booths and coin receptacles are structures. Gov't Br. 18 ("*Fox* and *Page* simply demonstrate that one can commit [Tennessee] third-degree burglary by … unlawfully entering a structure … and committing a crime.").

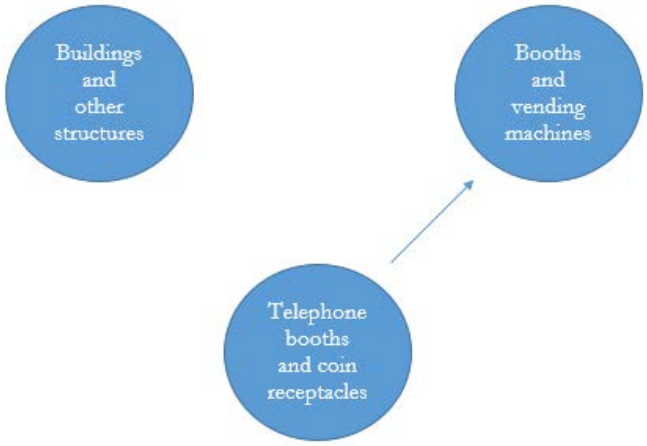
Caruthers forecloses this argument. As noted, *Caruthers* held that "coin receptacles and the like" are not "buildings or other structures." 458 F.3d at 476. That key holding, again, remains good law.

But even if *Caruthers* were not on the books, the Supreme Court's reasoning in *Taylor v. United States*, 495 U.S. 575 (1990), would preclude the Government from shoehorning phone booths and coin receptacles into the category of "buildings or other structures." *Taylor* stated that generic burglary covers unlawful entries into "buildings or other structures," but it also stated that generic burglary did not cover unlawful entries into places such as "*booth*[s]," "automobiles," "boat[s]," "vessel[s]," or "*vending machines*." *Id.* at 598-99 (emphasis added) (citations omitted).[4]

Traditional canons of construction require that the meaning of "other structure" is informed and limited by the characteristics of the preceding word, "building." When several words are associated in a context suggesting that the words have something in common, "they should be assigned a permissible meaning that makes them similar." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012); *see also Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995) (relying on this associated-words canon "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words."). Logically, therefore, phone booths and coin receptacles fall outside the former category of *buildings or other structures* and into the latter category of *booths and vending machines*.

[4] As *Taylor* noted, 495 U.S. at 599, "[o]ne of Missouri's second-degree burglary statutes in effect at the times of petitioner Taylor's convictions included breaking and entering 'any booth or tent, or any boat or vessel, or railroad car,'" citing Mo. Rev. Stat. § 560.070 (1969). The Missouri Supreme Court made clear that a "telephone booth" is a "booth." *See State v. Stoner*, 473 S.W.2d 363, 369 (Mo. 1971).

Put simply, one of these groups is not like the others:



Case law applying burglary's generic definition confirms that the meaning of "other structure" must be constrained by "building" and cannot be interpreted to encompass phone booths or coin receptacles. *See, e.g.*, *Shepard v. United States*, 544 U.S. 13, 15-16 (2005) ("The [ACCA] makes burglary a violent felony only if committed in a building or enclosed space … , not in a boat or motor vehicle."); *Mathis v. United States*, 136 S. Ct. 2243, 2250 (2016) (holding Iowa burglary statute overbroad because it criminalized entry into any land, water, or air vehicle); *United States v. Cisneros*, 826 F.3d 1190, 1194 (9th Cir. 2016) (holding Oregon statute overbroad because it defined "building" to include "any booth, vehicle, boat, aircraft or other structure adapted for overnight accommodation of persons or for carrying on business therein"); *United States v. Herrold*, 883 F.3d 517, 539 (5th Cir. 2018) ("Almost every federal court that has found itself in the position to consider similar burglary statutes has concluded that the inclusion of any vehicles renders a state burglary provision nongeneric."); *United States*

v. Hill, 53 F.3d 1151, 1153 (10th Cir. 1995) (holding overbroad Oklahoma statute that criminalized breaking into "any coin-operated or vending machine or device").

In sum, because Tennessee non-dwelling burglary covers unlawful entries into things that generic burglary does not cover, the former is broader than the latter, and a conviction under the Tennessee statute cannot serve as an ACCA predicate.

4. The Tennessee non-dwelling provision is also broader than the "remaining in" variant of generic burglary.

The Government also argues that Tennessee non-dwelling burglary is generic in a different way. In *Taylor v. United States*, 495 U.S. 575 (1990), the Supreme Court defined generic burglary as "an unlawful or unprivileged entry into, *or remaining in*, a building or other structure, with intent to commit a crime." *Id.* at 598 (emphasis added). The Government seizes on the phrase "remaining in" to argue that because the defendants in *Fox* unlawfully "remained in" the telephone booth after breaking into the coin receptacle, they committed generic burglary. So, according to the Government, the statute is generic, *see* Gov't Br. 18, despite *Fox*'s definitive contrary interpretation of Tennessee's non-dwelling burglary statute.

The Government's argument is flawed. *First*, as explained (at 26), *Taylor* states that generic burglary covers unlawfully remaining in "building[s] or other structure[s]" but not unlawfully remaining in "booth[s]." 495 U.S. at 598-99. Based on *Taylor*'s definition of generic burglary, even if the *Fox* defendants could be described as unlawfully "remaining in" the phone booth after breaking into the coin receptacle, they

did not commit generic burglary—but they did violate Tennessee's non-dwelling burglary statute. *Taylor* disposes of the Government's argument.

Second, the Government's "remaining in" argument is foreclosed by *Caruthers*'s interpretation of *Fox*. In *Caruthers*, this Court held that *Fox* "required an unlawful entry; it just happened to involve an unlawful entry into a payphone's coin receptacle." *Caruthers*, 458 F.3d at 475. That is, this Court has already concluded that *Fox* was not an unlawful-remaining-in case, as the Government contends, and that the non-dwelling provision is categorically broader than generic burglary, including generic burglary's "remaining in" variant. *Id.* at 475-76.

Third, the "remaining in" language in burglary's generic formulation is intended to "capture[] burglars who initially have a license to enter a particular location but who remain there once that license expires in order to commit a crime," *United States v. Herrold*, 883 F.3d 517, 532 (5th Cir. 2018), not those who commit a felony while lawfully remaining in a place they were permitted to occupy. The treatise that *Taylor* cited when it defined generic burglary confirms this understanding. *See Taylor v. United States*, 495 U.S. 575, 598 (1990) (citing 2 LaFave & Scott, *Substantive Criminal Law* § 8.13 (1986)). "In that treatise, LaFave and Scott address the remaining in alternative, explaining that the language's purpose is to capture defendants who lawfully enter a location and then remain, once their license to be there is lost, in order to commit a crime." *Herrold*, 883 F.3d at 532 (citing LaFave & Scott, § 8.13(b)). Indeed, as an example of "unlawful remaining in," LaFave and Scott describe a defendant who lawfully enters a bank when

it is open, but hides in the bank until it is closed to steal the bank's money, *see* LaFave & Scott, § 8.13(b), demonstrating that "unlawful remaining in" is triggered by the expiration of privileged presence, rather than the commission of a felony itself.

Further, "if the actor when he was breaking and entering only intended to commit a simple trespass, he was not guilty of a burglary although he in fact committed a burglary after entering." LaFave & Scott, § 8.13(e). In other words, the treatise on which burglary's generic definition is based contemplates that not all felonies are captured by the definition merely because the defendant necessarily "remained in" place after the felony occurred, as the Government contends. The "remaining in" variant, therefore, does not apply to one who merely commits a felony while lawfully on some premises. To violate the "remaining in" variant, one must commit a felony after one's license to occupy the premises has expired.

To support its "remaining in" argument, the Government (at 18) cites *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015), and *United States v. Ferguson*, 868 F.3d 514 (6th Cir. 2017). But *Priddy* and *Ferguson* address whether the *current* Tennessee burglary statute—which is materially different from the 1982 non-dwelling provision at issue here—is an ACCA predicate offense. The current burglary statute provides in relevant part that "[a] person commits burglary who, without the effective consent of the property owner … [e]nters a building and commits or attempts to commit a felony or theft." Tenn. Code Ann. § 39-14-402(a)(3) (1989). *Priddy* held that "burglary under [the current burglary statute] is … a 'remaining-in' variant of generic burglary because

someone who enters a building or structure and, while inside, commits or attempts to commit a felony will necessarily have remained inside the building or structure to do so." 808 F.3d at 685. But the current statute criminalizes entry "without the effective consent of the property owner," so any "remaining in" after the commission of a felony must also be unlawful within the meaning of generic burglary—that is, the statute presupposes unlawful presence in the first place.

In *Fox* and *Page*, on the other hand, neither of the defendants "unlawfully remained in" the place that the defendants had lawfully entered after they had broken into the coin receptacle and auditor's office, respectively. In *Fox*, it was still lawful for the defendant to be in the phone booth after he broke into the coin receptacle, and, in *Page*, it was still lawful for the defendants to remain in the publicly accessible hotel after they broke into the auditor's office. So, even if the Government is correct, and *Fox* and *Page* fall under generic burglary's "remaining in" variant, the cases still render the Tennessee burglary statute overbroad because the Government's interpretation of *Fox* and *Page* would criminalize *lawful* "remaining in" under the Tennessee statute, while generic burglary prohibits only *unlawful* "remaining in." *See Taylor v. United States*, 495 U.S. 575, 598 (1990).[5]

[5] *Priddy*'s current Tennessee burglary statute criminalizes remaining in a "building," but as noted, the 1982 third-degree burglary statute at issue here criminalizes entry into places other than buildings. So, the statute at issue here is broader than the statute at issue in *Priddy* with respect to the locational element as well.

B. Mitchell's convictions under Tennessee's 1982 aggravated-assault statute are not violent felonies under the ACCA.

As the district court recounted, Mitchell pleaded guilty to aggravated assault under Tenn. Code Ann. § 39-2-101 in March 1986 and again in April 1986. Op. 27. The modified categorical approach operates differently depending on whether the defendant has pleaded guilty or has been convicted by a jury. "The question," when determining whether a conviction by guilty plea falls into the ACCA's use-of-force-clause, "is whether the court documents establish that the defendant 'necessarily admitted'" to an offense, *United States v. Medina-Almaguer*, 559 F.3d 420, 423 (6th Cir. 2009), that "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. § 924(e)(2)(B)(i). If the defendant did not "necessarily admit" to an offense involving force, the offense cannot be a predicate under the use-of-force clause, "even if [the court is] forced to 'feign agnosticism about clearly knowable facts.'" *United States v. McMurray*, 653 F.3d 367, 381 (6th Cir. 2011) (citation omitted).

1. With respect to each aggravated-assault conviction, Mitchell did not necessarily admit to an offense involving force.

The Government acknowledges that, with respect to each aggravated-assault conviction, Mitchell might have pleaded guilty to violating Section 39-2-101(b)(3) of Tennessee's 1982 aggravated-assault statute. For his March 1986 conviction, the Government notes that "state court documents … do not rule out the possibility that Mitchell was convicted under" Section 39-2-101(b)(1) or Section 39-2-101(b)(3). Gov't Br. 22. For his April 1986 conviction, the Government notes that "Mitchell was

convicted … under [Section] 39-2-101(b)(2) *or* [Section] 39-2-101(b)(3)." Gov't Br. 22 (emphasis added).

This lack of specificity is critical here: If Mitchell pleaded guilty to an offense under Section 39-2-101(b)(3), he did not necessarily admit to an offense that has as an element "the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. § 924(e)(2)(B)(i). Section 39-2-101(b)(3) punishes "assault[ing] another while displaying a deadly weapon *or while the victim knows such person has a deadly weapon in his possession*" (emphasis added). Meanwhile, Section 39-2-101(b)(2) prohibits causing "bodily injury to another with a deadly weapon." The Government ignores the different language of these two clauses, lumping them together and stating that each is "aggravated assault with a deadly weapon" and so categorically a violent felony. Gov't Br. 22. Although (b)(2)'s language makes it a suitable candidate for the ACCA's use-of-force clause, the same cannot be said for (b)(3). To show why, we address separately below the phrase "assault[ing] another" and the phrase "while the victim knows such person has a deadly weapon on his possession."

a. The offense of "assault[ing] another" in violation of Section 39-2-101(b)(3) does not necessarily involve force. In *Johnson v. United States*, 559 U.S. 133 (2010), the Supreme Court interpreted "force," as that word is used in the ACCA, to mean "*violent* force"—that is, "substantial," "strong physical force," or "force capable of causing physical pain or injury." *Id.* at 140. The Court also held that the force associated with common-law battery does not necessarily rise to the level of force required to qualify

as an offense for the ACCA's use-of-force clause. *Id.* at 139; *see also United States v. Castleman*, 134 S. Ct. 1405, 1412 (2014) ("Minor uses of force may not constitute 'violence' in the generic sense."). But in Tennessee, committing common-law battery constitutes "assault[ing] another" in violation of Section 39-2-101(b)(3). So, "assaulting another" in violation of (b)(3) does not necessarily involve ACCA-qualifying force.

At the time of Mitchell's convictions, the word "assault" in Section 39-2-101(b)(3) was statutorily undefined. But Tennessee common law defined assault as "an act which conveys to the mind of the person set upon a well-grounded apprehension of personal injury or violence." *State v. Jones*, 789 S.W.2d 545, 550-51 (Tenn. 1990); *see also State v. Banner*, 1986 WL 1681, at *3 (Tenn. Crim. App. Feb. 6, 1986) (recognizing that the aggravated-assault statute "contains a clear legislative intent to enhance the punishment for simple assaults"); 2 LaFave & Scott, *Substantive Criminal Law* § 7.14 (1986) (noting that some state statutes leave assault undefined and leave "the matter to be determined by reference to the common law"); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 320-21 (2012) (observing that common-law terms that are undefined in a statute are given their common-law meaning unless there is a clear indication otherwise).

In 1986, Tennessee's definition of common-law *assault* was inextricably intertwined with the definition of common-law *battery*—so much so that a defendant who committed common-law battery would also have committed common-law assault. The Tennessee Supreme Court connected the two offenses more than a century ago:

"The battery includes the assault. … The one is a necessary part of the other." *State v. Chaffin*, 32 Tenn. 493, 494 (Tenn. 1852). Subsequent Tennessee Supreme Court decisions reinforced the connection: "[E]very battery includes an assault … [battery] cannot be separate from the assault." *Phillips v. State*, 3 S.W. 434, 436 (Tenn. 1887). And Tennessee case law shows that, at the time of Mitchell's convictions, the connection remained intact. *See State v. Deal*, 1988 WL 10075, at *2 (Tenn. Crim. App. Feb. 9, 1988) (reversing a conviction where jury found defendant guilty of battery but innocent of assault because defendant cannot commit battery without committing assault) (citing *Chaffin*, 32 Tenn. at 494; *Phillips*, 3 S.W. at 436).

Critically, moreover, Tennessee common-law battery does not necessarily involve ACCA-qualifying force. The Tennessee Supreme Court defines common-law battery as "*a touching of the person of [another]*, or something intimately associated with, or attached to, his person, for an unlawful purpose." *Huffman v. State*, 292 S.W.2d 738, 742 (Tenn. 1956) (emphasis added), *overruled on other grounds by State v. Irvin*, 603 S.W.2d 121 (Tenn. 1980). Touching alone is not necessarily "violent force"—that is, "substantial," "strong physical force," or "force capable of causing physical pain or injury to another person." *See Johnson*, 559 U.S. at 140-41. Because Tennessee common-law battery does not necessarily involve the type of force that would trigger the ACCA's use-of-force clause, neither does Tennessee common-law assault.

b. The second part of Section 39-2-101(b)(3)—assaulting another "while displaying a deadly weapon *or while the victim knows such person has a deadly weapon in his*

possession"—fares no better in qualifying (b)(3) as a basis for predicate convictions under the ACCA's use-of-force clause. By (b)(3)'s plain language, a defendant need not necessarily *use* or *display* a deadly weapon to come within its crosshairs. Instead, the defendant need only commit a touching (thereby committing common-law battery and assault) while *possessing* a deadly weapon that the victim knows about. That conduct is a far cry from the "violent force" necessary to implicate the ACCA's use-of-force clause.

United States v. Rede-Mendez, 680 F.3d 552, 558 (6th Cir. 2012), is instructive. There, this Court reasoned that "[n]ot every crime becomes a crime of violence when committed with a deadly weapon," and that "not all crimes involving a deadly weapon have the threatened use of physical force as an element." *Id.* A deadly weapon's mere involvement in an act does not "necessarily supply" ACCA-qualifying force. *Id.* Of course, *using* a deadly weapon might "transform a lesser degree of force into the necessary 'violent force.'" *Id.* But here, Section 39-2-101(b)(3) criminalizes a *touching* combined with the mere *possession* of a deadly weapon about which the victim knows; use (or display) is not necessary.

United States v. Parnell, 818 F.3d 974, 980-81 (9th Cir. 2016), explains why possessing a deadly weapon—unlike using or displaying a deadly weapon—cannot tip the scales. "The mere fact an individual is armed … does not mean he or she has used the weapon, or threatened to use it, in any way." *Id.* at 980. One cannot "presume an implied threat to use a weapon from a defendant's mere possession of it." *Id.* Although the "presence of a weapon … produces a *risk* of violent force," which implicates the

ACCA's now-defunct residual clause, a weapon's presence does not necessarily involve "actual or threatened use of such force," which implicates the ACCA's use-of-force clause *Id. Parnell* thus held that a Massachusetts statute, criminalizing the commission of a robbery while possessing a weapon, did not qualify for the ACCA's use-of-force clause. *Id.* at 981. Other courts have come to the same conclusion about similar statutes. *See, e.g.*, *United States v. Willis*, 2017 WL 3457159, at *2 (E.D. Mich. Aug. 11, 2017) (considering a Michigan robbery statute: "For purposes of the ACCA, though, a statute that requires only *possession* of a deadly weapon is insufficient, in contrast with offenses that require the use of a deadly weapon."); *United States v. Nagy*, 144 F. Supp. 3d 928, 934 (N.D. Ohio 2015) (considering a Ohio robbery statute); *United States v. Brooks*, 468 Fed. Appx. 623, 627 (7th Cir. 2012) (holding that a Tennessee statute—criminalizing possessing a deadly weapon with the intent to employ it during a non-dangerous crime—did not qualify for the ACCA's use-of-force-clause).

Nor is this Court's reasoning in *United States v. Rafidi*, 829 F.3d 437 (6th Cir. 2016), to the contrary. *Rafidi* held that a federal statute prohibiting forcibly assaulting a federal officer while using a deadly weapon categorically fell into the ACCA's use-of-force clause. *Id.* at 446. Although *Rafidi* acknowledged that the element of assaulting a federal officer itself might not constitute violent force, given case law interpreting the element to mean "any force whatsoever against a federal officer," *Rafidi* reasoned that the "element of *using* a deadly weapon during [the] encounter" tipped the scales and rendered the offense a violent felony. *Id.* at 445-46 (emphasis added). But nothing in

Rafidi suggests that simply *possessing* a deadly weapon (about which the victim knows) could similarly transform a non-violent touching into an ACCA predicate offense.

The Government's reliance on *Braden v. United States*, 817 F.3d 926 (6th Cir. 2016), is thus misplaced. Gov't Br. 22. There, this Court said that a conviction under a statute prohibiting "'assault' while 'us[ing] or display[ing] a deadly weapon'" was an ACCA predicate. *Braden*, 817 F.3d at 933 (citing Tenn. Code Ann. § 39-13-102(a)(1)(B)). But as noted, *using* or *displaying* a deadly weapon is different from *possessing* one. *Braden* never addressed whether mere possession can rise to ACCA-qualifying force.

2. Mitchell reserves his right to further review of this Court's precedent that crimes with reckless mens rea can be violent felonies under the ACCA.

For the reasons just stated, this Court should affirm the district court's ruling that Mitchell's aggravated-assault convictions are not ACCA predicate offenses. The district court relied on a different rationale, holding that Mitchell's aggravated-assault convictions are not ACCA predicate offenses because one of his convictions could have been satisfied by a reckless mens rea. This Court need not address the district court's rationale because Mitchell's argument for why his assault convictions are not ACCA predicates, as outlined above, is an alternative basis for affirmance.

Nonetheless, we believe that the district court's reasoning was correct. We acknowledge, however, that since the issuance of the district court's opinion, this Court has held that crimes committed with a reckless mens rea can be ACCA predicate offenses. *See United States v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017). The Government

relies on *Verwiebe* to claim that a Tennessee aggravated-assault conviction is an ACCA predicate offense. Mitchell maintains that *Verwiebe* was wrongly decided and reserves his right to seek further review, including en banc review in this Court, to challenge the ruling in *Verwiebe*.

The ACCA use-of-force clause requires "the use … of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). *Verwiebe* applied the reasoning of the Supreme Court's decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016), which interpreted 18 U.S.C. § 922(g)(9), not (g)(1), under which Mitchell was convicted. The unanimous panel in *United States v. Harper*, 875 F.3d 329, 331 (6th Cir. 2017), though bound by *Verwiebe*, recognized that applying reasoning from *Voisine* regarding 922(g)(9) rendered superfluous the phrase "against the person of another" in (g)(1).

Harper recognized that, under the ACCA, "to count as a 'use' of force, the force 'must be volitional.'" 875 F.3d at 331 (quoting *Voisine*, 136 S. Ct. at 2278). That is, the force must be intentional. Because the ACCA requires the "use … of physical force against the person of another," the intentional mens rea from the word "use" applies not only to the use of force "but also … to its *consequences*." *Id.* For crimes with reckless mens rea, the "actor is *indifferent* … to the substantial possibility that his force will apply to the person of another." *Id.* at 332. As the *Harper* panel recognized, that is not enough to satisfy the requirement of "use … of physical force against the person of another."

* * *

Because the Government claims on appeal that Mitchell was convicted of three

ACCA predicate offenses (and no more), for this Court to reverse, the Government must show that all of Mitchell's prior burglary and aggravated-assault convictions are valid ACCA predicates. As just shown, the Government cannot show that *any* of Mitchell's prior convictions are ACCA predicates, and therefore this Court should affirm the district court's grant of Mitchell's habeas motion.

C. As an alternative basis for affirmance, Mitchell's sentencing enhancement was invalid because the Government failed to support it with state-certified *Shepard* documents.

This Court should affirm for the reasons provided above. But Mitchell also maintains, as an alternative basis for affirmance, that the Government has not carried its burden to establish that he has three prior violent felony convictions.

To support a sentencing enhancement under the ACCA, it is the state's burden to prove by a preponderance that the defendant has the requisite three prior violent felony convictions. *United States v. Hockenberry*, 730 F.3d 645, 666 (6th Cir. 2013). Courts may rely on presentence reports to establish the fact of a conviction. *Id.* But only *Shepard* documents can establish that the conviction is a violent felony. *Id.*; *see United States v. Wynn*, 579 F.3d 567, 576-77 (6th Cir. 2009) (holding that presentence reports' factual allegations cannot be used to establish the type of conviction).

Here, because the Government in 2001 relied only on Mitchell's presentence report to establish that his convictions were violent felonies, rather than on state-certified *Shepard* documents, it has not satisfied its burden.

II. The district court abused its discretion by resentencing Mitchell to three years of supervised release and to "time served."

This Court reviews the district court's sentencing decision for abuse of discretion by determining whether the decision was reasonable. *United States v. Garcia-Robles*, 640 F.3d 159, 163 (6th Cir. 2011). To assess the "reasonableness of the sentence imposed," this Court "tak[es] into account the totality of the circumstances," *United States v. Erpenbeck*, 532 F.3d 423, 430 (6th Cir. 2008) (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)), and makes an "individualized assessment based on the facts presented," *United States v. Simmons*, 587 F.3d 348, 358 (6th Cir. 2009) (quotation marks omitted). A sentence is unreasonable if the court acts arbitrarily, fails to consider pertinent factors, or weighs factors unreasonably. *See, e.g.*, *United States v. Collington*, 461 F.3d 805, 808 (6th Cir. 2006).

A. Mitchell's supervised-release sentence was unreasonable in light of his excess prison time served and the changed circumstances in the years since he was initially sentenced.

After 17 years and seven months in prison, Mitchell won his release. Finding Mitchell was ineligible for the ACCA's sentencing enhancement, the district court vacated his prior sentence. It then sentenced Mitchell to "time served, to be followed by a three-year period of supervised release." Op. 44. The court expressly noted that "[a]ll other terms and conditions" of the prior judgment were "reimposed." *Id.*

When his sentence was vacated, Mitchell had already been imprisoned longer than the maximum prison time and maximum supervised-release term should have

been, *combined*. Yet in vacating his sentence, the district court reimposed, without any explanation, the three-year supervised-release term that had been appended to his prison sentence almost two decades earlier. This resentencing was unreasonable. This Court should vacate Mitchell's supervised-release sentence.

In imposing supervised release, courts are required to consider several factors. 18 U.S.C. §§ 3583(c), 3553(a). Two are relevant here. Section 3553(a)(1) instructs courts to consider "the nature and circumstances of the offense and the history and characteristics of the defendant." Section 3553(a)(6) instructs courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The latter factor reflects one way of thinking about the effect of Mitchell's excess prison time. Those in Mitchell's exact same situation who are sentenced in the future will serve less time than Mitchell did. One way to mitigate, if not eliminate, this disparity is to minimize Mitchell's *overall* sentence, which includes his imposed supervised release. Section 3553(a)(1), more broadly, instructs the court to consider all the relevant circumstances particular to a given defendant.

The district court here, however, failed to adequately consider Mitchell's excess prison time and the circumstances that have changed since Mitchell was first sentenced. To be sure, serving an excess prison sentence does not *automatically* entitle Mitchell to avoid supervised release. *United States v. Johnson*, 529 U.S. 53, 60 (2000). But "[t]here can be no doubt that equitable considerations of great weight exist when an individual is

incarcerated beyond the proper expiration of his prison term." *Id.*

And just because an excess sentence might not mandate an equitable reduction of supervised release in every case does not mean it should not have mattered here. Choosing to reduce Mitchell's supervised-release term was certainly within the court's power. *See United States v. Josiah*, 2016 WL 5864427 (D. Haw. Oct. 6, 2016); *United States v. Lee*, 2016 WL 4179292 (D. Haw. Aug. 4, 2016). In *Josiah*, the court reduced the supervised-release term of a habeas petitioner to "address[] the equitable considerations arising from the change required by *Johnson*." 2016 WL 5864427, at *4. In *Lee*, the court recognized that the *Johnson* petitioner had likely overserved his prison time, and, "considering the equities," reduced his supervised-release sentence. 2016 WL 4179292, at *3. That reasoning comports with this Court's holding that nothing "preclude[s] the court from considering" excess time served in prison to "modify or terminate supervision." *United States v. Perotti*, 702 Fed. Appx. 322, 324 (6th Cir. 2017). Further, and more generally, a district court may reduce or terminate a supervised-release sentence when "changed circumstances" would warrant it—for example, in light of a defendant's good behavior or when a supervised-release term is "inappropriately tailored" to serve the general sentencing goals of § 3553(a). *United States v. Lussier*, 104 F.3d 32, 36 (2d Cir. 1997). That is precisely the case here.

The district court here failed to consider how greatly the sentencing context and circumstances have changed since Mitchell's original sentence was imposed. The court recognized that Mitchell's prison sentence must be reduced to time served but failed to

consider whether the reimposition of supervised release remained appropriate so many years later. In 2001, the district court sentenced Mitchell under the impression that it was required to impose at least 15 years imprisonment and up to five years of supervised release. (CA6 No. 15-6178, RE 4-2: Corrected Habeas Motion, Page ID 30.) The court imposed a sentence of 20 years followed by three years of supervised release. (*Id.*) In a context in which the court believed a 20-year sentence was appropriate, three years of supervised release might have been an appropriate addition. But this district court below knew that the original sentence was wrong. Even if three years of supervised release was appropriate in the context of a 20-year sentence, that does not mean it remains appropriate in the context of a 10-year sentence overserved nearly twice over.

Indeed, in one respect the district court below actually imposed a *greater* sentence on Mitchell than did the court in 2001. The first time around, operating under an incorrect understanding of whether Mitchell qualified for ACCA enhancement, the court could have sentenced Mitchell to five years of supervised release, but chose to impose only three. (CA6 No. 15-6178, RE 4-2: Corrected Habeas Motion, Page ID 30.) (recognizing that the statutory maximum for his sentence was life imprisonment and five years of supervised release). Given the equitable factors that weigh in Mitchell's favor, for the habeas court to impose the maximum sentence of supervised release, even when the 2001 court did not, is an unreasonable abuse of discretion. *See* 18 U.S.C. § 3583(b)(2) (providing that a Class C felony has a maximum of three years of supervised release); 18 U.S.C. § 3559(a)(3) (defining a Class C felony as an offense carrying an

imprisonment term of 10 or more years).

In sum, Mitchell is a different person than he was almost two decades ago. The 2001 court only knew Mitchell as someone who had committed several crimes. Mitchell today, however, is someone who, with no formal legal education, secured his release via a *pro se* habeas motion—no small feat. Whatever was relevant 20 years ago in considering his history and characteristics is necessarily less relevant now in light of what he has accomplished.

B. The district court offered no rationale for imposing the same three years of supervised release that the court imposed in 2001, in conflict with sentencing requirements and the purpose of supervised release.

If the district court considered whether a supervised-release term appended to a 20-year sentence was appropriate for a 10-year sentence that had been overserved by seven years, it did not say. The court did not address whether the original term was appropriate in this new context and did not address the intervening events. Through this failure to offer any rationale or articulate any competing concerns, the court "simply select[ed] what the judge deem[ed] an appropriate sentence." *United States v. Webb*, 403 F.3d 373, 383 (6th Cir. 2005). This Court considers such a selection, without supporting justification, to be arbitrary—that is, the Court "expect[s] district judges to provide a reasoned explanation for their sentencing decisions." *Id.* at 385 n.8. Put another way, "a district judge violates a defendant's right to meaningful appellate review by insufficiently explaining [the] reasons for selecting a given sentence." *United States v. Cabrera*, 811 F.3d 801, 813 (6th Cir. 2011). Not doing so is an abuse of discretion, *United States v. Collington*,

461 F.3d 805, 808 (6th Cir. 2006), requiring reversal.

As explained, in responding to Mitchell's habeas motion, the district court should have considered the totality of the circumstances and crafted an equitable sentencing adjustment. The court needed to grapple with the real burden supervised release imposes on a defendant and whether imposing that burden here was warranted. The court had the discretion, indeed the mandate, to weigh the costs and benefits of the sentencing decision. *See Webb*, 403 F.3d at 385 (a sentence is an unreasonable abuse of discretion where a court does not properly weigh relevant considerations).

Exercising this discretion is particularly important with supervised release. In most cases, as was true here, a district court is not required to impose supervised release. The sentence's discretionary nature reflects Congress's intent to "allocate supervision to those releasees who needed it most." *Johnson v. United States*, 529 U.S. 694, 709 (2000). Supervised release should be reserved for "those, and only those, who need[] it." *Id.*

Supervised release "substantially restrict[s]" an individual's liberty. *Gall v. United States*, 552 U.S. 38, 58 (2007). Individuals on supervised release have diminished legal protections, such as being subject to a search without warrant or probable cause and financial monitoring. U.S. Sentencing Guidelines Manual, § 5D1.3(d)(3), (d)(7)(c). And supervised release may be revoked, and the defendant reimprisoned, for conduct found by a simple preponderance of the evidence, at a hearing where the Federal Rules of Evidence do not apply. 18 U.S.C. § 3583(e)(3); Fed. R. Evid. 1101(d)(3).

Because supervised release is intended to be applied only to those who need it,

after carefully considering the defendant's individual circumstances, courts should be especially thoughtful before *re*-imposing it. The 2001 court, given what it knew, settled on a three-year sentence. But the 2017 court had 17 years of context to inform its decision. Reimposing that sentence, with no reason given, contravened its duty to properly assess what amount of supervised release, if any, was warranted.

For Mitchell, who won his freedom from prison after spending many extra years behind bars, supervised release and its restraints on liberty is overkill, a sword of Damocles hanging over his head for three additional years. Put simply, he has paid the price and then some, and should be free to live his life.

* * *

This Court should vacate Mitchell's supervised release. Alternatively, this Court should remand and direct the district court to reconsider, with an explanation, the supervised release term, if any, it might impose.

C. At Mitchell's request, counsel also asks this Court for a limited remand directing the district court to clarify Mitchell's "time served" sentence.

The district court erred by sentencing Mitchell to "time served." Instead, after invalidating his ACCA sentencing enhancement, the court should have calculated the sentence that he properly *should* have received in 2001. The court also should have held a resentencing hearing and afforded him an opportunity to be heard.

Sentencing Mitchell to "time served" was not statutorily authorized. Given that the ACCA sentencing enhancement was invalid, the 2001 sentencing court should have

sentenced him to a *maximum* imprisonment term of 10 years. *See* 18 U.S.C. §§ 922(g), 924(a)(2). As noted, Mitchell was imprisoned for 17 years and seven months. And a sentence of "time served" can be viewed as a sentence for the time actually served in prison. *United States v. Roark*, 403 Fed. Appx. 1, 9 n.11 (6th Cir. 2010) (citing *United States v. D'Oliveira*, 402 F.3d 130, 132 (2d Cir. 2005)).

Sentencing Mitchell to "time served," therefore, improperly conveys that he was justifiably imprisoned for 17 years and seven months, and improperly legitimizes his overserved time. Put differently, the time-served appellation gets Mitchell's relief only half right; it recognizes that he is free to leave prison, but it does not reflect that his "time served" was *at least* seven years and seven months too long.

As this Court has held, "where a defendant's sentence exceeds the statutory maximum sentence, we vacate the excessive sentence and remand for resentencing." *United States v. Wettstain*, 618 F.3d 577, 593 (6th Cir. 2010) (citation omitted) (cleaned up); *see also United States v. Recla*, 560 F.3d 539, 547 (6th Cir. 2009) (directing the district court to "clarify" its "sentencing decision" on remand). "Time served," though a sentence borne from just relief, was statutorily excessive and thus requires a remand for calculation of Mitchell's proper, enhancement-free sentence.

At Mitchell's request, counsel specifically notes that sentencing him to "time served" violated his due process rights insofar as it imposed an "addition" to what his 2001 sentence should have been. As the Supreme Court observed in *Jones v. Thomas*, 491

U.S. 376, 385, (1989), "additions to a sentence in a subsequent proceeding … upset a defendant's legitimate expectation of finality."

Mitchell was resentenced to "time served" via the district court's written order and opinion. The court afforded Mitchell no sentencing hearing or opportunity to be heard and to object to the time-served sentence. That oversight was improper. *See United States v. Garcia-Robles*, 562 F.3d 763, 768 (6th Cir. 2009) (vacating sentence and remanding because "the district court failed to provide [the defendant] with an opportunity meaningfully to address the upward variance in his sentence").

Conclusion

This Court should affirm the district court's grant of Mitchell's habeas motion and vacatur of Mitchell's sentence.

But this Court should reverse the district court's imposition of three years of supervised release. Alternatively, this Court should remand and direct the district court to reconsider, with explanation, the supervised release term, if any, that is appropriate.

Finally, this Court should remand for the limited purpose of directing the district court to clarify its imposition of a "time served" sentence.

April 27, 2018

Respectfully submitted,

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Certificate of Compliance

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April 27, 2018

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Designation of Relevant Documents

Appellee/Cross-Appellant, pursuant to Sixth Circuit Rules 28(b) and 30(c), designates the following filings in the record as entries that are relevant to this appeal:

Description of entry	Docket Entry Number	Page ID	Date
2:99-cr-20272			
Order on Jury Verdict	RE 124	74	1/8/2001
Notice of Appeal	RE 219	530-31	7/28/2017
2:17-cv-02341			
Response to Motion	RE 6	22-40	5/30/2017
Order	RE 14	199-243	7/5/2017
Notice of Appeal	RE 17	303-04	7/28/2017
Notice of Appeal	RE 20	308	7/17/2017
15-6178			
Corrected Habeas Motion	RE 4-2	1-41	11/6/2015
Order	RE 16-1	1-2	1/23/2016
17-5904			
Order Granting Redesignation and Consolidation	RE 15-1	1	1/2/2018

Certificate of Service

I certify that on April 27, 2018 I filed this brief with the Clerk of the Court electronically via the CM/ECF system. I also certify that this attorney is a registered CM/ECF participant for whom service will be accomplished by the CM/ECF system on April 27, 2018:

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