No. __-_______

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL EDWARD MOORE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

APPENDIX

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No. 17-5584

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 14, 2017
DEBORAH S. HUNT, Clerk

MICHAEL EDWARD MOORE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

O R D E R

Michael Edward Moore, a federal prisoner proceeding through counsel, moves this court for a certificate of appealability to pursue his appeal of a district court judgment denying his motion to vacate, set aside, or correct his sentence filed under 28 U.S.C. § 2255.

In 2011, a jury convicted Moore of possessing a firearm as a felon, in violation of 18 U.S.C. § 922(g)(1), and possessing a stolen firearm, in violation of 18 U.S.C. § 922(j). He was sentenced as an armed career criminal under the Armed Career Criminal Act ("ACCA") based on his four prior convictions for violent felonies—namely, three burglary convictions under Tennessee Code Annotated § 39-14-402 and one aggravated burglary conviction under Tennessee Code Annotated § 39-14-403. Moore was sentenced to 235 months of imprisonment, to be followed by three years of supervised release. This court affirmed Moore's convictions and sentence. *United States v. Moore*, 578 F. App'x 550 (6th Cir. 2014).

In May 2016, Moore filed a § 2255 motion to vacate, set aside, or correct his sentence, claiming that he no longer qualifies as a career offender in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), in which the Supreme Court invalidated the residual clause of the ACCA as unconstitutionally vague. To be sentenced under the ACCA, a defendant must have at least three

prior convictions for a "violent felony" or a serious drug offense. The ACCA defines "violent felony" as an offense that is punishable by a term of imprisonment exceeding one year and either "has as an element the use, attempted use, or threatened use of physical force against the person of another" (use-of-force clause) or "is burglary, arson, or extortion, involves use of explosives" (enumerated-offense clause), "or otherwise involves conduct that presents a serious potential risk of physical injury to another" (residual clause). *See* 18 U.S.C. § 924(e)(2)(B).

Moore claims that his three prior burglary convictions fell under Tennessee Code Annotated § 39-14-402(a)(3) and that they qualified as predicate offenses only under the now-void residual clause. Contending that three of the four convictions that the district court used to enhance his sentence no longer qualify as predicate offenses, Moore argues that he cannot be sentenced under the ACCA and should be resentenced.

The district court denied the motion and declined to issue a certificate of appealability, reasoning that Moore's prior burglary convictions qualified as ACCA predicate offenses independent of the residual clause. The district court determined that, pursuant to this court's decision in *United States v. Priddy*, 808 F.3d 676, 685 (6th Cir. 2015), Moore's convictions for Class D burglary are categorically violent felonies under the enumerated-offense clause. The district court concluded that Moore's burglary convictions are unaffected by *Johnson* and thus Moore continues to qualify for application of the ACCA's sentencing enhancement. Moore now moves for a certificate of appealability.

A certificate of appealability may be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). That standard is met when the movant demonstrates "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327.

The Tennessee burglary statute under which Moore was convicted in 2001 provides that a person commits a burglary when, "without the effective consent of the property owner," he:

> (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 of 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.

Tenn. Code Ann. § 39-14-402(a) (2000). The first three variants of Tennessee burglary, i.e., Tenn. Code Ann. § 39-14-402(a)(1), (a)(2), and (a)(3), are Class D felonies, Tenn. Code Ann. § 39-14-402(c), and this court has held that "the first three variants . . . qualify as generic burglary since they each involve 'unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.'" *Priddy*, 808 F.3d at 684 (quoting *Taylor v. United States*, 495 U.S. 575, 599 (1990)).

Although the state court documents do not specify which subsection(s) of Tennessee Code Annotated § 39-14-402 Moore was convicted of violating, they indicate that all three burglary convictions were Class D felonies. Accordingly, pursuant to this court's decision in *Priddy*, Moore's burglary convictions qualify as generic burglary and thus are violent felonies under the ACCA's enumerated-offense clause. *See id.* at 684-85; *see also United States v. Ferguson*, 868 F.3d 514, 515 (2017).

Moore acknowledges *Priddy* but argues that it was incorrectly decided. In doing so, Moore relies on the Fifth Circuit's decision in *United States v. Bernel-Aveja*, 844 F.3d 206, 214 (5th Cir. 2016), which held that Ohio's burglary statute was broader than and thus did not qualify as generic burglary because it included "unlawful entry with the intent to commit a crime on the premises formed *after* that unlawful entry," (emphasis added), and the Eighth Circuit's decision in *United States v. McArthur*, 850 F.3d 925, 939-40 (8th Cir. 2017), which noted that the definition of "generic burglary" requires that the defendant intend to commit a crime at the time of unlawful entry and held that, because Minnesota's third-degree burglary statute lacks such an intent requirement, it does not qualify as a violent felony under the ACCA. These cases are not

binding; *Priddy* is. Because this court has recently confirmed that *Priddy* requires this outcome, reasonable jurists could not debate the district court's conclusion that Moore's burglary convictions qualify as violent felonies under the enumerated-offense clause. *See Ferguson*, 868 F.3d at 515–16 (rejecting the defendant's argument that this court should overrule *Priddy* and hold that a Class D burglary conviction under Tennessee Code Annotated § 39-14-402(a)(1), (2), or (3) is not a violent felony under the ACCA).

Accordingly, the court **DENIES** the motion for a certificate of appealability and **DENIES** the motion to proceed in forma pauperis as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

MICHAEL EDWARD MOORE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Nos. 1:11-CR-60-HSM-SKL-1
	)	1:16-CV-131-HSM
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

Before the Court is Petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 [Doc. 63].[1] He bases the request for relief on *Johnson v. United States*, 135 S. Ct. 2551 (2015), in which the Supreme Court held that the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), was unconstitutionally vague [*Id.*]. The United States responded in opposition on June 20, 2016 [Doc. 65]. For the reasons below, Petitioner's § 2255 motion will be **DENIED** and **DISMISSED WITH PREJUDICE**.

I. BACKGROUND

At the close of trial in 2011, a jury convicted Petitioner of possessing a firearm as a felon, in violation of 18 U.S.C. § 922(g)(1), and possessing a stolen firearm, in violation of 18 U.S.C. § 922(j) [Doc. 39]. Based on three prior Tennessee convictions for Class D simple burglary and one prior Tennessee conviction for aggravated burglary, the United States Probation Office deemed Petitioner to be an armed career criminal subject to the ACCA's fifteen-year mandatory

[1] On February 11, 2016, this Court appointed Federal Defender Services of Eastern Tennessee (FDSET) to investigate whether Petitioner is entitled to collateral relief and to file a petition or supplement an existing petition where appropriate. E.D. Tenn. S.O. 16-02 (Feb. 11, 2016). Consistent with that appointment, FDSET filed the instant petition.

minimum sentence [Presentence Investigation Report (PSR) ¶¶ 30, 58]. Because of his prior convictions, the probation officer assigned Petitioner seventeen criminal history points and a criminal history category of VI, the same category mandated by Petitioner's ACCA designation [*Id.* ¶¶ 63, 64]. Petitioner's total offense level and criminal history category yielded a Guideline range of 235 to 293 months' imprisonment [*Id.* ¶ 90, 91]. On June 6, 2012, the Court sentenced Petitioner to 235 months' imprisonment, within and at the bottom of the applicable Guideline range [Doc. 51].

Four years later—on May 13, 2016, Petitioner filed the instant petition for collateral relief based on the *Johnson* decision [Doc. 63 (attacking ACCA status in light of the *Johnson* decision)].

II. STANDARD OF REVIEW

The relief authorized by 28 U.S.C. § 2255 "does not encompass all claimed errors in conviction and sentencing." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). Rather, a petitioner must demonstrate "(1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law . . . so fundamental as to render the entire proceeding invalid." *Short v. United States*, 471 F.3d 686, 691 (6th Cir. 2006) (quoting *Mallett v. United States*, 334 F.3d 491, 496–97 (6th Cir. 2003)). He "must clear a significantly higher hurdle than would exist on direct appeal" and establish a "fundamental defect in the proceedings which necessarily results in a complete miscarriage of justice or an egregious error violative of due process." *Fair v. United States*, 157 F.3d 427, 430 (6th Cir. 1998).

III. ANALYSIS

The ACCA mandates a fifteen-year sentence for any felon who unlawfully possesses a firearm after having sustained three prior convictions "for a violent felony or a serious drug

offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1) (emphasis added). The provision defines "serious drug offense" as any "offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). The Act goes on to define "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the "use-of-physical-force clause"); (2) "is burglary, arson, or extortion, involves the use of explosives" (the "enumerated-offense clause"); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the "residual clause"). 18 U.S.C. § 924(e)(2)(B). For purposes of § 924(e)(B)(2)(i), "the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010). Only the residual clause was held to be unconstitutionally vague by the Supreme Court in *Johnson*. 135 S. Ct. at 2563. The Court went on to make clear, however, that its decision did not call into question the remainder of the ACCA's definition of violent felony—the use-of-physical-force and enumerated-offense clauses. *Id.*; *United States v. Priddy*, 808 F.3d 676, 682–83 (6th Cir. 2015). Nor does *Johnson* disrupt the use of a prior serious drug offense as an independent form of ACCA predicate conviction. *See*, *e.g., United States v. Smith*, No. 10-CR-20058, 2015 WL 5729114, at *9–13 (E.D. Mich. Sept. 20, 2015) (noting that *Johnson* does not affect categorization as an armed career criminal based on prior serious drug offenses).

The validity of Petitioner's sentence thus depends on whether three or more of his prior convictions qualify as "serious drug offenses" under § 924(e)(2)(A) or, in alternative, "violent

felonies" under one of the unaffected provisions of § 924(e)(2)(B). *See, e.g.*, *United States v. Ozier*, 796 F.3d 597, 604 (6th Cir. 2015) (denying petition where conviction qualified as a predicate offense independent of the residual clause), *overruled on other grounds by Mathis v. United States*, 136 S. Ct. 2243, 2251 n.1 (2016). To determine whether an offense qualifies under one of the above provisions, courts must first identify the precise crime of conviction by employing a "categorical approach," looking "only to the statutory definitions—elements—of a defendant's prior offense, and not to the particular facts underlying [each individual] conviction[]." *Descamps v. United States*, 133 S. Ct. 2276, 2283, 2285 (2013).

Review of Petitioner's prior state court judgments reveal that all three of Petitioner's prior burglary convictions involved the Class D variant of that offense [Docs. 50-1, 50-2].[2] For purposes of § 924(e), the Supreme Court has defined "burglary" as any conviction, "regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 599 (1990). At the time that Petitioner committed his Class D burglaries, Tennessee defined that offense as follows: (a)(1) "enter[ing] a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;" (a)(2) "remain[ing] concealed, within the intent to commit a felony, theft or assault;" or (a)(3) "enter[ing] a building and commit[ing] or attempt[ing] to commit a felony, theft or assault."

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[2] "[D]istrict court[s] [are] allowed to accept as true all factual allegations in a [PSR] to which the defendant does not object." *United States v. Bondurant*, 146 F. App'x 762, 763 (6th Cir. 2005). The proper time for making such an objection is at the original sentencing hearing and failure to make the objection at that time waives future objections. *United States v. Levy*, 250 F.3d 1015, 1018 (6th Cir. 2001). Without explanation as to his basis for doing so, Petitioner objects to the PSR's factual summary of his burglary offenses [Doc. 66 pp. 1–2]. Because Petitioner did not object to the use of those summaries at the original sentencing hearing, he cannot do so now.

Tenn. Code Ann. § 39-14-402.[3] Binding Sixth Circuit authority makes clear that all three variants of Class D burglary remain violent felonies after the *Johnson* decision under the ACCA's enumerated-offense clause. *See Priddy*, 808 F.3d at 685 (finding that post-1989 Tennessee Class D burglary is categorically a violent felony under the ACCA's enumerated offense clause); *see also United States v. Eason*, 643 F.3d 622, 624 (8th Cir. 2011) ("Subparts (1)–(3) of [Tenn. Code Ann. § 39-14-402] plainly set forth the elements of generic burglary as defined by the Supreme Court in [the Taylor [decision]."). To the extent that Petitioner argues that subdivision (a)(3) criminalizes conduct in excess of generic burglary [Doc. 66 pp. 2–4], he has failed to identify any intervening authority or basis on which this Court might deviate from the otherwise binding nature of the Sixth Circuit' prior holding to the contrary. In absence of the same, this Court remains bound by the Sixth Circuit's decision in *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015).[4]

Because at least three prior convictions remain violent felonies under provisions unaffected by the *Johnson* decision, Petitioner has not established an entitlement to relief. The

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[3] Tennessee revised its burglary statutes on November 1, 1989, as part of the State's comprehensive criminal code revision. *See, e.g.*, *State v. Langford*, 994 S.W. 2d 126, 127–28 (Tenn. 1999). The pre-1989 version of the Tennessee Code criminalized six types of burglary offenses: (1) first-degree burglary, Tenn. Code Ann. § 39-3-401 (1982); (2) breaking after entry, Tenn. Code Ann. § 39-3-402 (1982); (3) second-degree burglary, Tenn. Code Ann. § 39-3-403 (1982); (4) third-degree burglary, Tenn. Code Ann. § 39-3-404(a)(1) (1982); (5) safecracking, Tenn. Code Ann. § 39-3-404(b)(1) (1982); and (6) breaking into vehicles, Tenn. Code Ann. § 39-3-406 (1982). Tennessee law now prohibits only three types of burglary: (1) burglary, Tenn. Code Ann. § 39-14-402 (2016); (2) aggravated burglary, Tenn. Code Ann. § 39-14-403 (2016); and (3) especially aggravated burglary, Tenn. Code Ann. § 39-14-404 (2016).

[4] Explaining that district courts should only deviate from the binding authority of the Circuit in which it sits where it is "powerfully convinced that the [C]ircuit will overrule itself at the next available opportunity." *Beard v. Whitley Cnty. REMC*, 656 F. Supp. 1461, 1471 (N.D. Ind. 1987), *aff'd*, 840 F.2d 405 (7th Cir. 1988).

Court need not address the status of Petitioner's prior Tennessee conviction for aggravated burglary.

IV. CONCLUSION

For the reasons discussed above, the § 2255 motion [Doc. 63] will be **DENIED** and **DISMISSED WITH PREJUDICE**. The Court will **CERTIFY** any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, this Court will **DENY** Petitioner leave to proceed *in forma pauperis* on appeal. *See* Rule 24 of the Federal Rules of Appellate Procedure. Petitioner having failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability **SHALL NOT ISSUE**. 28 U.S.C. § 2253; Rule 22(b) of the Federal Rules of Appellate Procedure.

ORDER ACCORDINGLY.

/s/ Harry S. Mattice, Jr.
HARRY S. MATTICE, JR.
UNITED STATES DISTRICT JUDGE

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 14a0680n.06

No. 12-5665

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
Sep 02, 2014
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL EDWARD MOORE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

OPINION

Before: MOORE, WHITE, and DONALD, Circuit Judges.

KAREN NELSON MOORE, Circuit Judge. In 2012, a jury convicted Michael Edward Moore of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e), and of possessing a stolen firearm, in violation of 18 U.S.C. § 922(j). Absent any enhancement, his guidelines-recommended sentence for these crimes would have been 100 to 125 months of imprisonment. A dozen years earlier, however, Moore had also been convicted on four counts of burglary in violation of Tennessee Code Annotated § 39-14-402(a). The district court classified each of these burglary convictions as a "violent felony" under the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e), which resulted in a new guidelines-recommended sentence of 235 to 293 months of imprisonment. The district court sentenced Moore to 235 months of imprisonment. On appeal, Moore argues that his burglary convictions do not categorically qualify as violent felonies. We disagree and **AFFIRM** the sentence imposed by the district court.

I. BACKGROUND

In 2000, Moore committed a string of burglaries. According to the various charging affidavits, Moore forcibly removed the padlocks on storage trailers outside of Wal-Mart, P & S School Supply, Dick's Sporting Goods, and The Home Place. *See, e.g.*, App'x at 20. Then, once inside, Moore and his accomplices stole merchandise, including electronics and home furniture. Within days, however, the police apprehended Moore, and a Hamilton County grand jury indicted Moore with "unlawfully and knowingly enter[ing] the business[es] . . . without the owner's effective consent, with intent to commit Theft, in violation of Tennessee Code Annotated [§] 39-14-402 . . . ." App'x at 17, 33, 46, 60. Moore pleaded guilty to the four burglary counts in exchange for the prosecutor dropping other charges, and the state-court judge sentenced Moore to nearly one year in a workhouse and ten years of probation.

Unfortunately, Moore did not stop his criminal activity after serving his sentence. In 2010, Moore became involved in a child-custody dispute with his wife. He enlisted the help of the police in recovering physical custody of his child, but they first ran a computerized record check. During the check, the police discovered that Moore had an outstanding warrant. The police arrested him, but he fled on foot to a friend's automobile. When the police subdued him, they discovered a magazine containing ten bullets under the seat that Moore had been occupying. The police also found two other firearms, one of which had been stolen, during a search of Moore's property.

A federal grand jury indicted Moore on four gun charges. Moore went to trial, and the jury convicted him on two of the charges: being a felon in possession of a firearm and possessing a stolen firearm. Moore does not appeal these convictions.

While compiling the Presentence Investigation Report ("PSR"), the probation office discovered Moore's lengthy criminal history. The PSR classified Moore as an armed career criminal under the ACCA on the basis of a 2001 state-court conviction for aggravated burglary pursuant to Tennessee Code Annotated § 39-14-403 and the four convictions relating to burglaries committed in 2000. PSR at 17–18. Moore objected to the use of the four burglary convictions as predicate offenses, which trigger the ACCA's harsher penalties. Specifically, he claimed that a conviction pursuant to § 39-14-402 does not categorically qualify as a violent felony under the ACCA's enumerated-offense clause or residual clause. The district court overruled Moore's objections and sentenced him to 235 months of imprisonment. Moore now appeals.

II. ANALYSIS

A. The ACCA

Moore challenges the district court's determination that his four burglary convictions qualify as violent felonies under the ACCA, presenting a question of law. Accordingly, we review de novo. *United States v. McMurray*, 653 F.3d 367, 371 (6th Cir. 2011).

Under the ACCA, "the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, . . . that—(i) has as an element the use, attempted

use, or threatened use of physical force against the person of another; or (ii) is burglary . . . , or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . ." 18 U.S.C. § 924(e)(2)(B). We have interpreted this language as creating three separate hooks of liability: the "elements prong," the "enumerated-offense prong," and the "residual prong."[1] *United States v. Cooper*, 739 F.3d 873, 878 (6th Cir. 2014).

In determining whether a state statute fits on one of these hooks, we employ a familiar two-step test. "First, we apply the categorical approach outlined in *Taylor v. United States*, 495 U.S. 575 (1990), 'look[ing] only to the fact of conviction and the statutory definition—not the facts underlying the offense—to determine whether that definition supports a conclusion that the conviction was for a [violent felony.]'" *Cooper*, 739 F.3d at 878 (quoting *United States v. Bartee*, 529 F.3d 357, 359 (6th Cir. 2008)) (first alteration in original). "Second, '[i]f it is possible to violate the statute in a way that would constitute a [violent felony] and in a way that would not, [we] may consider the indictment, guilty plea, or similar documents to determine whether they necessarily establish the nature of the prior conviction.'" *Id.* (quoting *United States v. Gibbs*, 626 F.3d 344, 352 (6th Cir. 2010)) (first and third alterations in original).

B. Section 39-14-402 Is a Divisible Statute

Under Tennessee Code Annotated § 39-14-402,

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

[1]"Whether a conviction is a 'violent felony' under the ACCA is analyzed in the same way as whether a conviction is a 'crime of violence' under the United States Sentencing Guidelines ('U.S.S.G.') § 4B1.2(a)." *McMurray*, 653 F.3d at 371–72 n.1 (citing *United States v. Gibbs*, 626 F.3d 344, 352 n.6 (6th Cir. 2010)).

(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.

This statute is "divisible," meaning that it "list[s] potential offense elements in the alternative, render[ing] opaque which element played a part in the defendant's conviction." *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). Thus, for a conviction under § 39-14-402 to qualify as a violent felony under the categorical approach, each version of the crime must qualify as a violent felony. *Gibbs*, 626 F.3d at 352. The statute cannot satisfy this standard because a conviction under § 39-14-402(a)(4) is not necessarily a violent felony under the ACCA. *See United States v. Couch*, 65 F.3d 542, 544–45 (6th Cir. 1995); Appellee Br. at 9 n.2 (conceding that convictions under § 39-14-402(a)(4) "do not constitute violent felonies under the enumerated-offense clause").

C. Moore Pleaded Guilty to Violating § 39-14-402(a)(3)

Because a conviction under § 39-14-402 does not categorically qualify as a violent felony, we must turn to the modified-categorical approach to determine, if we can, to which version of the crime Moore pleaded guilty. At this second step, we may consult "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some

comparable judicial record of this information" to determine the precise subsection to which Moore pleaded guilty. *Shepard v. United States*, 544 U.S. 13, 26 (2005).

Moore has submitted three sets of documents that might (1) qualify under *Shepard* and (2) be useful—the affidavits of complaint, the indictments, and the state-court judgments; however, only the state-court judgments meet both criteria. First, the affidavits of complaint are not appropriate *Shepard* documents. *See Shepard*, 544 U.S. at 16 (holding that courts cannot rely upon "complaint applications to determine whether an earlier guilty plea necessarily admitted, and supported a conviction for, generic burglary."); *United States v. Medina-Almaguer*, 559 F.3d 420, 423–24 (6th Cir. 2009) (noting problems with relying on affidavits of complaint); *United States v. Wells*, 473 F.3d 640, 647–48 n.5 (6th Cir. 2007) (limiting the use of affidavits of complaint to determinations of "whether prior offenses constitute a single criminal episode or multiple episodes").

Second, the indictments are not useful because they charge Moore with "unlawfully and knowingly enter[ing] [a] *business* . . . ." App'x at 17, 33, 46, 60 (emphasis added). Section 39-14-402, however, differentiates between buildings and other, more mobile enclosures, such as freight cars and automobiles. *Compare* § 39-14-402(a)(1)–(3) *with* § 39-14-402(a)(4). A "business" could fall within either category, and therefore, the indictments are of little use.

Third, the state-court judgments are valid *Shepard* documents. *See, e.g.*, *United States v. Cooper*, 739 F.3d 873, 880–81 (6th Cir. 2014) (relying upon a Tennessee judgment form); *United States v. McMurray*, 653 F.3d 367, 378 (6th Cir. 2011) (considering a Tennessee

judgment form to be a valid *Shepard* document). They are also useful because they indicate that Moore pleaded guilty to a Class D version of burglary. App'x at 12, 24, 30, 51. Given this fact, we can safely conclude that Moore must have been charged with violating subsection (a)(1), (a)(2), or (a)(3). *See* § 39-14-402(c) ("Burglary under subdivision (a)(1), (2) or (3) is a Class D felony."); § 39-14-402(d) ("Burglary under subdivision (a)(4) is a Class E felony."). Moreover, Moore agrees with this conclusion.[2] *See* Appellant Br. at 7 ("Mr. Moore argued that the portion of Tennessee's burglary statute Mr. Moore had been convicted under included subsection (a)(3) . . . ."); *id.* at 9 ("[Moore's state-court] judgments reflect he was convicted of Class D felonies . . . ."); *id.* at 12 ("Mr. Moore . . . was convicted under § 39-14-402(a)(1)–(3)."); *id.* at 14 ("Mr. Moore's judgments reflect conviction for burglary as a Class D felony, which would be § 39-14-402(a)(1)–(3).").

While Moore and the government agree that Moore pleaded guilty to a Class D felony, they disagree over whether Moore was convicted under subsection (a)(1) or (a)(3). The government argues that Tennessee convicted Moore of violating subsection (a)(1), given the similarity between the indictment's language and that subsection. *See* Appellee Br. at 9. Moore disagrees, implicitly asserting that he was convicted under subsection (a)(3). *See* Appellant Br. at 13. Importantly, in his objections to the PSR, Moore conceded that "both sections 39-14-

[2]While Moore concedes that he was convicted under Tennessee Code Annotated § 39-14-402(a)(1), (2), or (3), he argues that he should have been charged with violating § 39-14-402(a)(4). Appellant Br. at 12–13. This may be so, but if Moore believes that his conduct violated only subsection (a)(4), then he must challenge his convictions in state court. In determining whether his convictions qualify as violent felonies under the ACCA, we merely rely upon the state-court documents, and those documents clearly demonstrate that Moore pleaded guilty of violating § 39-14-402(a)(1), (2), or (3).

402(a)(1) and (a)(2) *are* generic burglaries under the *Taylor* definition," Objections to PSR at 2, waiving any argument that a conviction under one of those subsections does not qualify as a violent felony, *see United States v. Kincaide*, 145 F.3d 771, 784 (6th Cir. 1998). Ultimately, it makes little difference, but for simplicity's and Moore's sake, we assume that (a)(3) is the applicable subsection. The important takeaway from the *Shepard* documents is that Moore could not have pleaded guilty to violating subsection (a)(4) because a violation of that subsection is a Class E felony. *See* § 39-14-402(d). The state-court judgments foreclose that possibility.

D. A Conviction Under § 39-14-402(a)(3) Qualifies As a Violent Felony

Having concluded that § 39-14-402(a)(3) is the relevant subsection, we must determine whether a violation of it categorically qualifies as a violent felony under one of the ACCA's prongs. No one argues that subsection (a)(3) satisfies the elements prong. The government does contend, however, that burglary, as defined in subsection (a)(3), is a violent felony under the ACCA's enumerated-offense and residual clauses. Moore disagrees. Based on available case law, we must side with the government and conclude that a conviction under § 39-14-402(a)(3) qualifies as a violent felony under the residual clause of the ACCA.[3]

In determining whether an offense qualifies under the residual clause, the Supreme Court has directed the lower courts to "employ the 'categorical approach' . . . , 'look[ing] only to the fact of conviction and the statutory definition . . . and not generally consider[ing] the particular facts disclosed by the record of conviction.'" *James v. United States*, 550 U.S. 192, 202 (2007)

[3]Because we conclude that subsection (a)(3) satisfies the residual clause, we express no view on whether it would also satisfy the enumerated-offense clause.

(quoting *Shepard*, 544 U.S. at 17). If "'the risk posed by [the crime in question] is comparable to that posed by its closest analog among the enumerated offenses,'" then the offense is a violent felony under the residual clause. *Sykes v. United States*, 131 S. Ct. 2267, 2273 (2011) (quoting *James*, 550 U.S. at 203) (alteration in original). Here, unsurprisingly, the closest analogous offense to burglary is burglary. The Supreme Court has already recognized that a generic burglary presents "the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate." *James*, 550 U.S. at 203. Burglary, as defined in subsection (a)(3), also presents this risk of confrontation and violence and, thus, qualifies as a violent felony under the residual clause.

Moreover, in *United States v. Brown*, 516 F. App'x 461 (6th Cir 2013), a panel of this court reached the same conclusion regarding subsection (a)(3). *See id.* at 465. As we stated in that unpublished case, the conduct prohibited by subsection (a)(3) "is violent and aggressive because it is 'aimed at other persons or property where persons might be located and thereby injured.'" *Id.* (quoting *United States v. Vanhook*, 640 F.3d 706, 714 (6th Cir. 2011)). Moore offers no valid distinction between his case and *Brown*, nor does he offer any incisive criticism of *Brown*. Thus, seeing no reason to deviate from our prior holding, we conclude that Moore's conviction under subsection (a)(3) qualifies as a violent felony under the residual clause.

Moore argues to the contrary, but he is unconvincing. He claims that his conviction under subsection (a)(3) is not covered by the residual clause in this instance because the charging affidavits allege that he entered into storage trailers outside of various businesses and that the

risk of violence was considerably less than when someone breaks into the average building. *See* Appellant Br. at 13–14. This argument, however, runs directly counter to the clear directions of *Shepard* and *James*, which require the courts to take a categorical approach and ignore the specific facts of conviction. Consequently, we reject Moore's counterargument.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** Moore's sentence.