
NO. _____

IN THE UNITED STATES SUPREME COURT

_____ TERM

UNITED STATES OF AMERICA,

Respondent,

v.

SHANNON FERGUSON,

Petitioner.

APPENDIX

Erin P. Rust
Assistant Federal Community Defender
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.
835 Georgia Avenue, Suite 600
Chattanooga, Tennessee 37402
(423) 756-4349

Counsel for Petitioner

No. 15-6303

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 19, 2017
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SHANNON L. FERGUSON,

Defendant-Appellant.

ORDER

BEFORE: BATCHELDER, ROGERS, and WHITE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Rich L. Hunt

Deborah S. Hunt, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 17a0191p 06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SHANNON L. FERGUSON,

Defendant-Appellant.

No. 15-6303

Appeal from the United States District Court
for the Eastern District of Tennessee of Chattanooga.
No. 1:14-cr-00061-1—Curtis L. Collier, District Judge.

Decided and Filed: August 22, 2017

Before: BATCHELDER, ROGERS, and WHITE, Circuit Judges.

COUNSEL

ON BRIEF: Erin P. Rust, FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, Chattanooga, Tennessee, for Appellant. Luke A. McLaurin, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Shannon Ferguson pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Before his sentencing, the district court found that at least three of Ferguson's previous convictions were violent felonies that triggered the Armed Career Criminal Act's ("ACCA") mandatory minimum sentence of fifteen years' imprisonment. 18 U.S.C. § 924(e)(1). The parties' arguments focus on eight prior convictions, each of which occurred in Tennessee. Three convictions were for burglary, in

violation of Tenn. Code Ann. § 39-14-402, and five convictions were for aggravated burglary, in violation of Tenn. Code Ann. § 39-14-403. On appeal, Ferguson asserts that none of his prior convictions count as predicate offenses for purposes of the ACCA. Although he is correct that some of his prior convictions are not predicate offenses, three are. Accordingly, for the following reasons, we AFFIRM the district court's judgment.

Ferguson's prior convictions for aggravated burglary no longer count toward a finding that he is an armed career criminal. Sitting en banc, our court recently overruled a decade-old precedent and held that Tennessee's aggravated burglary statute sweeps more broadly than the generic definition of burglary and, therefore, may not be counted as a predicate offense. *United States v. Stitt*, 860 F.3d 854, 860–61 (6th Cir. 2017) (en banc) (overruling *United States v. Nance*, 481 F.3d 882 (6th Cir. 2007)).

Ferguson's prior convictions for burglary, however, do count toward a finding that he is an armed career criminal. Our existing precedent compels this holding. See *United States v. Priddy*, 808 F.3d 676, 684–85 (6th Cir. 2015). Tennessee's burglary statute provides that

(a) A person commits burglary who, without the effective consent of the property owner:

- (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;
- (2) Remains concealed, with the intent to commit a felony, theft or assault, in a building;
- (3) Enters a building and commits or attempts to commit a felony, theft or assault; or
- (4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.

...

(c) Burglary under subdivision (a)(1), (2) or (3) is a Class D felony.

(d) Burglary under subdivision (a)(4) is a Class E felony.

Tenn. Code Ann. § 39-14-402. The Supreme Court has defined "generic burglary" as "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). In *Priddy*, we held that all

Class D burglary convictions under Tennessee law—that is, convictions under subsections (a)(1), (a)(2), or (a)(3) of the Tennessee burglary statute—fit within the generic definition of burglary and are therefore violent felonies for purposes of the ACCA. *Priddy*, 808 F.3d at 684–85. The judgments in Ferguson’s burglary convictions indicate that he was thrice convicted of the Class D variant of Tennessee burglary. Accordingly, *Priddy* dictates that his three burglary convictions are violent felonies, and the district court’s finding that he is an armed career criminal was proper.

Ferguson argues that *Priddy* incorrectly held that § 39-14-402(a)(3) fits within the generic definition of burglary because it allows a defendant to be convicted of burglary if he enters a building and then forms the requisite intent to commit a crime while inside. He builds this argument on the foundation of a comment made by the district court during the sentencing hearing. Although the district court expressed some sympathy for Ferguson’s argument, the hearing occurred shortly before we decided *Priddy*.

Priddy controls. One panel of this court may not overrule the decision of another panel; only the en banc court or the United States Supreme Court may overrule the prior panel. See *Salmi v. Sec’y of Health & Human Servs.*, 774 F.3d 685, 689 (6th Cir. 1985). As it so happens, the en banc court in *Stitt* did comment on *Priddy*, but not in a way that assists Ferguson. In *Stitt*, we explicitly overruled *Nance*. We also indicated that *Priddy*’s holding concerning aggravated burglary relied on the binding precedent set by *Nance* but “did not expand further on *Nance*’s reasoning.” See *Stitt*, 860 F.3d at 861 n.4. *Stitt* has therefore abrogated *Priddy*’s holding on aggravated burglary. Cf. *id.* at 863 (Boggs, J., concurring) (explaining that the court overruled *Nance* but not mentioning *Priddy*). Nothing in *Stitt*, however, undermined *Priddy*’s holding on burglary. Accordingly, we hold that *Priddy*’s burglary analysis remains controlling, governs here, and compels us to find that Ferguson’s prior Tennessee burglary convictions are violent felonies. Because he has three such convictions, the district court properly sentenced him as an armed career criminal. We therefore AFFIRM the judgment of the district court.

United States District Court

Eastern District of Tennessee

UNITED STATES OF AMERICA
v.
SHANNON L. FERGUSON

JUDGMENT IN A CRIMINAL CASE
(For Offenses committed on or after November 1, 1987)

Case Number: 1:14-cr-00061-001-CLC-CHS

Anthony Martinez

Defendant's Attorney

THE DEFENDANT:

- ☒ pleaded guilty to count(s): One
☐ pleaded nolo contendere to count(s) which was accepted by the court.
☐ was found guilty on count(s) after a plea of not guilty.

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

Title & Section	Nature of Offense	Date Violation Concluded	Count
18 U.S.C. § 922(g), 18 U.S.C. § 924(e)	Felon in Possession of a Firearm, Armed Career Criminal	November 13, 2013	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. 3553.

- ☐ The defendant has been found not guilty on count(s).
☐ All remaining counts as to this defendant in this case are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and the United States attorney of any material change in the defendant's economic circumstances.

October 8, 2015

Date of Imposition of Judgment

/s/

Signature of Judicial Officer

Curtis L. Collier, United States District Judge

Name & Title of Judicial Officer

Date

DEFENDANT: Shannon L. Ferguson
CASE NUMBER: 1:14-cr-00061-001-CLC-CHS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 180 months.

- ☒ The court makes the following recommendations to the Bureau of Prisons: The court recommends that the defendant receive 500 hours of substance abuse treatment from the BOP Institution Residential Drug Abuse Treatment Program..
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
 - at a.m. p.m. on
 - ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - ☐ before 2 p.m. on
 - ☐ as notified by the United States Marshal.
 - ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Shannon L. Ferguson
CASE NUMBER: 1:14-cr-00061-001-CLC-CHS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

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

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district or other specified geographic area without the permission of the Court or probation officer;
2. The defendant shall report to the probation officer in a manner and frequency directed by the Court or probation officer;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his/her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the Court;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by his/her criminal record or personal history of characteristics and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Shannon L. Ferguson
CASE NUMBER: 1:14-cr-00061-001-CLC-CHS

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SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of testing and/or treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as he is released from the program by the probation officer.

DEFENDANT: Shannon L. Ferguson
CASE NUMBER: 1:14-cr-00061-001-CLC-CHS

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 6. The assessment is ordered in accordance with 18 U.S.C. 3013.

	Assessment	Fine	Restitution
Totals:	\$ 100.00	\$	\$

- ☐ The determination of restitution is deferred until __. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.
- ☐ The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, if the United States is a victim, all other victims, if any, shall receive full restitution before the United States receives any restitution, and all restitution shall be paid to the victims before any restitution is paid to a provider of compensation, pursuant to 18 U.S.C. 3664.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
TOTALS:	\$__	\$__	

- ☐ If applicable, restitution amount ordered pursuant to plea agreement \$__
- ☐ The defendant shall pay interest on any fine or restitution of more than \$2500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:
- ☐ The interest requirement is waived for the ☐ fine and/or ☐ restitution.
- ☐ The interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

DEFENDANT: Shannon L. Ferguson
CASE NUMBER: 1:14-cr-00061-001-CLC-CHS

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$100.00 due immediately, balance due
☐ not later than , or
☒ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ F below); or
- C ☐ Payment in equal _ installments of \$ _ over a period of _ , to commence _ after the date of this judgment; or
- D ☐ Payment in equal _ installments of \$ _ over a period of _ , to commence _ after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _ after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at the time; or
- F ☒ Special instruction regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if the judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. Unless otherwise directed by the court, the probation officer, or the United States attorney, all criminal monetary penalties except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be made to U.S. District Court, 900 Georgia Avenue, Suite 309, Chattanooga, TN 37402. Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names, and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs