APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-5782/5783

JAMES WALKER,
Plaintiff-Appellee

v.

UNITED STATES OF AMERICA,
Defendant-Appellant

Filed: April 16, 2019

Before: ROGERS, STRANCH, and THAPAR, Circuit Judges.

OPINION

PER CURIAM.

James Walker was found guilty of being a felon in possession of ammunition. Because the district court found that he had previously been convicted of three violent felonies, he was subject to a mandatory sentence of at least 15 years' imprisonment under the Armed Career Criminal Act (ACCA). Following the decision in *Samuel John-*

son v. United States, 135 S. Ct. 2551, Walker filed a habeas petition arguing that his prior convictions no longer qualify as violent felonies under the ACCA. The district court held that only two of Walker's prior convictions constituted violent felonies, vacated his sentence, and resentenced him to 88 months' imprisonment. We **REVERSE**.

I. BACKGROUND

After a jury trial, Walker was found guilty of being a felon in possession of ammunition, in violation of 18 U.S.C. § 922(g)(1). The district court found that he was subject to an ACCA enhancement based on five prior felony convictions: (1) a 1974 Tennessee conviction for robbery with a deadly weapon; (2) a 1982 Texas conviction for robbery; (3) a 1983 Tennessee conviction for attempted third-degree burglary; (4) a 1986 Tennessee conviction for burglary; and (5) a 1994 Tennessee conviction for robbery. Because he had three prior convictions for violent felonies, Walker was required to be sentenced to no less than 15 years of imprisonment. 18 U.S.C. § 924(e). Absent three qualifying convictions, his maximum sentence would have been 10 years. 18 U.S.C. § 924(a)(2). The court sentenced Walker to the mandatory minimum of 15 years' imprisonment. We affirmed his conviction and sentence. *United States v. Walker*, 506 F. App'x 482 (6th Cir. 2012).

In January 2014, Walker timely filed a pro se habeas petition under 28 U.S.C. § 2255, raising several claims that are not at issue here. After the Supreme Court held that the ACCA's "residual clause" was void for vagueness in *Samuel Johnson*, 135 S. Ct. at 2557, Walker moved to amend this petition to include a claim that he no longer qualified for a sentencing enhancement under the ACCA. The district court allowed him to amend his petition and appointed counsel. The Government conceded that, with the invalidation of the residual clause, Walker's conviction

for attempted third-degree burglary is no longer a violent felony under the ACCA, but argued that his four other convictions still qualify as violent felonies. The court determined that Walker's two Tennessee robbery convictions are violent felonies but Walker's convictions for Texas robbery and Tennessee burglary are not. The court explained that Tennessee's third-degree burglary statute sweeps more broadly than generic burglary and that Texas robbery could be committed by recklessly causing bodily injury to another, an insufficient mental state for an offense to be considered a violent felony. Accordingly, the district court vacated Walker's sentence and resentenced him to 88 months' imprisonment.

On appeal, Walker argues that the district court erred by holding that his Tennessee robbery convictions were violent felonies under the ACCA. The Government initially argued that the district court erred in holding that Walker's Tennessee burglary conviction and Texas robbery conviction were not violent felonies. After briefing was concluded, however, this court held that the third-degree burglary statute under which Walker was convicted is not a violent felony. *Cradler v. United States*, 891 F.3d 659, 671 (6th Cir. 2018). The Government has conceded the issue of Tennessee burglary in light of this binding precedent, but continues to argue that Texas robbery is a violent felony under the ACCA.

II. ANALYSIS

This court reviews de novo a district court's determination regarding whether a prior conviction constitutes a 'violent felony' under the ACCA." *Id.* at 664 (quoting *Braden v. United States*, 817 F.3d 926, 930 (6th Cir. 2016)).

To determine whether a prior conviction counts as a "violent felony" under the ACCA, we "use the categorical

approach." *United States v. Covington*, 738 F.3d 759, 762 (6th Cir. 2014) (quotation marks omitted). This involves looking not at the facts underlying the conviction but rather at "the elements of a defendant's prior conviction[]." *Id.* (citing *Descamps v. United States*, 570 U.S. 254, 261 (2013)). Once we determine the elements of conviction, we then examine whether this offense necessarily describes a violent felony. *Id.* at 763. Since *Samuel Johnson* invalidated the ACCA's residual clause, a crime is a violent felony if (1) the offense "has as an element 'the use, attempted use, or threatened use of physical force against the person of another,'" *id.* at 763 (quoting 18 U.S.C. § 924(e)(2)(B)(i)), or (2) its elements "are equivalent to the elements of the generic definition of one of the offenses enumerated in . . . [18 U.S.C. §] 924(e)(2)(B)(ii)—burglary, arson, extortion, or a crime involving the use of explosives," *id.* at 764. We often refer to the first clause as the "use-of-force clause" and to the second as the "enumerated-offenses clause." *See, e.g.*, *Raines v. United States*, 898 F.3d 680, 685 (6th Cir. 2018).

Whether a prior conviction qualifies as a violent felony under either prong requires review of the minimum conduct necessary for conviction. "Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) (alterations in original) (quoting *Curtis Johnson v. United States*, 559 U.S. 133, 137 (2010)). In determining the minimum conduct criminalized by a state statute, federal courts are bound by state courts' interpretation of the elements of the offense. *Curtis Johnson*, 559 U.S. at 138. Whether a state statute involves the use of "physical

force" within the meaning of § 924(e)(2)(B)(i), however, "is a question of federal law, not state law." *Id.*

"[T]here are two steps in applying the categorical approach to determine whether a prior conviction constitutes . . . a violent felony under the ACCA. First, a court must ask whether the statute at issue is divisible by determining if the statute lists 'alternative elements.'" *Covington*, 738 F.3d at 763 (quoting *Descamps*, 570 U.S. at 278). If the answer to this question is affirmative, courts then use a "modified categorical approach" to determine the elements of conviction. *Id.* at 762-63. But we "use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction." *Descamps*, 570 U.S. at 278. We do not use it "to substitute . . . a facts-based inquiry for [the] elements-based one" required by the categorical approach. *Id.* "In other words, the modified approach serves—and serves solely—as a tool to identify the elements of the crime of conviction when a statute's disjunctive phrasing renders one (or more) of them opaque." *Mathis v. United States*, 136 S. Ct. 2243, 2253 (2016).

A. Tennessee Burglary

As the Government concedes, Walker's 1986 Tennessee conviction for third-degree burglary is not a violent felony under the ACCA. In *Cradler*, we overturned our contrary prior precedent in light of *Mathis*, concluding that Tennessee third-degree burglary does not qualify as a violent felony under the ACCA's enumerated-offenses clause "[b]ecause the Tennessee Supreme Court has included offense conduct in its definition of third-degree burglary that lies outside the narrower definition of generic burglary." 891 F.3d at 671; *see also United States v. Mitchell*, 905 F.3d 991, 993 (6th Cir. 2018) (applying C*ra-*

dler to hold that a conviction for "the 1982 version of [Tennessee] third-degree burglary . . . is not a 'violent' felony under the ACCA").

B. Tennessee Robbery

On the other hand, as the Government argues, our binding precedent dictates that Walker's 1974 Tennessee conviction for robbery with a deadly weapon and his 1994 Tennessee conviction for robbery are violent felonies under the ACCA. In the past five years, this court has thrice held that Tennessee robbery is categorically a violent felony. *United States v. Southers*, 866 F.3d 364, 367-69 (6th Cir. 2017); *United States v. Taylor*, 800 F.3d 701, 718-19 & n.5 (6th Cir. 2015); *United States v. Mitchell*, 743 F.3d 1054, 1059-60 (6th Cir. 2014).

In sum, Walker's two Tennessee robbery convictions are categorically violent felonies and the Government has conceded that Walker's Tennessee convictions for third-degree burglary and attempted third-degree burglary are not violent felonies. Thus, whether Walker is subject to a mandatory ACCA sentencing enhancement for conviction of three violent felonies depends on whether his 1982 Texas conviction for robbery is a violent felony. As explained below, it is.

C. Texas Robbery

At the time of Walker's 1982 conviction, Texas defined the crime of robbery as follows.

> (a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 of this code and with intent to obtain or maintain control of the property, he:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another; or

> (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Tex. Penal Code § 29.02 (1974). The Government argues that this statute is divisible into (a)(1) and (a)(2) but concedes on appeal that each subsection is not further divisible. Walker takes no position on divisibility but argues that, regardless of whether the statute is divisible, "neither clause satisfies the use of force definition of the ACCA."

We agree with the district court's well-reasoned opinion that (a)(1) and (a)(2) delineate distinct crimes, with different elements, but the statute is not further divisible. These two subsections list alternative elements and thus are separate crimes, but the mental states described in each subsection are merely alternative means of carrying out these crimes. *See Mathis*, 136 S. Ct. at 2256; *Gomez-Perez v. Lynch*, 829 F.3d 323, 326-28 (5th Cir. 2016) (holding, with regard to a Texas assault statute that criminalizes "intentionally, knowingly, or recklessly causin[ing] bodily injury to another," that these "three culpable mental states" are merely "'conceptually equivalent' means of satisfying the intent element"). We therefore look to the *Shepard* documents for the limited purpose of determining under which subsection Walker was convicted. *Mathis*, 136 S. Ct. at 2249. Because Walker was indicted for "intentionally caus[ing] bodily injury" and later pleaded guilty to this charge, he was convicted under § 29.02(a)(1) of intentionally, knowingly, or recklessly causing bodily injury to another in the course of committing theft. Bodily injury was—and still is—defined under Texas law as "physical pain, illness, or any impairment of physical condition." Tex. Penal Code § 1.07 (1974).

Given that § 29.02(a)(1) does not match any of the crimes listed in the ACCA's enumerated-offenses clause, it is a violent felony only if it falls within the ACCA's use-

of-force clause—i.e., if it "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). The Supreme Court has instructed that, in this context, "the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person. . . . [T]he word 'violent' in § 924(e)(2)(B) connotes a substantial degree of force." *Curtis Johnson*, 559 U.S. at 140 (citations omitted). Thus, convictions under statutes that criminalize "any unwanted physical touching"—"such as a 'tap on the shoulder without consent'"—are not violent felonies under the ACCA's use-of-force clause. *Id.* at 138, 145 (alterations and citations omitted). On the other hand, the Supreme Court recently held that "robbery offenses that require the criminal to overcome the victim's resistance" are categorically violent felonies under the ACCA's force clause. *Stokeling v. United States*, 139 S. Ct. 544, 550 (2019). The Court also suggested that "conduct that leads to relatively minor forms of injury—such as a 'cut, abrasion or bruise'—'necessitate[s]' the use of 'violent force'" because even such minor force rises above the level of "mere offensive touching" and is "'capable of causing physical pain or injury.'" *Id.* at 554 (alterations in original) (quoting *United States v. Castleman*, 572 U.S. 157, 170 (2014), and then *id.* at 182 (Scalia, J., concurring)).

The district court held that § 29.02(a)(1) was not a violent felony because someone could be convicted under this subsection for recklessly causing physical injury. In so holding, the court relied on our decision *in United States v. McMurray*, where we concluded that "the 'use of physical force' clause of the ACCA . . . requires more than reckless conduct." 653 F.3d 367, 375 (6th Cir. 2011). After the district court handed down its decision, however, this

court held that Supreme Court precedent required the opposite conclusion—that a *mens* rea of recklessness is "sufficient to constitute a crime that 'has, an element, the use or attempted use of physical force.'" *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017) (interpreting an identically worded clause of the Guidelines); *see also United States v. Harper*, 875 F.3d 329, 330-32 (6th Cir. 2017) (criticizing this conclusion but construing *Verwiebe* as binding precedent). We subsequently applied this holding to the ACCA's use-of-force clause. *Davis v. United States*, 900 F.3d 733, 736 (6th Cir. 2018). The district court therefore cannot be affirmed on this ground.

Nor can the district court be affirmed on any other ground. As an initial matter, Texas robbery requires the degree of force that the Supreme Court has instructed is necessary for an offense to be a violent felony. Walker was convicted of intentionally, knowingly, or recklessly causing bodily injury to another. To be convicted of causing bodily injury, he must have necessarily used force "'capable of causing physical pain or injury.'" *Stokeling*, 139 S. Ct. at 553-54 (quoting *Curtis Johnson*, 559 U.S. at 140); *see also United States v. Hall*, 877 F.3d 800, 807 (8th Cir. 2017) (holding that Texas robbery is a violent felony because this offense "requires either actual bodily injury or a threat thereof"). Although Texas's definition of bodily injury "appears to be purposefully broad," *Lane v. State*, 763 S.W.2d 785, 786 (Tex. Crim. App. 1989), we are not aware of any case in which someone was convicted of Texas robbery without the use of force rising to the level required by *Stokeling*. Walker does not argue otherwise.

Walker contends that a "defendant can sustain a robbery conviction in Texas where force arises from anger, or a heat of passion-type circumstance; and where the use of force is not contemporaneous with an intent to steal." But that matters not. The degree of premeditation—or

provocation—is irrelevant to whether a crime is a violent felony. All that is required under this circuit's precedent is that the use of force elements of the offense require a *mens* rea of at least recklessness. *Verwiebe*, 874 F.3d at 262. Moreover, what makes Texas robbery a violent felony for purposes of the ACCA is that it requires the causation of injury, not that it involves theft.

Walker's argument that Texas robbery is not a violent felony because a defendant can be convicted for "mere solicitation" to commit this crime fares no better. Under Texas law, an individual is responsible for a criminal act committed by another person if "acting with intent to promote or assist the commission of the offense, he solicits . . . the other person to commit the offense." Texas Penal Code § 7.02(a)(2). This is a form of accomplice liability, which "is simply an alternative theory of liability; it is 'not a distinct substantive crime.'" *United States v. Richardson*, 906 F.3d 417, 426 (6th Cir. 2018) (citation omitted). If a crime is a violent felony for purposes of the ACCA's force clause, a conviction for this crime remains a violent felony whether one is convicted of this crime as a principal or an accessory. *Id.* (holding that a "conviction for aiding and abetting Hobbs Act robbery satisfies [the ACCA's] force clause").

III. CONCLUSION

For the foregoing reasons, Texas Penal Code § 29.02(a)(1) is a violent felony under the ACCA's force clause and Walker has been convicted of three violent felonies. We therefore **REVERSE** the district court's judgment and remand for resentencing under the ACCA.

STRANCH, Circuit Judge, concurring.

James Walker is a 65-year-old man, convicted of possessing 13 bullets that he had found in a rooming house he managed and removed for safekeeping. After deciding that his prior conviction for Texas robbery was not a "violent felony," the district court resentenced Walker to 88 months' imprisonment for this crime. He has since been released from prison. But because our caselaw has changed, we are sending him back. He will now be required to serve a prison sentence that is over double as long—a sentence of no less than 15 years. I concur in this result for one reason only—it is required by our precedent.

Our decision today is not only unjust, it is also unsound. In *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017), a panel of this court overruled our precedent, holding that a *mens* rea of recklessness was sufficient for an offense to have "as an element the use, attempted use, or threatened use of physical force." The opinion asserts that this result is required by the Supreme Court's decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016). But, as another panel of this court explained less than a month later, *Verwiebe* misreads both *Voisine* and the ACCA's plain text. *See United States v. Harper*, 875 F.3d 329, 330-32 (6th Cir. 2017).[1]

In *Voisine*, the Supreme Court construed the statutory definition of the term "misdemeanor crime of domestic violence," which "necessarily involves the 'use . . . of physical force.'" *Voisine*, 136 S. Ct. at 2278 (quoting 18

[1] Both *Verwiebe* and *Harper* dealt with the Career Offender Guideline's use-of-force clause, not the ACCA's use-of-force clause. But the two clauses are identically phrased, and this court interprets them identically. *See Davis v. United States*, 900 F.3d 733, 736 (6th Cir. 2018).

U.S.C. § 921(a)(33)(A)). The ACCA's force clause, on the other hand, defines a "violent felony" as a crime punishable by more than a year of imprisonment 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) (emphasis added). This distinction in phrasing is significant. *See Bennett v. Spear*, 520 U.S. 154, 173 (1997) ("It is the cardinal principle of statutory construction that it is our duty to give effect, if possible, to every clause and word of a statute." (alterations, citation and internal quotation marks omitted)).

As *Harper* painstakingly clarifies, the force clause's requirement that physical force be used "against the person of another" is "not meaningless, but restrictive." 875 F.3d at 332. This phrase "describes the particular type of 'use of physical force' necessary to satisfy [the ACCA]. Specifically, [the ACCA] requires not merely a volitional application of force, but a volitional application 'against the person of another.'" *Id.* at 331 (citation omitted). Thus, the ACCA's force clause "requires a *mens* rea—not only as to the employment of force but also as to its consequences—that the provision in *Voisine* did not. That requirement is met if the actor intends (i.e., 'consciously desires') to apply force to the person of another." *Id.* The same "is not true of an actor who uses force recklessly. True, to 'use' force, the actor must choose to employ it; and thus his employment of the force is volitional. But the force's application 'against the person of another' is not." *Id.* Instead, an "actor is reckless if he 'consciously disregard[s] a substantial risk that the conduct will cause harm to another.'" *Id.* at 331-32 (quoting *Voisine*, 136 S. Ct. at 2278). In short, the ACCA's requirement that force be used against the person of another "narrows the scope of the phrase 'use of force' to require not merely recklessness as to the consequences of one's force, but knowledge

or intent that the force apply to another person." *Id.* at 332.

Like the *Harper* court, if we were not bound by *Verwiebe*, I would hold that an offense that requires only the reckless use of force, as does Texas robbery, is not a violent felony under the ACCA. *Id.* At least two other circuits have taken this position. *See United States v. Hodge*, 902 F.3d 420, 427 (4th Cir. 2018); *United States v. Rose*, 896 F.3d 104, 109-110 (1st Cir. 2018); *United States v. Middleton*, 883 F.3d 485, 497-500 (4th Cir. 2018) (Floyd, J., concurring); *see also Gonzalez-Ramirez v. Sessions*, 727 F. App'x 404, 405 & n.7 (9th Cir. 2018) (construing a similarly-phrased statute, 18 U.S.C. § 16(a), which defines a "crime of violence" as "an offense that has as an element the use . . . of physical force against the person or property of another"). But *Verwiebe* remains binding precedent unless and until "an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985). I therefore reluctantly concur in this court's opinion reversing the district court and returning James Walker to prison.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 07-20243 / No. 14-02021

JAMES WALKER,
Movant,

v.

UNITED STATES OF AMERICA,
Respondent

Filed: April 20, 2017

ORDER

MAYS, United States District Judge.

Before the Court is James Walker's January 6, 2014 *pro se* motion seeking to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (the "§ 2255 Motion"). (Cv. ECF No. 1 at 1.)[1] Walker challenges his sentence in

[1] Unless otherwise noted, all pin cites for record citations are to the "PageID" page number.

Criminal Case No. 07-20243.[2] On November 12, 2014, the Court ordered the United States (the "Government") to respond. (Cv. ECF No. 5 at 24.) The Government responded on March 27, 2015. (Cv. ECF No. 11 at 35.)

On October 13, 2015, Walker moved to amend the § 2255 Motion, seeking relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson*"). On October 12, 2016, after Walker had filed two further motions to amend, the Court ordered the Government to respond. (Cv. ECF No. 22 at 112.) The Government responded on October 19, 2016. (Cv. ECF No. 23 at 113.) Walker replied on November 7, 2016. (Cv. ECF No. 26 at 139.)

For the following reasons, the § 2255 Motion is **GRANTED** in part and **DENIED** in part.

I. BACKGROUND

A. Conviction, Sentence, and Appeal

On August 14, 2007, a federal grand jury in the Western District of Tennessee returned a one-count indictment charging Walker with knowingly possessing ammunition as a convicted felon, in violation of 18 U.S.C. § 922(g). (Cr. ECF No. 3 at 3.) Walker proceeded to trial on February 9, 2010. (Cr. ECF No. 79 at 89.) Following a jury trial, Walker was convicted on February 11, 2010. (*Id.*)

The United States Probation Office prepared a Presentence Investigation Report (the "PSR"). The PSR stated that Walker managed a rooming house at 740 Lucy in Memphis, Tennessee, from which he sold crack cocaine to undercover police officers on several occasions. (*Id.* ¶¶ 5-9.) On August 1, 2007, officers with the Memphis Police Department conducted a knock and talk at 740

[2] References to "07-20243" are to filings in *United States v. Walker*, Case No. 2:07-cr-20243-SHM-1 (W.D. Tenn.).

Lucy following complaints of drug sales. (*Id.* ¶ 10.) Walker answered the door and provided verbal and written consent for the officers to search his room. (*Id.*) The search uncovered 0.3 gm of crack cocaine and 13 9mm rounds of ammunition. (*Id.*) Walker admitted that he had previously been convicted of a felony. (*Id.* ¶ 11.)[3]

The PSR calculated Walker's guidelines sentencing range pursuant to the 2009 edition of the United States Sentencing Commission Guidelines Manual (the "U.S.S.G."). (*Id.* at ¶ 16.) Walker was an armed career criminal under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (the "ACCA"). (*Id.* ¶ 25.) He had five prior violent-felony convictions. (*Id.* ¶¶ 31, 33-35, 37.) Walker's guidelines range was 262-327 months in prison. (*Id.* ¶ 72.) Under the ACCA, Walker's statutory-minimum sentence was 180 months. (*Id.* ¶ 71.)

On July 14, 2011, the Court sentenced Walker to 180 months, followed by three years' supervised release. (Cr. ECF No. 108.) Judgment was entered on July 21, 2011. (Cr. ECF No. 109 at 146.)

Walker appealed, challenging the Court's denial of a motion for mistrial and contending that his mandatory 180-month sentence was unconstitutional under the Eighth Amendment. *United States v. Walker*, 506 F. App'x 482, 483 (6th Cir. 2012). The Court of Appeals for the Sixth Circuit affirmed Walker's conviction and sentence on November 28, 2012. *Id.*

B. § 2255 Proceedings

On January 6, 2014, Walker filed the § 2255 Motion, asserting numerous grounds for relief. Walker argues:

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[3] At his sentencing hearing, Walker did not object to these facts, and the Court accepted them for sentencing purposes. (Cr. ECF No. 124 at 549-51.)

1. that he was subjected to an illegal, warrantless search, in violation of the Fourth Amendment;

2. that his trial counsel was ineffective for failing to file a motion to suppress illegally discovered evidence and for failing to request a jury instruction on the "innocent possession" or justification defense;

3. that his 180-month sentence under the ACCA is cruel and unusual punishment, in violation of the Eighth Amendment; and

4. that there was insufficient evidence at trial to support a finding of constructive possession of ammunition.

(Cv. ECF No. 1 at 4-13.)

On October 13, 2015, Walker filed a pro se Motion for Leave to Amend 2255 Motion (the "First Motion to Amend"), seeking to add two additional grounds for relief:

5. that, in light of *Johnson*, he no longer qualifies as an armed career criminal under the ACCA and that his sentence must be set aside; and

6. that his counsel was ineffective for not challenging his armed-career-criminal designation at the time of his sentencing.

(Cv. ECF No. 13 at 48.)

On June 24, 2016, the Court appointed counsel to represent Walker for purposes of *Johnson* Review. (Cr. ECF No. 134 at 639.) On June 27, 2016, Walker filed a Motion to Vacate and Correct Sentence Under 28 U.S.C. § 2255, which the Court construes as a second motion to amend the § 2255 Motion to add grounds for relief under *Johnson* (the "Second Motion to Amend"). (Cv. ECF No. 16 at 75.) On August 15, 2016, Walker filed a Motion for Leave to Amend Motion to Vacate and Correct Sentence Under 28

U.S.C. § 2255, which the Court construes as a third motion to amend the § 2255 Motion to add grounds for relief under *Johnson* (the "Third Motion to Amend"). (Cv. ECF No. 19 at 82.) On September 19, 2016, the Government responded, stating that it has no objection to the filing of the proposed amendment. (Cv. ECF No. 21 at 110.)

C. Preliminary Matters

For good cause shown, the First, Second, and Third Motions to Amend are **GRANTED**.

Walker has filed several motions seeking appointment of counsel. On February 16, 2016, Walker filed a Notice, which the Court construes as a pro se Motion to Appoint Counsel (the "First Appointment of Counsel Motion"). (Cv. ECF No. 14 at 71.) On June 13, 2016, Walker filed a Motion for Resentencing and Release with Request for Appointment of Counsel (the "Second Appointment of Counsel Motion"). (Cr. ECF No. 133 at 637.) Because Walker now has Court-appointed counsel, the First Appointment of Counsel Motion and the Second Appointment of Counsel Motion are **DENIED** as moot.

II. STANDARD OF REVIEW

Walker seeks relief under 28 U.S.C. § 2255. Under § 2255(a),

> [a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or that the sentence was in excess of the maximum authorized by law . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a).

"To succeed on a § 2255 motion, a prisoner in custody must show '(1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid.'" *McPhearson v. United States*, 675 F.3d 553, 558-59 (6th Cir. 2012) (*quoting Mallett v. United States*, 334 F.3d 491, 496-97 (6th Cir. 2003)).

A prisoner must file his § 2255 motion within one year of the latest of:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

A § 2255 motion is not a substitute for a direct appeal. *Ray v. United States*, 721 F.3d 758, 761 (6th Cir. 2013). "[C]laims not raised on direct appeal," which are thus procedurally defaulted, "may not be raised on collateral review unless the petitioner shows cause and prejudice." *Massaro v. United States*, 538 U.S. 500, 504 (2003) (citing cases); *see also, e.g.*, *Jones v. Bell*, 801 F.3d 556, 562 (6th

Cir. 2015) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977)).

In the procedural-default context, the cause inquiry "'ordinarily turn[s] on whether . . . some objective factor external to the defense impeded counsel's efforts'" to raise the issue on direct appeal. *Ambrose v. Booker*, 684 F.3d 638, 645 (6th Cir. 2012) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)) (alteration and ellipses in *Ambrose*); *see also United States v. Frady*, 456 U.S. 152, 167-68 (1982) (cause-inquiry standards in § 2254 cases apply to § 2255 cases). "[F]or cause to exist, an 'external impediment, whether it be government interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner from raising the claim.'" *Bates v. United States*, 473 F. App'x 446, 448-49 (6th Cir. 2012) (quoting *McCleskey v. Zant*, 499 U.S. 467, 497 (1991)) (emphasis removed).

To show prejudice to excuse default, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." *Frady*, 456 U.S. at 168; *see also Ambrose*, 684 F.3d at 649.

Ineffective assistance of counsel can constitute cause excusing procedural default. Where a petitioner claims that a procedural default occurred due to ineffective assistance of counsel, "relief under § 2255 [is] available subject to the standard of *Strickland v. Washington*, [466 U.S. 668 (1984)]." *Grant v. United States*, 72 F.3d 503, 506 (6th Cir. 1996); *see also Bell*, 801 F.3d at 562. Ineffective assistance of counsel, under the *Strickland* standard, can also serve as an independent ground for § 2255 relief. *See, e.g., Campbell v. United States*, 686 F.3d 353, 357 (6th Cir. 2012).

To establish ineffective assistance of counsel, "[f]irst, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the

deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

To demonstrate deficient performance by counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In considering an ineffective-assistance claim, a court "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance. . . . The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 687, 689).

To demonstrate prejudice, a petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* "In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 111-12 (citing *Wong v. Belmontes*, 558 U.S. 15, 27 (2009); *Strickland*, 466 U.S. at 693).

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697. If a reviewing court

finds a lack of prejudice, it need not determine whether, in fact, counsel's performance was deficient. *Id.*

"Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) (citing *Strickland*, 466 U.S. at 689, 693).

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom.

Richter, 562 U.S. at 105 (citations omitted). "Counsel [cannot] be unconstitutionally ineffective for failing to raise . . . meritless arguments." *Mapes v. Coyle*, 171 F.3d 408, 427 (6th Cir. 1999).

Alternatively, a petitioner may obtain review of a procedurally defaulted claim by demonstrating his "actual innocence." *Bousley v. United States*, 523 U.S. 614, 623-24 (1998). "To establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is more

likely than not that no reasonable juror would have convicted him." *Id.* at 623 (quotation marks omitted) (quoting *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995)).

After a petitioner files a § 2255 motion, the Court reviews it and, "[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion . . . ." Rules Governing Section 2255 Proceedings for the U.S. District Courts ("§ 2255 Rules") at Rule 4(b). "If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order." *Id.* The § 2255 movant is entitled to reply to the government's response. *Id.* at Rule 5(d). The Court may also direct the parties to provide additional information relating to the motion. *Id.* at Rule 7(a). If the district judge addressing the § 2255 motion is the same judge who oversaw the trial, the judge "'may rely on his or her recollection of the trial'" in denying the motion. *Christopher v. United States*, 605 F. App'x 533, 537 (6th Cir. 2015) (quoting *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999)).

III. ANALYSIS

A. Timeliness of § 2255 Motion

On November 28, 2012, the Sixth Circuit affirmed Walker's conviction. *Walker*, 506 F. App'x 482. Walker did not seek a writ of certiorari in the U.S. Supreme Court.

For § 2255(f)(1) purposes, "[w]here a defendant pursues direct review but does not seek a writ of certiorari, the conviction becomes final at expiration of the time for seeking such a writ." *Story v. United States*, Nos. 2:13-CR-55-JRG-MCLC-1, 2:16-CV-282-JRG, 2016 WL 7077616, at *2 (E.D. Tenn. Dec. 2, 2016) (citing *Clay v. United States*, 537 U.S. 522, 525 (2003); U.S. Sup. Ct. R.

13(3)). The deadline for seeking a writ of certiorari from the U.S. Supreme Court is 90 days from the date of the Court of Appeals's decision. U.S. Sup. Ct. R. 13(3). That deadline was February 26, 2013. Walker's conviction became final that day. Walker filed the § 2255 Motion on January 6, 2014, less than a year after his conviction became final. The § 2255 Motion is timely.

Walker also challenges his sentence based on *Johnson*, which provides a new rule of constitutional law made retroactively applicable to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). *Johnson* was decided on June 26, 2015, and Walker filed the First Motion to Amend on October 13, 2015. Walker filed that motion within one year of *Johnson*. Walker's § 2255 Motion, as amended, is timely and properly before the Court. *See* 28 U.S.C. §§ 2255(f)(3).

B. Fourth Amendment Violations

Walker contends that law enforcement officers violated the Fourth Amendment during the search that led to his arrest. He alleges that, without probable cause, reasonable suspicion that a crime was in progress, or a warrant, officers illegally searched the room where they found Walker at 740 Lucy, which led to discovery of the ammunition that formed the basis of Walker's § 922(g) conviction. Walker alleges that the building at 740 Lucy did not belong to him and that he was visiting as a third party. Walker asserts that, before the search, the officers did not know Walker was a convicted felon or have reason to suspect that Walker was in possession of a gun or ammunition. Walker alleges that the officers found the ammunition in violation of the plain sight rule. (Cv. ECF No. 1 at 4-8.)

Walker cannot assert a free-standing Fourth Amendment claim in collateral proceedings under § 2255. *Ray*,

721 F.3d at 762. "[T]he Fourth Amendment exclusionary rule 'is a judicially created remedy rather than a personal constitutional right' whose purpose is 'to safeguard Fourth Amendment rights generally through its deterrent effect.'" *Id.* (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 376 (1986)). "It is, thus, a structural remedy designed to exclude evidence so as to deter police misconduct, not to 'redress the injury to the privacy of the victim of the search or seizure.'" *Id.* (quoting *Stone v. Powell*, 428 U.S. 465, 486 (1976)). Although "the merits of a Fourth Amendment claim still must be assessed when a claim of ineffective assistance of counsel is founded on incompetent representation with respect to a Fourth Amendment issue," absent a showing that Walker did not have "an opportunity for full and fair litigation of [his Fourth Amendment] claim at trial and on direct appeal," Walker's claim is not cognizable under a § 2255 motion. *Id.*

Walker has not shown that he was denied an opportunity for full and fair litigation of his Fourth Amendment claim at trial and on direct appeal. The § 2255 Motion is **DENIED** on this ground.

C. Ineffective Assistance of Trial Counsel

Walker alleges that his trial counsel was ineffective (1) for failing to file a motion to suppress evidence of the ammunition found in Walker's possession and (2) for failing to request a jury instruction on the "innocent possession" or justification defense.

1. Failure to File Motion to Suppress

Walker's trial counsel did not file a motion to suppress evidence found during the search. (Cv. ECF No. 8 at 30.) In a sworn affidavit, trial counsel states:

> Based on the discovery received from the Government, the review of the discovery with Mr. Walker and

> the conversations with Mr. Walker surrounding the incident, it was determined that a motion to suppress was unwarranted because Mr. Walker gave the officers consent to search the residence. So, while the officers did not have a warrant to search the rooming house at 740 Lucy, no warrant was necessary when consent to search was provided by Mr. Walker.

(*Id.*) The Government argues that, because Walker gave the officers consent to search the room Walker was occupying, Walker's ineffective assistance claim on this ground is meritless. (Cv. ECF No. 11 at 39-42.)

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Warrantless searches and seizures "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). One exception is a search conducted with a person's free and voluntary consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 248 (1973); *United States v. Carter*, 378 F.3d 584, 587 (6th Cir. 2004). "Consent to a search may be in the form of words, gesture, or conduct." *Carter*, 378 F.3d at 587 (quotation marks omitted). The Government must prove that consent was "freely and voluntarily given," and "consent must be proved by clear and positive testimony." *United States v. Scott*, 578 F.2d 1186, 1188 (6th Cir. 1976).

Trial testimony showed that several law enforcement officers arrived at 740 Lucy, following up on information about drug activity provided by an undercover officer. (Cr. ECF No. 121 at 237.) The officers went to the front of the building, a multi-apartment rooming house, entered the main door, and knocked on the first door on the left. (Cr. ECF No. 122 at 327.) After Walker answered, they

identified themselves as police officers with the Memphis Police Department. The officers asked if they could enter, and Walker allowed them in. (*Id.* at 327-28.)

One officer testified that, on entering, he saw some crack cocaine and a box containing ammunition on a dresser in the room. (*Id.* at 328-29.) He testified that, based on his training and experience, he asked Walker if he had any weapons in the room and that Walker said he did not. (*Id.* at 329.) The officer testified that he asked Walker if "he'd mind if [they] looked around his room" and Walker answered that he did not. (*Id.*) The officer testified that he presented Walker with a consent-to-search form and advised Walker of the form and what the officers planned to do. (*Id.*) After Walker had signed the form, the officers searched the room. (*Id.*) The officers seized the crack cocaine and ammunition and placed Walker under arrest. (*Id.* at 335.)

The evidence shows that Walker's consent was freely and voluntarily given. He does not allege the contrary. Because Walker consented to the search, the search did not violate the Fourth Amendment. A motion to suppress evidence found during the search would have been meritless. Walker's trial counsel was not ineffective for failing to file a motion to suppress. The § 2255 Motion is **DENIED** on this ground.

2. Failure to Request Jury Instruction

Walker's trial counsel did not request an "innocent possession"-defense jury instruction. (Cv. ECF No. 8 at 31.) In a sworn affidavit, trial counsel states:

> Based on the facts as I knew them to be in Mr. Walker's case, we could not overcome the preponderance burden which would warrant the rarely given jury instruction. There was no unlawful and present, imminent, and impending threat of such a nature as to

> induce a well-grounded apprehension of death or serious bodily injury. Mr. Walker was not under attack by or from anyone.

(*Id.*) The Government argues that because Walker was never under an unlawful or present threat, Walker's ineffective assistance claim on this ground is meritless. (Cv. ECF No. 11 at 43.)

In felon-in-possession cases under 18 U.S.C. § 922(g), "a defense of justification may arise in rare situations." *United States v. Singleton*, 902 F.2d 471, 472 (6th Cir. 1990). To establish this defense, a defendant must show:

> (1) that defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;
>
> (2) that defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct;
>
> (3) that defendant had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm; and
>
> (4) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm.

Id. (alterations, citations, and quotation marks omitted). A defendant must also "show that he did not maintain possession any longer than absolutely necessary." *Id.* at 473.

Walker argues that his counsel should have requested an "innocent possession"-defense jury instruction because: (a) there was no firearm present; (b) Walker did not live at the residence and was not aware that the ammunition was in the room; (c) he was not at the residence

for long; (d) he did not intend to illegally possess the ammunition; and (e) the officers did not have any suspicion that ammunition was present or that he knew it was present. (Cv. ECF No. 1 at 10.)

Walker does not assert that he faced any "unlawful and present, imminent, and impending threat" of death or serious bodily injury that would have warranted his possession of the ammunition. *See Singleton*, 902 F.2d at 472. Because Walker did not face any impending threat of death or serious bodily injury, he has not shown that a justification-defense jury instruction was warranted. A request for such a jury instruction would have been meritless. Walker's trial counsel was not ineffective for not asking for that instruction. The § 2255 Motion is **DENIED** on this ground.

D. Eighth Amendment Violation

Walker contends that his 180-month sentence violates the Eighth Amendment. Walker argues there was a lack of evidence supporting the elements of intent, knowledge, and possession necessary to establish a felon-in-possession offense. Walker further argues that "bullets are harmless when there is not a firearm present." (Cv. ECF No. 1 at 13.)

"[A] § 2255 motion may not be employed to relitigate an issue that was raised and considered on direct appeal absent highly exceptional circumstances, such as an intervening change in the law." *Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999). Walker challenged his 180-month sentence on Eighth Amendment grounds on direct appeal. *Walker*, 506 F. App'x at 489-90. The court of appeals rejected both Walker's categorical and proportionality challenges to his sentence. *Id.*

Walker does not allege highly exceptional circumstances that warrant reconsideration of this issue. He

cites no intervening change in the law. The § 2255 Motion is **DENIED** on this ground.

E. Insufficiency of Evidence of Constructive Possession

Walker challenges the sufficiency of the evidence supporting a finding that he constructively possessed the ammunition. (Cv. ECF No. 1 at 13.)

Walker procedurally defaulted his sufficiency-of-the-evidence claim by failing to raise it on direct appeal. The Sixth Circuit has "repeatedly held that the sufficiency of the evidence to support a conviction may not be collaterally reviewed on a Section 2255 proceeding." *United States v. Osborn*, 415 F.2d 1021, 1024 (6th Cir. 1969). The § 2255 Motion is **DENIED** on this ground.

F. *Johnson* Challenge

1. Propriety of Merits Review

Walker's *Johnson* challenge alleges constitutional error that resulted in a sentence that now exceeds the statutory limits applicable to his offense. *See McPhearson*, 675 F.3d at 559. The Government does not argue that Walker's *Johnson* challenge is procedurally defaulted. Walker did not challenge his ACCA sentencing enhancement on direct appeal. Courts that have considered procedural-default challenges to prisoners' *Johnson*-based § 2255 motions have consistently ruled that cause and prejudice excuse a prisoner's procedural default in the *Johnson* context. *E.g.*, *Duhart v. United States*, No. 08-60309-CR, 2016 WL 4720424, at *4 (S.D. Fla. Sept. 9, 2016) ("Where the Supreme Court explicitly overrules well-settled precedent and gives retroactive application to that new rule after a litigant's direct appeal, '[b]y definition' a claim based on that new rule cannot be said to have been reasonably available to counsel at the time of the direct appeal." (quoting *Reed v. Ross*, 468 U.S. 1, 17 (1984))).

Because the Court considers Walker's *Johnson* challenge on the merits, it need not address Walker's ineffective-assistance claim based on his counsel's failure to challenge Walker's armed career criminal designation at the time of his sentencing. Walker's *Johnson*-based ineffective-assistance claim is **DENIED** as moot.

2. ACCA's "Violent Felony" Framework

Under the ACCA, a defendant convicted under 18 U.S.C. § 922(g) who has three prior convictions for violent felonies or serious drug offenses is subject to a mandatory minimum sentence of 180 months in prison. 18 U.S.C. § 924(e). Without the prior qualifying convictions, a defendant convicted under § 922(g) is subject to a statutory maximum sentence of 120 months in prison. 18 U.S.C. § 924(a)(2).

The ACCA defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that (a) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the "use-of-force clause"); (b) "is burglary, arson, or extortion, [or] involves use of explosives" (the "enumerated-offenses clause"); or (c) "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).

In *Johnson*, the Supreme Court held that a sentence imposed under the residual clause of the ACCA violates due process. 135 S. Ct. at 2563. In *Welch*, the Supreme Court applied its holding in *Johnson* retroactively to ACCA cases on collateral review. 136 S. Ct. at 1268. *See also In re Watkins*, 810 F.3d 375, 383-84 (6th Cir. 2015) (same).

Johnson does not question sentencing enhancements under the ACCA's use-of-force or enumerated-offenses

clauses. *Johnson*, 135 S. Ct. at 2563. "The government accordingly cannot enhance [a defendant's] sentence based on a prior conviction that constitutes a violent felony pursuant only to the residual clause." *United States v. Priddy*, 808 F.3d 676, 683 (6th Cir. 2015). "But a defendant can still receive an ACCA-enhanced sentence based on the statute's use-of-force clause or enumerated-offense[s] clause." *Id.*

"When determining which crimes fall within . . . the violent felony provision" of the ACCA, "federal courts use the categorical approach." *United States v. Covington*, 738 F.3d 759, 762 (6th Cir. 2013) (quotation marks omitted).[4] Using that approach, courts "look [] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 600 (1990).

"[T]here are two steps in applying the categorical approach to determine whether a prior conviction constitutes . . . a violent felony under the ACCA." *Covington*, 738 F.3d at 763. "First, a court must ask whether the statute at issue is divisible by determining if the statute lists 'alternative elements.'" *Id.* (quoting *Descamps v. United States*, 133 S. Ct. 2276, 2293 (2013)). "[A] divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." *Descamps*, 133 S. Ct. at 2283.

If a statute is divisible, meaning that it "comprises multiple, alternative versions of the crime," a court uses a

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[4] *Covington* addresses the definition of "crime of violence" in U.S.S.G. § 4B1.2(a). 738 F.3d at 761-62. Guidelines decisions are applicable to ACCA cases because, "[w]hether 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 . . . § 4B1.2(a)." *United States v. McMurray*, 653 F.3d 367, 371 n.1 (6th Cir. 2011).

"modified categorical approach" and may "examine a limited class of documents," such as the indictment and jury instructions, "to determine which of a statute's alternative elements formed the basis of the defendant's prior conviction."[5] *Id.* at 2283-84. "Where the defendant has pled guilty, these so-called *Shepard* documents may include the 'charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.'" *United States v. Denson*, 728 F.3d 603, 608 (6th Cir. 2013) (quoting *Shepard v. United States*, 544 U.S. 13, 16 (2005)). "[T]he question is whether the court documents establish that the defendant necessarily admitted the elements of a predicate offense through his plea." *United States v. McMurray*, 653 F.3d 367, 377 (6th Cir. 2011) (quotation marks omitted).

The Supreme Court has clarified that a court should use the modified categorical approach only when a statute "lists multiple elements disjunctively," not when it "enu-

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[5] In *United States v. Mitchell*, the court explained that "[a] divisible statute is necessary but not sufficient for application of the modified categorical approach." 743 F.3d 1054, 1063 (6th Cir. 2014). The court further explained, "We make explicit a step in the analysis that the *Covington* panel alluded to implicitly: if a statute is divisible—in that it sets out one or more elements of the offense in the alternative—at least one, but not all of those alternative elements must depart from: (1) the elements of the generic ACCA crime (if the conviction is based on an enumerated offense); or (2) the definitions provided in . . . the 'use of physical force" clause . . . (if the conviction is based on a non-enumerated offense)." *Id.* at 1065. The comments in *Mitchell* appear to be dicta. The Court need not determine whether this portion of *Mitchell* controls because, as discussed below, the Tennessee third degree burglary and Texas robbery statutes under which Walker was convicted each included at least one alternative element that departed from the definition in the ACCA's use-of-force and enumerated-offenses clauses.

merates various factual means of committing a single element." *Mathis v. United States*, 136 S. Ct. 2243, 2249, 2256 (2016). A "court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means." *Id.* at 2256. It can do so by examining state law to determine (a) whether "a state court decision definitively answers the question," or (b) whether "the statute on its face . . . resolve[s] the issue." *Id.* Alternatively listed items are elements where they "carry different punishments" or where the statute "itself identif[ies]" them as "things [that] must be charged." *Id.* They are means where the "statutory list is drafted to offer 'illustrative examples'" only. *Id.* "[I]f state law fails to provide clear answers," a court may take "a peek at the record documents" of the prior conviction "for the sole and limited purpose of determining whether the listed items are elements of the offense." *Id.* (alterations and quotation marks omitted). If the listed items are "means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution." *Id.*

After having determined which of a statute's alternative elements formed the basis of the defendant's prior conviction, or after having determined that the statute is indivisible, the second step in the categorical approach requires the court to "ask whether the offense the statute describes, as a category, is a [violent felony]." *Covington*, 738 F.3d at 763.

"When determining whether a particular offense qualifies as a 'violent felony' under the use-of-force clause, [a court is] limited to determining whether that offense 'has as an element the use, attempted use, or threatened use of physical force against the person of another.'" *Priddy*, 808 F.3d at 685 (quoting 18 U.S.C. § 924(e)(2)(B)(i)). "The force involved must be 'violent force—that is, force capable of causing physical pain or injury to another person.'"

Id. (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson 2010*")).

When determining whether a particular offense qualifies as a violent felony under the enumerated-offenses clause, the "question is whether the elements of the prior conviction are equivalent to the elements of the generic definition of one of the offenses enumerated in . . . [§] 924(e)(2)(B)(ii)." *Covington*, 738 F.3d at 764. "The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense." *Descamps*, 133 S. Ct. at 2281.

"If the offense 'sweeps more broadly' and 'criminalizes a broader swath of conduct' than [would] meet these tests, then the offense, as a category, is not a [violent felony]." *Covington*, 738 F.3d at 764 (quoting *Descamps*, 133 S. Ct. at 2281, 2283, 2289-91).

3. Analysis of Walker's Previous Convictions

The Government contends that four of the five previous convictions identified as ACCA predicates in Walker's PSR remain qualifying convictions after *Johnson*. (Cv. ECF No. 23 at 116-28.) They are: (1) a 1974 Tennessee conviction for robbery with a deadly weapon; (2) a 1982 Texas conviction for robbery; (3) a 1986 Tennessee conviction for third-degree burglary; and (4) a 1994 Tennessee conviction for robbery. (PSR ¶¶ 31, 33, 35, 37.) The Government concedes that Walker's 1983 Tennessee conviction for attempted third-degree burglary does not qualify as an ACCA predicate after *Johnson*. (Cv. ECF No. 23 at 128; *see* PSR ¶ 34.)

a. Tennessee Robbery Convictions

Walker concedes that the Sixth Circuit has held, post-*Johnson*, that a Tennessee robbery conviction is a violent

felony under the ACCA's use-of-force clause. (Cv. ECF No. 19 at 91.) In *United States v. Taylor*, the Sixth Circuit affirmed the continued vitality post-*Johnson* of *United States v. Mitchell*, 743 F.3d 1054 (6th Cir. 2014), which held that Tennessee robbery (substantially the same version of the robbery statute as the statute under which Walker was convicted) is categorically a violent felony under the ACCA's use-of-force clause. 800 F.3d 701, 718-19 & n.5 (6th Cir. 2015). In *United States v. Johnson*, the Sixth Circuit held that Tennessee robbery with a deadly weapon (again, substantially the same version of the robbery statute as the statute under which Walker was convicted) is also categorically a violent felony under the ACCA's use-of-force clause. 530 F. App'x 528, 533 (6th Cir. 2013) (citing *United States v. Gloss*, 661 F.3d 317 (6th Cir. 2011)).

To preserve the issue for appellate review, Walker argues that a circuit split in post-*Johnson* analyses of robbery convictions under various states' robbery statutes calls into question the continued validity of the Sixth Circuit's decision in *Taylor*. (Cv. ECF No. 19 at 91-93.) However, "[a] published prior panel decision" by the Sixth Circuit "'remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or [the Sixth Circuit] sitting en banc overrules the prior decision.'" *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009) (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)). The Court must follow *Mitchell*, *Taylor*, and other Sixth Circuit decisions classifying Tennessee's robbery statutes under the ACCA. Both Walker's 1974 Tennessee conviction for robbery with a deadly weapon and his 1994 Tennessee conviction for robbery remain violent felonies under the ACCA after *Johnson*.

b. Tennessee Third-Degree Burglary Conviction

At the time of the offense conduct on which Walker's 1986 third-degree burglary conviction was based, Tenn. Code Ann. § 39-3-404 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 then (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) (repealed) (additional penalty provisions omitted). Section 39-3-404(a)(1) —the "building provision"—criminalized the breaking and entering into a non-dwelling house, and § 39-3-404(b)(1)—the "safecracking provision"—criminalized the opening or attempted opening of a vault, safe, or other secure place following a breaking and entering into a building.

In *United States v. Caruthers*, the Sixth Circuit addressed whether a defendant's previous conviction under

§ 39-3-404 qualified as a violent felony under the ACCA's enumerated-offenses clause. 458 F.3d 459, 475-76 (6th Cir. 2006). The court determined that § 39-3-404 is "nongeneric along the 'building or structure' dimension, as it permitted third-degree burglary convictions for unlawful entry into coin receptacles and the like." *Id.* (citing *Fox v. State*, 383 S.W.2d 25, 27 (Tenn. 1964)). To use current terminology, § 39-3-404 "criminaliz[ed] a broader swath of conduct than" generic burglary. *Descamps*, 133 S. Ct. at 2281.

Having determined that § 39-3-404 is "nongeneric," the *Caruthers* court considered whether the defendant "actually committed a generic burglary" as demonstrated by the available *Shepard* documents for his § 39-3-404 conviction. *Caruthers*, 458 F.3d at 476 (quoting *Taylor*, 495 U.S. at 600). 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," *Caruthers* held that the defendant's § 39-3-404 convictions were for "generic burglaries" and qualified as ACCA predicates. *Id.*

Caruthers was decided before *Descamps*, in which the Supreme Court clarified that its "decisions authorize review of [*Shepard*] documents only when a statute defines burglary not . . . overbroadly, but instead alternatively." *Descamps*, 133 S. Ct. at 2286.

Following *Descamps* and *Mathis*, Walker contends that, not only is § 39-3-404 nongeneric or overbroad, as held by *Caruthers*, but it is also "indivisible, because the various locations where the offense can take place merely provide different means of committing the same offense." (Cv. ECF No. 19 at 91 (citing *Mathis*, 136 S. Ct. at 2255).) Walker argues that, because § 39-3-404 is both overbroad and indivisible—the latter condition precluding any examination of *Shepard* documents—his § 39-3-404 conviction

cannot qualify as an ACCA predicate. (*Id.*) The Government argues that § 39-3-404 is divisible because it contains alternative elements, not means, and that the Court may examine *Shepard* documents to determine which alternative elements formed the basis of Walker's conviction. (Cv. ECF No. 23 at 119.)

Section 39-3-404 as a whole is overbroad, as recognized by *Caruthers*. Nevertheless, § 39-3-404 is divisible. Section 39-3-404 on its face reflects a divisible structure: § 39-3-404(a)(1) criminalized the burglarizing of buildings other than dwellings, and § 39-3-404(b)(1) criminalized the burglarizing of vaults, safes, etc. (otherwise known as safecracking). Tennessee courts recognized that § 39-3-404 criminalized multiple alternative offenses, not a single offense that could be committed in multiple ways. *E.g., Englett v. State*, No. 01-C-019103CC00086, 1991 WL 255894, at *2 (Tenn. Crim. App. Dec. 5, 1991) ("As to the burglary and safecracking charges, both of these offenses were prohibited at that time by Tenn. Code Ann. § 39-3-404.").[6] Offenses under §§ 39-3-404(a)(1) and (b)(1) also carried different punishments. Tenn. Code. Ann. §§ 39-3-404(a)(2)-(4), (b)(1)-(2). Both the text of § 39-3-404 and Tennessee case law construing it exhibit *Mathis*'s hallmarks of divisibility. *Mathis*, 136 S. Ct. at 2256.

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[6] Although some Tennessee decisions treat the safecracking provision as a sentencing enhancement, *see, e.g., State v. Lindsay*, 637 S.W.2d 886, 890 (Tenn. Crim. App. 1982) (construing a substantially similar prior version of § 39-3-404), that does not mean that § 39-3-404 as a whole merely "enumerate[d] various factual means of committing a single element" such as a single "locational element," *Mathis*, 136 S. Ct. at 2249-50. Even if understood as a sentencing enhancement, the safecracking provision "provide[d] for greater punishment if the burglar open[ed] a vault, safe, or other secure place after entry," which assumed that a "burglarious entry" had already occurred. *Lindsay*, 637 S.W.2d at 890. Section § 39-3-404(b)(1) criminalized distinct, additional conduct that § 39-3-404(a)(1) did not.

Because § 39-3-404 is divisible, the Court may examine *Shepard* documents to determine which of § 39-3-404's alternative elements formed the basis of Walker's prior conviction. *See Descamps*, 133 S. Ct. at 2283-84.

Walker's *Shepard* documents demonstrate that he was convicted under § 39-3-404(a)(1), the building provision, not under § 39-3-404(b)(1)'s safecracking provision. In April 1985, a Tennessee grand jury charged that Walker, on December 13, 1984, "did commit the offense of burglary in the 3rd degree by unlawfully, feloniously and burglariously breaking into and entering THE BUSINESS HOUSE OF MEN'S WORLD FASHIONS . . . with intent unlawfully, feloniously and burglariously to steal, take and carry away the personal property therein." (Cv. ECF No. 23-1 at 131-32.) Walker's record of judgment shows that he pled guilty to this charged offense. (*Id.* at 133.)

Having confirmed that Walker was convicted under § 39-3-404's building provision, the Court must determine whether a burglary offense under that provision, as a category, is a violent felony.[7] *See Covington*, 738 F.3d at 763. The Government contends that it is.

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[7] Although the Court may examine the *Shepard* documents for Walker's § 39-3-404 conviction to determine which of the statute's alternative offenses formed the basis of that conviction, the Court may not examine the *Shepard* documents to determine whether the factual basis for that conviction amounts to generic burglary. Thus, the Court may not conclude that Walker's § 39-3-404(a)(1) offense qualifies as an ACCA predicate because the indictment alleged that a building, in fact, was burglarized. Sixth Circuit decisions have previously endorsed that kind of fact-based analysis. *See, e.g., Caruthers*, 458 F.3d 474-76 (analyzing a pre-1989 Tennessee third-degree burglary offense); *Taylor*, 800 F.3d at 719-720 (endorsing, in dicta, *Caruthers*'s method of analysis of a pre-1989 Tennessee third-degree burglary offense). *Mathis*, however, rules out such a fact-based approach. *See* 136 S. Ct. at 2251 ("How a given defendant actually perpetrated the

At the time of Walker's conviction, a third-degree burglary conviction under § 39-3-404's building provision required the state to prove four elements: "(1) the breach, (2) the entry, (3) any house of another other than dwelling house, and (4) felonious intent." *Petree v. State*, 530 S.W.2d 90, 94 (Tenn. Crim. App. 1975); *see also Duchac v. State*, 505 S.W.2d 237, 239 (Tenn. 1973) (same).[8] The Sixth Circuit has noted that, under § 39-3-404, the entry must be unlawful. *Caruthers*, 458 F.3d at 475. In *Taylor*, the Supreme Court defined generic burglary for purposes of the ACCA's enumerated-offenses clause as "any crime, 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." 495 U.S. at 599. By criminalizing the unlawful entry into a non-dwelling "house" (i.e., a building or structure) with intent to commit a felony, the text of § 39-3-404's building provision appears to have criminalized conduct constituting an ACCA predicate under the enumerated-offenses clause.

Tennessee case law, however, shows that § 39-3-404's building provision is overbroad. In *Fox*, the Tennessee

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crime—what we have referred to as the 'underlying brute facts or means' of commission—makes no difference; even if his conduct fits within the generic offense, the mismatch of elements saves the defendant from an ACCA sentence." (citation omitted*); see also United States v. Simmons*, No. 3:13-cr-00066, at *6-7 (M.D. Tenn. July 21, 2016) ("While the Sixth Circuit in both *Caruthers* and *Taylor* looked at the underlying charging documents to determine whether the defendant 'actually committed a generic burglary' *Mathis* now forecloses that approach." (citation omitted)).

[8] *Petree* and *Duchac* addressed Tennessee third-degree burglary under previously styled Tenn. Code Ann. § 39-904, which, as discussed below, had identical language, in relevant respects, to Tenn. Code Ann. § 39-3-404. *See Petree*, 530 S.W.2d at 94; *Duchac*, 505 S.W.2d at 239.

Supreme Court addressed whether a third-degree burglary conviction could be sustained where a defendant lawfully entered a public phone booth, but broke and opened a coin receptacle inside the phone booth. 214 S.W.2d at 26-27. At the time, Tenn. Code Ann. § 39-904, a predecessor version of § 39-3-404, provided: "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" ("§ 39-904's building provision"). Tenn. Code Ann. § 39-904 (1955) (effective Jan. 1, 1956) (repealed). Section 39-904 also provided: "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 . . . ." ("§ 39-904's safecracking provision"). *See* Public Acts of 1955, ch. 321, 1188.[9] *Fox* held that the "[d]efendants could lawfully enter the telephone booth, which is a business house within the meaning of Section 39-904, but by breaking into the money receptacle after lawful entry they would be guilty of burglary in the third degree." 214 S.W.2d at 27.

Although § 39-904 included a safecracking provision, *Fox*'s holding does not rely on or discuss it. Section 39-904's safecracking provision criminalized the opening or

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[9] Section 39-904's safecracking provision does not appear in the 1955 edition of the Code. The 1955 edition of the Code was enacted on February 2, 1955. Public Acts of 1955, ch. 6, 53-54. Section 39-904's safecracking provision was enacted on March 18, 1955. Public Acts of 1955, ch. 321, at 1188 (amending § 10913, a predecessor version of § 39-904 (*see* Tenn. Code Ann. at 909, 970 (2009) (showing that § 10913 of the 1932 Code became § 39-904 of the 1955 Code))). Section 39-904's safecracking provision took effect immediately upon its passage and was incorporated into § 39-904 thereafter. *See State ex rel. Wooten v. Bomar*, 352 S.W.2d 5, 5-6 (Tenn. 1961) (discussing the addition of § 39-904's safecracking provision to § 39-904).

attempted opening of "any vault, safe, or other secure place" after first "break[ing] and enter[ing] . . . any building," but the defendants in *Fox* had not broken and entered into the phone booth itself. *Fox*, 383 S.W.2d at 27. In holding that the defendants' conduct, opening a coin receptacle after having lawfully entered a public phone booth, violated § 39-904's building provision, *Fox* relied on the reasoning of *Page v. State*, 98 S.W.2d 98 (Tenn. 1936). *Id.*

In *Page v. State*, the Tennessee Supreme Court addressed whether a burglary conviction could be sustained where the defendant was lawfully inside a "business house," but broke and entered into a room within the business house. 98 S.W.2d at 98-99. The *Page* defendants had lawfully been inside a hotel, but broke into the hotel auditor's office and stole personal property. *Id.* at 98. They had not broken and entered into the hotel building itself.

Tennessee's burglary statute applying to dwellings, then § 10910, had a corresponding provision, § 10911, that criminalized the breaking of the "premises, or any safe or receptacle therein" even without a breaking into the dwelling itself. *See* Tenn. Code Ann. §§ 10910-11 (1932) (repealed).[10] The court explained that one could be convicted of "technical burglary," as defined in § 10910, "if, though lawfully in a dwelling house in the first instance, he breaks and enters into a room of such premises with intent to commit a felony." *Page*, 98 S.W.2d at 98-99. Although Tennessee's burglary statute applicable to non-

[10] Section 10910 provided: "Burglary is the breaking and entering into a dwelling house, by night, with intent to commit a felony." Section 10911 provided: "Any person who, after having entered upon the premises mentioned in the foregoing section, with intent to commit a felony, shall break any such premises, or any safe or receptacle therein, shall receive the same punishment as if he had broken into the premises in the first instance."

dwellings, then § 10913, did not have a corresponding provision that criminalized the breaking of the "premises, or any safe or receptacle therein" without a breaking into the non-dwelling itself, *see* Tenn. Code Ann. §§ 10910-19, *Page* concluded that, "[u]pon the same reasoning, one, although lawfully in a business house, commits the offense described in section 10913 of the Code when he breaks and enters into a room of that business house, which he has no right to enter, for the purpose of committing a felony." 98 S.W.2d at 99.

Just as *Page* applied § 10911, or its principle, to § 10913, *Fox* reasoned that "Section 39-902 [formerly, § 10911], or at least the same principle, applie[d] also to Section 39-904." *Fox*, 214 S.W.2d at 26-27. *Fox* concluded:

> The holding in the *Page* case applies to the facts in this case. Defendants could lawfully enter the telephone booth, which is a business house within the meaning of Section 39-904, but by breaking into the money receptacle after lawful entry they would be guilty of burglary in the third degree.

Id. at 27.

In *Heald v. State*, the Tennessee Court of Criminal Appeals was asked to overrule *Fox*'s holding "that the fact that a telephone booth was open to the public and hence lawfully entered did not prevent one breaking into the money receptacle from being guilty of third degree burglary." 472 S.W.2d 242, 243 (Tenn. Crim. App. 1970). *Heald* declined, opining, "We, being an intermediate appellate court, have no authority to overrule a clear and controlling authority promulgated by our Supreme Court." *Id.*

By the time of Walker's 1986 third-degree burglary conviction, § 39-904's building and safecracking provisions

had been restyled as §§ 39-3-404(a)(1) and (b)(1) respectively. Although restyled, the offense-conduct language remained the same. In *Caruthers*, the Sixth Circuit concluded that § 39-3-404 as a whole was overbroad or "nongeneric" because "it permitted third-degree burglary convictions for unlawful entry into coin receptacles and the like." 458 F.3d at 476 (citing *Fox*, 214 S.W.2d at 27). *Fox* was a building-provision case, not a safecracking-provision case. *Fox* has never been overruled. *Caruthers*'s holding that § 39-3-404 is overbroad because of *Fox* is binding on the Court. *Fox* makes § 39-3-404(a)(1) overbroad.

In support of its position that § 39-3-404(a)(1) is not overbroad post-*Mathis*, the Government cites *Harvey v. United States*, Nos. 1:11-CR-43-CLC-SKL-1, 1:13-CV-246-CLC (E.D. Tenn. Sept. 28, 2016). *Harvey* concluded that a defendant's convictions for third degree burglary under § 39-904 and § 39-3-404 qualified as ACCA predicates where his PSR showed that his "convictions involved breaking and entering into residences or businesses, not 'vault[s], safe[s], or other secure place[s].'" *Id.* at *8-9 (alterations in original). *Harvey* did not address whether § 39-904 and § 39-3-404—specifically, those statutes' building provisions—were overbroad because of *Fox*. *See also, e.g., Norwood v. United States*, Nos. 3:04-CR-141-TAV-HBG-1, 3:16-cv-601-TAV, 2016 WL 6892748, at *3 (E.D. Tenn. Nov. 22, 2016) (same). *But see United States v. Simmons*, No. 3:13-cr-00066, at *6-7 (M.D. Tenn. July 21, 2016) (concluding that a conviction under § 39-3-404(a)(1) does not qualify as an ACCA predicate following *Mathis*).

Because § 39-3-404(a)(1) could be violated where the "entry into, or remaining in, a building or structure" was lawful, a § 39-3-404(a)(1) offense is broader than generic burglary. Walker's 1986 Tennessee conviction for third-

degree burglary is no longer a violent felony under the ACCA after *Johnson*.[11]

c. Texas Robbery Conviction

At the time of the offense conduct on which Walker's 1982 robbery conviction was based, Texas Penal Code § 29.02 provided:

> (a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 of this code and with intent to obtain or maintain control of the property, he:

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[11] Walker argues that § 39-3-404(a)(1) is overbroad for other reasons, but those arguments lack merit. He argues that Tennessee decisions have held that a "breaking" can consist of merely raising a door latch or opening a shut door. (Cv. ECF No. 26 at 141.) Nothing in *Taylor*'s definition of generic burglary requires a violent breaking. Under *Taylor*, generic burglary is accomplished by means of an unlawful "entry into, or ***remaining in***" a building or structure, which requires no actual breaking at all. 495 U.S. at 599 (emphasis added). Walker also argues that Tennessee decisions have held that third-degree burglary can be committed when one merely breaks and enters a room within a building even though the initial entry into the building did not require a breaking. (Cv. ECF No. 26 at 142.) *In United States v. Jones*, the Sixth Circuit held that an offense under Tennessee's pre-1989 second-degree burglary statute is categorically a violent felony under the ACCA even though that statute applied to both buildings and rooms within buildings. 673 F.3d 497, 505 (6th Cir. 2012).

Walker also argues that it is unclear whether, under Tennessee law, the unlawful entry and felonious intent had to occur simultaneously, which Walker argues is required under *Taylor*'s definition of generic burglary. (Cv. ECF No. 26 at 142.) In affirming defendants' convictions for third-degree burglary, Tennessee appellate courts have routinely explained that those convictions could be affirmed because, *inter alia*, the unlawful entry and felonious intent had occurred simultaneously. *E.g., Duchac*, 505 S.W.2d at 240; *Hindman v. State*, 384 S.W.2d 18, 20 (Tenn. 1964); *Petree v. State*, 530 S.W.2d at 94.

> (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
>
> (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Tex. Penal Code § 29.02 (1974). The Texas Penal Code further provided, "'In the course of committing theft' means conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft." Tex. Penal Code § 29.01.[12] Robbery is not a felony listed in the ACCA's enumerated-offenses clause. *See* 18 U.S.C. § 924(e)(2)(B)(ii). The Sixth Circuit has not addressed whether a conviction under § 29.02 qualifies as a violent felony under the ACCA's use-of-force clause.

Section 29.02 is a divisible statute that criminalizes separate crimes: (a) robbery with bodily injury, and (b) robbery by threats or fear. *E.g., Walton v. State*, 575 S.W.2d 25, 25 n.1 (Tex. Crim. App. 1978) (reciting the elements for each offense). Section 29.02 as a whole is overbroad because it authorizes convictions based on reckless conduct. *See* Tex. Penal Code § 29.02(a)(1). In *McMurray*, the Sixth Circuit "conclude[d] that the 'use of physical force' clause of the ACCA, § 924(e)(2)(B)(i), requires more than reckless conduct." 653 F.3d at 375.

The Government argues that, because § 29.02 "is divisible on its face," distinguishing between § 29.02(a)(1)'s and (a)(2)'s respective robbery offenses, the "Court may use the modified categorical approach in order to determine which elements formed the basis of Walker's conviction." (Cv. ECF No. 23 at 122.) The Government notes that a Texas grand jury charged that Walker, on September 21, 1981, "while in the course of committing theft and

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[12] Sections 29.01 and 29.02 remain unchanged in relevant respects.

with intent to obtain and maintain control of the property" of his victim, "did then and there knowingly and intentionally cause bodily injury" to the victim "by pushing [him] to the ground." (Cv. ECF No. 23-3 at 134.) Walker's record of judgment shows that he pled guilty to this charged offense. (Cv. ECF No. 23-4 at 135.) The Government contends (1) that Walker's *Shepard* documents confirm that Walker was convicted under § 29.02(a)(1) for robbery with bodily injury and (2) that a § 29.02(a)(1) offense is categorically a violent felony under the ACCA's use-of-force clause. (Cv. ECF No. 23 at 123-24.) The Government argues that *McMurray* has no bearing on Walker's conviction because Walker's indictment shows that Walker was convicted of "knowing[] and intentional[]" robbery, not robbery committed recklessly.[13] (*Id.* at 128.)

The Court may examine Walker's *Shepard* documents to determine under which of § 29.02(a)'s provisions Walker was convicted because the statute and Texas decisional law define robbery in terms of two alternative offenses. To that end, Walker's *Shepard* documents confirm

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[13] The Government does not explicitly argue, but nevertheless suggests, that *McMurray* has been undermined by *Voisine v. United States*, 136 S. Ct. 2272 (2016). (Cv. ECF No. 23 at 125-27.) The Government states that recent Supreme Court authority, including *Voisine*, "makes clear . . . that the intentional, knowing, or reckless causation of bodily injury necessarily involves the use of force." (*Id.* at 125.) *Voisine* addressed whether 18 U.S.C. § 922(g)(9), which makes it a crime for anyone who has been convicted of a "misdemeanor crime of domestic violence" to possess a firearm, extends to misdemeanor assault convictions based on reckless conduct. 136 S. Ct. at 2276. *Voisine* held that it does. *Id.* at 2282. Courts in this Circuit, however, have rejected the argument that *Voisine* has undermined *McMurray*'s holding that crimes committed recklessly cannot qualify as ACCA predicates under the ACCA's use-of-force clause. *E.g., United States v. Wehunt*, ___ F. Supp. 3d ___, No. 1:16-cr-17-1, 2017 WL 347544, at *2 (E.D. Tenn. Jan. 24, 2017).

that he was convicted under § 29.02(a)(1) for robbery with bodily injury.

The Court may examine *Shepard* documents to rule out that Walker's conviction was based on reckless conduct only if § 29.02(a)(1), which criminalizes "intentionally, knowingly, or recklessly caus[ing] bodily injury to another," lists alternative mental state elements rather than alternative means of satisfying a single mental state element. If "means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution." *Mathis*, 136 S. Ct. at 2256.[14] The Government cites no authority that "intentionally, knowingly, or recklessly" lists alternative elements rather than means under § 29.02(a)(1) or that the Court may treat those mental state terms within § 29.02(a)(1) as alternative elements simply because § 29.02(a)(1) is divisible from § 29.02(a)(2).

Under Texas law, the elements of robbery with bodily injury under § 29.02(a)(1) are: "(1) a person (2) in the course of committing theft (3) with intent to obtain or maintain control of property (4) intentionally, knowingly or recklessly (5) causes bodily injury to another." *Walton*, 575 S.W.2d at 25 n.1 (quotation marks omitted). The fourth element—"intentionally, knowingly or recklessly"—is the culpable mental state element for the fifth element. *See Ex parte Santella,* 606 S.W.2d 331, 331-33 (Tex. Crim. App. 1980) (en banc) (discussing § 29.02 elements as included elements of an aggravated robbery offense).

In *Landrian v. State*, the Texas Court of Criminal Appeals discussed Texas's assault statute (to which *Mathis*

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[14] *Mathis* noted the possibility that a statute which criminalizes "intentionally, knowingly, or recklessly" committing a prohibited act may list "interchangeable means of satisfying a single *mens rea* element." 136 S. Ct. at 2253 n.3 (discussing Texas's assault statute, Tex. Penal Code § 22.01(a)(1)).

alluded) in reviewing a Texas aggravated assault conviction. 268 S.W.3d 532 (Tex. Crim. App. 2008). Under Texas law, a person commits assault if that person "intentionally, knowingly, or recklessly causes bodily injury to another" or "intentionally or knowingly threatens another with imminent bodily injury." Tex. Penal Code § 22.01(a)(1)-(2).[15] A person commits aggravated assault where that person commits assault and engages in conduct that qualifies as one of two statutory aggravating factors. *See* Tex. Penal Code § 22.02(a); *Landrian*, 268 S.W.3d at 536-37. In *Landrian*, the court addressed whether the trial court erred in instructing the jury on defendant's aggravated assault charge where the jury instructions, *inter alia*, did not require the jury to unanimously agree as to whether the defendant had caused bodily injury "intentionally or knowingly" or "recklessly." 268 S.W.3d at 534 & n.5.

Landrian explained that, under Texas law, although a "jury must agree that the defendant committed one specific crime," a jury is not required to "unanimously find that the defendant committed that crime in one specific way." *Id.* at 535. It noted that "[t]he gravamen of the offense of aggravated assault is the specific type of assault defined in Section 22.01," and "the *actus reus* for 'bodily injury' aggravated assault is 'causing bodily injury.'" *Id.* at 537. *Landrian* noted that, under the assault statute's bodily-injury provision, "any of three culpable mental states suffices: intentionally, knowingly, or recklessly causing bodily injury." *Id.* Addressing the legal significance of those mental states, the court explained:

> The legislature was apparently neutral about which of these three mental states accompanied the forbidden

[15] A third form of assault is offensive or provocative contact. *See* Tex. Penal Code § 22.01(a)(3).

> conduct because all three culpable mental states are listed together in a single phrase within a single subsection of the statute. There is no indication that the legislature intended for an "intentional" bodily injury assault to be a separate crime from a "knowing" bodily injury assault or that both of those differ from a "reckless" bodily injury assault. All three culpable mental states are strung together in a single phrase within a single subsection of the statute. All result in the same punishment. They are conceptually equivalent.

Id. The court noted that Texas courts traditionally had not required jury unanimity on mental state where multiple mental states were applicable:

> Because the Penal Code explicitly states that proof of a greater culpability is also proof of any lesser culpability, it would not matter, for example, if six members of a jury found that the defendant intentionally killed his victim and six members found that he had knowingly killed his victim.

Id. The court reasoned that "[t]he same is true with 'bodily injury' assault." *Id.* at 537-38.

Following *Mathis*, in *Gomez-Perez v. Lynch*, the Fifth Circuit cited *Landrian* and concluded that the clause "intentionally, knowingly, or recklessly" as used in Texas's assault statute lists alternative mental state means, not elements. 829 F.3d 323, 325 (5th Cir. 2016). The court explained: "Texas law has definitively answered the 'means or elements' question: the three culpable mental states in section 22.01(a)(1) are 'conceptually equivalent' means of satisfying the intent element, so jury unanimity as to a particular one is not required." *Id.* at 328 (citing *Landrian*, 268 S.W.3d at 537).

Although *Mathis*, *Landrian*, and *Gomez-Perez* addressed Texas's assault statute, those authorities strongly

suggest that the "intentionally, knowingly, or recklessly" clause in Texas's robbery statute likewise lists alternative means, not elements, of satisfying the culpable mental state element for robbery with bodily injury. Like § 22.01(a)(1), § 29.02(a)(1) provides that a person commits an offense who "intentionally, knowingly, or recklessly causes bodily injury to another." Tex. Penal Code §§ 22.01(a)(1), 29.02(a)(1). As in its assault counterpart, in § 29.02(a)(1), "all three culpable mental states are listed together in a single phrase within a single subsection of the statute." *Landrian*, 268 S.W.3d at 537. Like its assault counterpart, "[a]ll" of § 29.02(a)(1)'s mental states "result in the same punishment." *Id.*; *see* Tex. Penal Code § 29.02(b) (making any offense under § 29.02 a second degree felony); *cf. Mathis*, 136 S. Ct. at 2256 ("If statutory alternatives carry different punishments, . . . they must be elements."). *Landrian* did not limit its discussion or analysis of alternate mental state terms to Texas assault. Although decided after Walker's 1982 robbery conviction, *Landrian* did not purport to announce a new rule governing mental state elements for criminal offenses. *Mathis*, *Landrian*, and *Gomez-Perez* preclude examination of Walker's *Shepard* documents to rule out that his robbery conviction was based on reckless conduct.

The parties disagree about whether § 29.02(a)(1) is overbroad for other reasons. The Court need not decide those issues. Because a § 29.02(a)(1) conviction could be based on reckless conduct and § 29.02(a)(1)'s mental state element is indivisible, Walker's 1982 Texas conviction for robbery is no longer a violent felony under the ACCA after *Johnson*.

4. Johnson Relief

Because Walker no longer has at least three ACCA-predicate offenses after *Johnson*, he no longer qualifies as

an armed career criminal under the ACCA. Walker is entitled to be relief under *Johnson*. On this ground only, the § 2255 Motion is **GRANTED**.

IV. CONCLUSION

For the foregoing reasons, the § 2255 Motion is **GRANTED** in part and **DENIED** in part. The § 2255 Motion is **GRANTED** on the basis of Walker's *Johnson* challenge. Because Walker is entitled to relief under *Johnson*, the judgment in Criminal Case No. 07-20243 is **VACATED**, and the matter will be set for resentencing. The Probation Office is directed to prepare a Supplemental Presentence Investigation Report. The parties may file position papers once the Report has been prepared. The § 2255 Motion is **DENIED** on all other grounds.

This order is an "order granting a future resentencing" and "does not complete the § 2255 proceeding[s]." *United States v. Hadden*, 475 F.3d 652, 662 (4th Cir. 2007). Upon resentencing and entry of a new judgment in Criminal Case No. 07-20243, the Court will enter judgment in these § 2255 proceedings. *See generally id.* at 659-666 (discussing appealability of orders in § 2255 proceedings granting in part and denying in part the § 2255 motion); *Ajan v. United States*, 731 F.3d 629, 631-32 (6th Cir. 2013) (citing *Hadden* approvingly).

So ordered this 20th day of April, 2017.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-5782

JAMES WALKER,
Petitioner-Appellee

v.

UNITED STATES OF AMERICA,
Respondent-Appellant

No. 17-5783

UNITED STATES OF AMERICA,
Plaintiff-Appellant

v.

JAMES WALKER,
Defendant-Appellee

Filed: July 23, 2019

Before: ROGERS, STRANCH, and THAPAR, Circuit Judges.

The panel issued an order denying the petition for rehearing en banc. KETHLEDGE, J., delivered a separate opinion dissenting from the denial of rehearing en banc, in which MOORE, STRANCH, and WHITE, JJ., joined. STRANCH, J., delivered a separate dissenting opinion, in which MOORE, J., joined.

ORDER

PER CURIAM.

The court received a petition for rehearing en banc. The original panel has reviewed the petition and concludes that the issues raised in the petition were fully considered upon the original submission and decision. The petition was then circulated to the full court.[1] Less than a majority of the judges voted in favor of rehearing en banc.

Therefore, the petition is denied.

KETHLEDGE, Circuit Judge, dissenting from the denial of rehearing en banc.

Sometimes we should correct our own mistakes. The question here is whether a defendant "use[s] . . . physical force against the person of another"—as that phrase is used in 18 U.S.C. § 924(e)(2)(B)(i) and various other provisions of the criminal code, as well as in the Sentencing Guidelines—when the defendant is indifferent (which is to

[1] Judge Donald recused herself from participation in this decision.

say reckless) as to whether his force in fact applies to another person. Prior to 2016, the circuit courts uniformly answered no—that crimes involving the reckless use of force are not violent felonies (or, depending on the provision, crimes of violence) as defined by these provisions. *See United States v. Harper*, 875 F.3d 329, 332 (6th Cir. 2017) (collecting cases). In 2016, however, the Supreme Court decided *Voisine v. United States*, 136 S.Ct. 2272, (2016), which interpreted an altogether different provision, namely the definition of "misdemeanor crime of domestic violence" as defined in 18 U.S.C. § 921(a)(33)(A). That provision, unlike the one here, requires only a "use . . . of physical force" period, rather than a use of force "against the person of another." The Court in *Voisine* expressly limited its inquiry to the meaning of a single word in § 921(a)(33)(A)(ii)—"use"—which the Court interpreted to require a "volitional" application of force, as opposed to an accidental one. 136 S.Ct. at 2279. And the Court reasoned that, so long as the defendant's application of force is volitional, the word "use" is "indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct." *Id.* Thus, the Court held, crimes in which the defendant employs force recklessly may satisfy the "use of force" element of § 921(a)(33)(A)(ii). *See id.* at 2276.

Several courts have since extended *Voisine* to abrogate the pre-2016 consensus and hold that crimes involving the reckless use of force are violent felonies or crimes of violence as defined by § 924(e)(2)(B)(i) and its various counterparts. Unlike the provision at issue in *Voisine*, however, § 924(e)(2)(B)(i) does require the "use . . . of physical force against the person of another." That difference in text yields a difference in meaning. As a unani-

mous panel of our court explained in *Harper*: "The italicized language is a restrictive phrase that describes the particular type of 'use of physical force' necessary to satisfy [U.S.S.G. § 4B1.2, which is a Guidelines counterpart of § 924(e)(2)(B)(i)]. Specifically, § 4B1.2 requires not merely a volitional application of force, but a volitional application 'against the person of another.'" 875 F.3d at 331 (citation omitted). And that means "the force's application to another person must be volitional or deliberate." *Id.* Thus, "understood the way the English language is ordinarily understood," the phrase "use . . . of physical force against the person of another" requires "not merely recklessness as to the consequences of one's force, but knowledge or intent that the force apply to another person." *See id.* at 331-32.

Yet the law as described in *Harper* is not the law of our circuit, because by chance a conflicting decision, namely *United States v. Verwiebe*, 872 F.3d 408 (6th Cir.), amended, 874 F.3d 258 (6th Cir. 2017), was published days before *Harper* was. *Verwiebe* asserted that § 4B1.2(a) "define[s] crimes of violence nearly identically to [18 U.S.C.] § 921(a)(33)(A)(ii)"—which was the provision at issue in *Voisine*. *See Verwiebe*, 874 F.3d at 262; *see also United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018) (likewise characterizing these provisions as "nearly identical"). Respectfully, however, that assertion was mistaken, because § 4B1.2—unlike § 921(a)(33)(A)(ii)—requires the use of physical force "against the person of another." In the work of textual exegesis, the presence of a restrictive phrase in one provision but not another does not leave them nearly identical. And from that mistaken premise *Verwiebe* mistakenly held that § 4B1.2 requires only recklessness as to whether the defendant's force would apply to the person of another. *See Verwiebe*, 874 F.3d at 264.

In fairness, though, *Verwiebe* followed a trail already blazed by three other circuits. But none of the cases on which *Verwiebe* relied—namely *United States v. Pam*, 867 F.3d 1191, 1207-08 (10th Cir. 2017); *United States v. Mendez-Henriquez*, 847 F.3d 214, 221-22 (5th Cir. 2017); and *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016)—even acknowledged, much less addressed, the possibility that the restrictive phrase "against the person of another" could affect the *mens* rea required by § 4B1.2(a) and its various counterparts. Those cases therefore do not represent a reasoned consensus as to what that phrase means. Indeed they do not even purport to explain what it means. Instead they illustrate a dynamic that sometimes arises in the lower courts: "Loose language in one case hardens into a holding in another, and other cases follow suit. Eventually the caselaw takes on a life of its own, often lived at variance with the rules laid down in the statute itself." *DeLuca v. Blue Cross Blue Shield of Michigan*, 628 F.3d 743, 752 (6th Cir. 2010) (dissenting opinion).

We should have reheard this case. The issue here recurs frequently and typically doubles a defendant's sentence; and the opinion that bound us in *Harper* is seriously open to question. Moreover, any concerns about our ability to apply the rule in *Harper* are belied by the fact that, pre-*Voisine*, the lower courts had uniformly applied that same rule for more than a decade. Nor is there any merit to the assertion that §§ 921(a)(33)(A)(ii) and 924(e)(2)(B)(i) require the same *mens rea* (which, per *Voisine*, would be recklessness) because § 921(a)(33)(A)(ii) requires a "victim." That requirement, the argument goes, serves as the equivalent of the phrase "against the person of another" as used in § 924(e)(2)(B)(i). But again this is rough-cut textualism. True, the definition of "misdemeanor crime of domestic violence" in § 921(a)(33)(A)(ii) requires that there be a domestic "victim" in addition to a

"use of physical force[.]" Hence that provision implicitly requires that the defendant's "use of physical force" in fact harm another person. But there are legions of victims harmed by force applied recklessly. And nothing in the text of § 921(a)(33)(A)(ii) requires that the defendant act *knowingly or intentionally* with respect to that harm. Meanwhile, as shown above, § 924(e)(2)(B)(i) does include language to that effect: "against the person of another." Finally, though the decision whether to rehear a case en banc depends primarily on jurisprudential concerns, it bears mention that—by our inaction—we send back to prison, quite wrongly in my view, a 65-year-old man whose crime was possession of a dozen bullets and who had already served the sentence (88 months) that the district court thought sufficient.

"In sum, *Voisine* tells us what 'use' means, not what 'against the person of another' means." *Harper*, 875 F.3d at 333; *see also Voisine*, 136 S.Ct. at 2278 (observing that "'use[,]'" in that case, "is the only statutory language either party thinks relevant" in § 921(a)(33)(A)(ii)). That phrase on its face restricts the scope of one of the more important definitions in all of federal criminal law. Indeed the Supreme Court has said that "[t]he critical aspect" of the text at issue here "is that a crime of violence is one involving the 'use . . . of physical force *against the person or property of another*.'" *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (emphasis and ellipses in original). Yet our court has chosen to read that phrase—that "critical aspect"—to mean precisely nothing. And by denying rehearing we have rendered more intractable what has become a deep circuit split.

I respectfully dissent from the denial of rehearing en banc.

STRANCH, Circuit Judge, dissenting from the denial of rehearing en banc.

I join fully in Judge Kethledge's dissent from the denial of rehearing en banc. And while I recognize that our change of sides would not resolve the existing circuit split, I believe our newly constituted court would have found value in seeking to answer this question together and would have provided value in speaking to the defendants and families impacted by our decision.

I write separately because there is another reason we should take up the question of whether crimes that have a *mens* rea of recklessness necessarily involve the "use . . . of physical force against the person of another," as required by the ACCA's use-of-force clause. 18 U.S.C. § 924(e)(2)(B)(i). The Supreme Court has explicitly left open the possibility that the term "use of physical force" should be given "divergent readings" in § 921(a)(33)(A) and the ACCA "in light of differences in [the statutes'] contexts and purposes." *Voisine v. United States*, 136 S. Ct. 2272, 2280 n.4 (2016). Though § 921(a)(33)(A) deals with misdemeanor crimes of domestic violence, the ACCA's scope is restricted to violent felonies. And the Court found that the "common-law meaning of force" is a "comical misfit" with the "ACCA's definition of a violent felony," yet concluded that the "common-law meaning of force fits perfectly" in the context of misdemeanor crimes of domestic violence. *United States v. Castleman*, 572 U.S. 157, 163 (2014) (citation and internal quotation marks omitted). Indeed, the Court noted that "[t]he very reasons we gave for rejecting that meaning in defining a 'violent felony' are reasons to embrace it in defining a 'misdemeanor crime of domestic violence.'" *Id.*; *see also id.* at 164-65 (discussing § 921(a)(33)(A)'s context and purpose). Analysis of this issue thus also should include recognition

that the statutes' divergent "contexts and purposes" provide a substantial basis to conclude that the ACCA's requirement of the use of physical force *against the person of another* is more stringent than § 921(a)(33)(A)'s requirement of the use of physical force *period*.