

## **APPENDIX A**

**United States v. Crutchfield**

United States Court of Appeals for the Sixth Circuit

August 26, 2019, Filed

File Name: 19a0450n.06

Nos. 17-6358, 17-6360

**Reporter**

2019 U.S. App. LEXIS 25527 \*; 2019 FED App. 0450N (6th Cir.); \_\_ Fed. Appx. \_\_; 2019 WL 4013408

UNITED STATES OF AMERICA,  
Plaintiff-Appellant, v. DALTON  
CRUTCHFIELD, Defendant-Appellee.

**Notice:** NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**Subsequent History:** Rehearing denied by, En banc [United States v. Crutchfield, 2019 U.S. App. LEXIS 27782 \(6th Cir., Sept. 13, 2019\)](#)

**Prior History:** [\*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

[Crutchfield v. United States, 2017 U.S. Dist. LEXIS 155984 \(W.D. Tenn., Sept. 25, 2017\)](#)

**Case Summary**

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**Overview**

**HOLDINGS:** [1]-The order granting defendant's [28 U.S.C.S. § 2255](#) petition for habeas corpus was reversed, and the case was remanded for the reinstatement of his original 180-month sentence since his Tennessee aggravated burglary conviction categorically qualified as an ACCA predicate, his argument regarding entry was forfeited, as he did not assert that argument in his [§ 2255](#) motion in the district court, even if defendant had not forfeited that argument, it would still fail, and his second new argument on appeal, which focused on the intent element of Tennessee's burglary statute, likewise failed as that argument concerning the intent element of burglary had already been addressed and dismissed by the United States Supreme Court.

**Outcome**

Reversed and remanded.

**LexisNexis® Headnotes**

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

Criminal Law & Procedure > ... > Theft & Related Offenses > Burglary & Criminal Trespass > Burglary

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > Prior Felonies

**HN1 [+] Adjustments & Enhancements, Armed Career Criminals**

Aggravated burglary in Tennessee categorically qualifies as an Armed Career Criminal Act predicate.

Criminal Law & Procedure > ... > Theft & Related Offenses > Burglary & Criminal Trespass > Burglary

**HN2 [+] Burglary & Criminal Trespass, Burglary**

Burglary of a vehicle adapted for overnight accommodation constitutes a generic burglary under the Taylor decision.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

Criminal Law & Procedure > ... > Theft & Related Offenses > Burglary & Criminal Trespass > Burglary

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > Prior Felonies

**HN3 [+] Adjustments & Enhancements, Armed Career Criminals**

Tennessee aggravated burglary describes generic burglary and qualifies as a violent felony under the Armed Career Criminal Act.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > Prior Felonies

Criminal Law & Procedure > ... > Standards of Review > De Novo

Review > Conclusions of Law

## **HN4** [+] **Adjustments & Enhancements, Armed Career Criminals**

An appellate court reviews *de novo* a district court's determination regarding whether a prior conviction constitutes a violent felony under the Armed Career Criminal Act.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > Prior Felonies

Criminal Law & Procedure > Sentencing > Ranges

## **HN5** [+] **Adjustments & Enhancements, Armed Career Criminals**

The Armed Career Criminal Act (ACCA) provides that a person who violates [18 U.S.C.S. 922\(g\)](#) and also has three prior convictions for a violent felony shall be subjected to a fifteen-year mandatory minimum sentence of imprisonment. [18 U.S.C.S. § 924\(e\)\(1\)](#). The ACCA defines a violent felony as any crime punishable by imprisonment for a term exceeding one year that is burglary, arson, or extortion, or involves use of explosives. [18 U.S.C.S. § 924\(e\)\(2\)\(B\)\(ii\)](#).

**Counsel:** For DALTON ERIC CRUTCHFIELD, Petitioner - Appellee (17-6358): Madelyn Dianne Smothers, Federal Public Defender, Federal Public Defender, Memphis, TN.

For UNITED STATES OF AMERICA, Respondent - Appellant (17-6358): Annie Tauer Christoff, Office of the U.S. Attorney, Western District of Tennessee, Memphis, TN.

For UNITED STATES OF AMERICA, Plaintiff - Appellant (17-6360): Annie Tauer Christoff, Office of the U.S. Attorney, Western District of Tennessee, Memphis, TN.

For DALTON ERIC CRUTCHFIELD, Defendant - Appellee (17-6360): Madelyn Dianne Smothers, Federal Public Defender, Federal Public Defender, Memphis, TN.

**Judges:** BEFORE: CLAY, LARSEN, and READLER, Circuit Judges.

**Opinion by:** CLAY

### Opinion

**CLAY, Circuit Judge.** The government appeals the district court's order granting Dalton Crutchfield's petition for habeas corpus under [28 U.S.C. § 2255](#), and the district court's subsequent resentencing of Crutchfield to time served. The district court resentenced Crutchfield based on this Court's determination that Tennessee aggravated burglary, [Tenn. Code Ann. § 39-14-403\(a\)](#) (1997), does not qualify as a predicate offense under the [Armed Career Criminal Act \("ACCA"\)](#). See [United States](#)

*v. Stitt, 860 F.3d 854, 864-65 (6th Cir. 2017)* (en banc) [\*2] ("*Stitt I*"). But the Supreme Court reversed *Stitt I*. See *Stitt v. United States, 139 S. Ct. 399, 407-08, 202 L. Ed. 2d 364 (2018)* ("*Stitt II*"). And a recent panel of this Court, in a published decision, affirmed this Court's pre-*Stitt I* decisions holding that *HN1* [?] aggravated burglary in Tennessee categorically qualifies as an ACCA predicate. See *Brumbach v. United States, 929 F.3d 791, 794-95 (6th Cir. 2019)*. Therefore, we **REVERSE** the district court's order granting Crutchfield habeas relief and **REMAND** for the reinstatement of his original sentence.

## BACKGROUND

On February 22, 2011, a grand jury indicted Crutchfield of being a felon in possession of a firearm, in violation of *18 U.S.C. §§ 922(g)* and *924(a), (e)*. Crutchfield pleaded guilty pursuant to a written plea agreement. Upon receiving the presentence investigation report ("PSR"), Crutchfield filed a sentencing position statement noting that he had no objections to the PSR. At the sentencing hearing, Crutchfield acknowledged that he qualified as an armed career criminal based on his four prior convictions for Tennessee aggravated burglary and requested to be sentenced to the statutory minimum term of 180 months of incarceration. On September 14, 2011, the district court sentenced Crutchfield to 180 months of incarceration out of a guidelines range maximum of 210 months of incarceration.

On June [\*3] 17, 2016, Crutchfield filed a *28 U.S.C. § 2255* motion to vacate his sentence based on the Supreme Court's decision striking down the ACCA's residual clause. See *Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)*. While his *§ 2255* motion was pending, the en banc Sixth Circuit decided *Stitt I*. In *Stitt I*, the original panel had held that this Court's prior decisions in *United States v. Priddy, 808 F.3d 676 (6th Cir. 2015)* and *United States v. Nance, 481 F.3d 882 (6th Cir. 2007)* foreclosed the argument that Tennessee aggravated burglary did not qualify as a violent felony. See *United States v. Stitt, 637 F. App'x 927, 930-32 (6th Cir. 2016)*. On June 27, 2017, this Court, sitting en banc, reversed the original *Stitt* panel, overruled *Nance* and *Priddy*, and held that Tennessee aggravated burglary was not generic burglary because it included burglary of vehicles adapted for overnight accommodation. *Stitt I, 860 F. 3d at 857-63*.

In light of our decision in *Stitt I*, the government conceded with hesitation that Crutchfield's prior convictions for Tennessee aggravated burglary were no longer predicate offenses that subjected him to the mandatory minimum sentence he received. The district court granted Crutchfield's *§ 2255* motion and resentenced him to time served and three years of supervised release. However, the government maintained that *Stitt I* was incorrectly decided. It appealed the district court's granting of Crutchfield's *§ 2255* motion and the district court's [\*4] amended judgment, and this Court stayed the consolidated appeals pending the Supreme Court's decision in *Stitt II*. In *Stitt*

*II*, the Supreme Court explicitly overruled our en banc decision in *Stitt I*, holding that [HN2](#)[ burglary of a vehicle adapted for overnight accommodation constitutes a generic burglary under *Taylor*. *See Stitt II*, 139 S. Ct. at 407.

In a recent published decision, [Brumbach v. United States](#), 929 F.3d 791, (6th Cir. 2019), this Court considered, for the first time, whether a conviction under Tennessee's aggravated burglary statute qualifies as a violent felony under the ACCA in light of the Supreme Court's reversal of *Stitt I* in *Stitt II*. In *Brumbach*, this Court held that because of *Stitt II*'s reversal of *Stitt I*, *Nance* and *Priddy* once again constitute binding Sixth Circuit precedent and that, therefore, [HN3](#)[ Tennessee aggravated burglary describes generic burglary and qualifies as a violent felony under the ACCA. *Id. at 794* (reversing the district court's order granting the petitioner's habeas petition and remanding for reinstatement of the petitioner's original sentence).

## DISCUSSION

### I. Standard of Review

[HN4](#)[ This Court reviews "de novo a district court's determination regarding whether a prior conviction constitutes a 'violent felony' under the ACCA." *Brumbach*, 929 F.3d at 794 (quoting *Braden v. United States*, 817 F.3d 926, 930 (6th Cir. 2016)).

### II. Analysis [\*5]

The government's primary argument on appeal is that in light of the Supreme Court's decision in *Stitt II*, we have returned to the time when this Circuit treated Tennessee aggravated burglary categorically as a violent felony under the ACCA. On that account, the government asserts that Crutchfield's prior convictions place him back in ACCA mandatory minimum sentence territory, and therefore we should reverse the district court's granting of Crutchfield's [§ 2255](#) motion and reinstate his original sentence.

Crutchfield pleaded guilty to being a felon in possession of a firearm under [18 U.S.C. § 922\(g\)](#). He has four prior convictions for Tennessee aggravated burglary. [HN5](#)[ The ACCA provides that a person who violates [922\(g\)](#) and also has three prior convictions for a "violent felony" shall be subjected to a fifteen-year mandatory minimum sentence of imprisonment. *See 18 U.S.C. § 924(e)(1)*. Relevant to our analysis, the ACCA defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year . . . that is burglary, arson, or extortion, [or] involves use of explosives[.]" *Id. at § 924(e)(2)(B)(ii)*. At issue in this appeal is whether Tennessee's aggravated burglary statute falls within the ACCA's generic definition of burglary. Binding [\*6] precedent in our Circuit holds that it does. *See Brumbach*, 929 F.3d at 794; *see also Mann v. United States*, 773 Fed. Appx. 308, 309 (6th Cir. 2019) (citing *Brumbach*, 929 F.3d at 794-95) (explaining that, due to the Supreme Court's reversal of *Stitt I*,

"Tennessee aggravated burglary is an ACCA predicate"). Crutchfield's case is one of many that contain the very issue that this Court decided in *Brumbach*.

*Brumbach* considered whether, following *Stitt II*, this Court's decisions in *Nance* and *Priddy* were once again good law. [929 F.3d at 794-95](#). In *Brumbach*, this Court held that because the Supreme Court "reverse[d] the rationale by which we overruled *Nance*[,] . . . it necessarily follows that *Nance*'s holding . . . is once again the law of this circuit." [Id. at 794](#). Concluding that *Stitt II* had reinstated this Court's pre-*Stitt I* decisions in *Nance* and *Priddy*, *Brumbach* then held that these decisions foreclosed new arguments that Tennessee aggravated burglary is not generic burglary. [Id. at 795](#). *Brumbach*'s holding regarding the preclusive force of *Nance* and *Priddy* controls this case. [Salmi v. Sec'y of Health & Human Servs., 774 F.2d 685, 689 \(6th Cir. 1985\)](#) (explaining that a panel of this Court cannot overrule a prior panel decision absent an inconsistent decision of the Supreme Court or this Court sitting en banc).

Crutchfield raises two new issues on appeal that he did not raise in the district court. He separately [\*7] challenges both the "entry" and "intent" elements of Tennessee's burglary statute. First, he argues that "[b]ecause Tennessee law endorses such a broad concept of 'entry,' no Tennessee burglary conviction after 1974 can count as a generic burglary, or consequently, as an ACCA predicate." (Appellee Br. at 7.) Crutchfield's argument regarding entry is forfeited, as he did not assert this argument in his [§ 2255](#) motion in the district court.

[Frazier v. Jenkins, 770 F.3d 485, 497 \(6th Cir. 2014\)](#) ("Generally, we will not address arguments raised for the first time on appeal, . . . [and] we decline to do so here.") And even if Crutchfield had not forfeited this argument, it would still fail because *Brumbach* advanced an identical argument, and the Court dismissed it as precluded by controlling Sixth Circuit precedent. [Brumbach, 929 F.3d at 795](#) ("Even if there is merit to *Brumbach*'s arguments concerning Tennessee's definition of entry, a panel of this court cannot overrule *Nance*.").

Crutchfield's second new argument on appeal, which focuses on the "intent" element of Tennessee's burglary statute, likewise fails. Crutchfield challenges "whether [§ 39-14-402\(a\)\(3\)](#) fits within the generic definition of burglary because it allows a defendant to be convicted of burglary if he enters a building and [\*8] *then* forms the requisite intent to commit a crime while inside." (Appellee Br. at 28) (emphasis in original). Crutchfield forfeited this argument by failing to raise it below. See [Frazier, 770 F.3d at 497](#). The argument also fails on the merits; this argument concerning the "intent" element of burglary has already been addressed and dismissed by the Supreme Court. See [Quarles v. United States, 139 S. Ct. 1872, 1880, 204 L. Ed. 2d 200 \(2019\)](#) (decided during the pendency of Crutchfield's case and concluding "that generic remaining-in burglary occurs when the defendant forms the intent to commit a crime at any time while unlawfully remaining in a building or structure").

## CONCLUSION

Crutchfield's main issue on appeal—whether his convictions for Tennessee aggravated burglary qualify as violent felonies under the ACCA—has been addressed by this Court's recent published decision in *Brumbach*. Therefore, even if Crutchfield had not forfeited his new arguments by failing to raise them in the district court, both new arguments are foreclosed by existing precedent of this Court and the Supreme Court. Based on the foregoing, we **REVERSE** the district court's order granting Crutchfield habeas relief under [§ 2255](#) and **REMAND** for the reinstatement of his original 180-month sentence.

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**United States v. Crutchfield**

United States Court of Appeals for the Sixth Circuit

September 13, 2019, Filed

Nos. 17-6358/6360

**Reporter**

2019 U.S. App. LEXIS 27782 \*

UNITED STATES OF AMERICA,  
Plaintiff-Appellant, v. DALTON  
CRUTCHFIELD, Defendant-Appellee.

**Prior History:** [United States v. Crutchfield,](#)  
[2019 U.S. App. LEXIS 25527 \(6th Cir.\) \(6th](#)  
[Cir. Tenn., Aug. 26, 2019\)](#)

**Counsel:** [\*1] For Dalton Eric Crutchfield (17-6360, **17-6358**), Petitioner - Appellee, Defendant - Appellee: Madelyn Dianne Smothers, Federal Public Defender, Federal Public Defender, Memphis, TN.

For United States of America (17-6360, **17-6358**), Respondent - Appellant, Plaintiff - Appellant: Annie Tauer Christoff, Office of the U.S. Attorney, Western District of Tennessee, Memphis, TN.

**Judges:** BEFORE: CLAY, LARSEN, and READLER, Circuit Judges.

**Opinion**

**ORDER**

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that

the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court.\* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

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\* Judge Donald recused herself from participation in this ruling.

**Jackson v. United States**

United States Court of Appeals for the Sixth Circuit

September 17, 2019, Filed

Nos. 17-6080/6081

**Reporter**

2019 U.S. App. LEXIS 27959 \*

PATRICK JACKSON, aka Patrick Jones, Petitioner-Appellee, (No. **17-6080**) v. UNITED STATES OF AMERICA, Respondent-Appellant. UNITED STATES OF AMERICA Plaintiff-Appellant, (No. 17-6081) v. PATRICK JACKSON, aka Patrick Jones, Defendant-Appellee.

**Notice:** NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**Prior History:** [\*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

*United States v. Jackson, 2015 U.S. Dist. LEXIS 17925 (W.D. Tenn., Feb. 13, 2015)*

**Counsel:** For Patrick Jackson, aka: Patrick Jones (**17-6080**, 17-6081), Petitioner - Appellee: Mary C. Jermann-Robinson, Assistant Federal Public Defender, Federal Public Defender, Memphis, TN.

For United States of America (**17-6080**, 17-6081), Respondent - Appellant: Naya Bedini, Office of the U.S. Attorney, Western District of Tennessee, Memphis, TN.

**Judges:** Before: GUY, COOK, and GRIFFIN, Circuit Judges.

**Opinion**

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**ORDER**

The United States appeals a district court judgment granting Patrick Jackson's motion to vacate his sentence under 28 U.S.C. § 2255, as well as the amended judgment in his criminal proceeding. The appeals have been consolidated. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*.

In 2015, Jackson entered a guilty plea to a charge of being a felon in possession of a firearm. Because he had six prior convictions of aggravated burglary in Tennessee, he was sentenced under the [Armed Career Criminal Act \(ACCA\)](#) to 190 months of imprisonment. His conviction was affirmed on direct appeal.

In his motion to vacate, Jackson argued that his prior aggravated burglaries in Tennessee did [\*2] not qualify as violent felonies under the ACCA, relying on a case pending in this court at the time raising the argument that aggravated burglary under Tennessee law was broader than generic burglary because it included burglaries of vehicles used for overnight accommodation. After this court's en banc decision agreeing that aggravated burglary in Tennessee was not a qualifying conviction under the ACCA, the district court granted the motion and resentenced Jackson to 51 months of imprisonment to run concurrently with a state sentence he was serving. The government appealed from both judgments. The appeals were held in abeyance pending the Supreme Court's consideration of the case relied on by Jackson. The Supreme Court reversed this court's decision in [United States v. Stitt](#), 139 S. Ct. 399, 406, 202 L. Ed. 2d 364 (2018), and the government's brief asks that the district court's decisions be reversed and the original sentence reinstated, citing [United States v. Moody](#), 206 F.3d 609, 616 (6th Cir. 2000).

Jackson now argues that his aggravated burglary convictions do not qualify under the ACCA because Tennessee law defines

the entry of a habitation to include an entry by an instrument not intended to be used to commit a felony, relying on [State v. Crow](#), 517 S.W.2d 753, 755 (Tenn. 1974). Jackson also argues that the district court should consider on remand [\*3] whether aggravated burglary in Tennessee may be committed by forming an intent to commit a felony while remaining in a building rather than at the time of entry, citing [Quarles v. United States](#), 850 F.3d 836, 840 (6th Cir. 2017), *aff'd*, 139 S. Ct. 1872, 204 L. Ed. 2d 200 (2019).

We review the district court's decision de novo. *See Davis v. United States*, 900 F.3d 733, 735 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 1374, 203 L. Ed. 2d 612 (2019).

In [United States v. Nance](#), 481 F.3d 882, 888 (6th Cir. 2007), we held that Tennessee's aggravated burglary statute constituted a violent felony for purposes of the ACCA. *See United States v. Priddy*, 808 F.3d 676, 684 (6th Cir. 2015). Our decision in *Stitt*, overruling *Nance*, has now been reversed by the Supreme Court, and *Nance* is once again the law of this circuit. [Brumbach v. United States](#), 929 F.3d 791, 2019 WL 3024727, at \*3 (6th Cir. 2019).

Jackson's new arguments were not presented in the district court and are not properly before the court. *See Weinberger v. United States*, 268 F.3d 346, 352 (6th Cir. 2001). In any event, a panel of this court cannot overrule *Nance*'s holding. *See Brumbach*, 929 F.3d 791, 2019 WL 3024727, at \*3; [United States v. Elbe](#), 774 F.3d 885, 891 (6th Cir. 2014). Also, the Supreme Court has now held that criminal

Jackson v. United States

intent for burglary can be formed at any time while unlawfully remaining in a building. *Quarles v. United States, 139 S. Ct. 1872, 1880, 204 L. Ed. 2d 200 (2019)*.

Accordingly, we **REVERSE** the district court's judgments and **REMAND** with instructions to reinstate the original sentence.

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[United States v. Kemmerling](#)

United States Court of Appeals for the Sixth Circuit

September 17, 2019, Filed

Nos. 17-6515/6516

**Reporter**

2019 U.S. App. LEXIS 27960 \*

UNITED STATES OF AMERICA,  
Plaintiff-Appellant, v. JOSEPH  
KEMMERLING, Defendant-Appellee.

**Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION.** *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**Prior History:** [\*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

[United States v. Kemmerling, 612 Fed. Appx. 373, 2015 U.S. App. LEXIS 13443 \(6th Cir.\) \(6th Cir. Tenn., July 30, 2015\)](#)

**Case Summary**

**Overview**

**HOLDINGS:** [1]-Even if there were merit to appellant's argument that his aggravated burglary conviction should not have counted as an ACCA predicate, a panel of the appellate court could not overrule case law holding that a Tennessee conviction for aggravated burglary was a violent felony for purposes of the ACCA. Rather, that could only be done by an inconsistent decision of the United States Supreme Court or a decision of the en banc appellate court.

**Outcome**

Judgment granting motion to vacate reversed; case remanded with instructions to reinstate original sentence. Motions to file surreply and supplemental brief denied.

**LexisNexis® Headnotes**

Governments > Courts > Judicial Precedent

[HNI](#) [blue square] Courts, Judicial Precedent

A panel of the appellate court cannot overrule a judicial holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the ACCA. Rather, that can only be done by an inconsistent decision of the United States Supreme Court or a decision of the en banc appellate court.

**Counsel:** For United States of America, Plaintiff - Appellant (17-6515): Naya Bedini, Office of the U.S. Attorney, Western District of Tennessee, Memphis, TN.

For Joseph Kemmerling, Defendant - Appellee (17-6515): Madelyn Dianne Smothers, Federal Public Defender, Federal Public Defender, Federal Defender, Memphis, TN.

For Joseph Kemmerling, Petitioner - Appellee (17-6516): Madelyn Dianne Smothers, Federal Public Defender, Federal Public Defender, Federal Defender, Memphis, TN.

For United States of America, Respondent - Appellant (17-6516): Naya Bedini, Office of the U.S. Attorney, Western District of Tennessee, Memphis, TN.

**Judges:** Before: GUY, COOK, and GRIFFIN, Circuit Judges.

## Opinion

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### ORDER

In these consolidated cases, the United States appeals a district court order granting relief under [28 U.S.C. § 2255](#) to Joseph

Kemmerling from his enhanced sentence under the [Armed Career Criminal Act \("ACCA"\)](#) (No. 17-6516) and the amended judgment imposed following the grant of [§ 2255](#) relief (No. 17-6515). Kemmerling seeks leave to file a surreply and a supplemental brief. The parties have waived oral argument, and this panel unanimously agrees that oral argument [\*2] is not needed. *See Fed. R. App. P. 34(a).*

In 2014, Kemmerling pleaded guilty to being a felon in possession of a firearm, in violation of [18 U.S.C. § 922\(g\)\(1\)](#). The district court found that he was an armed career criminal under the Armed Career Criminal Act ("ACCA") based on two prior Tennessee convictions for aggravated burglary and one prior Tennessee conviction for robbery. The district court therefore sentenced him, pursuant to [18 U.S.C. § 924\(e\)](#), to 180 months of imprisonment and 2 years of supervised release. This court affirmed. *United States v. Kemmerling*, [612 F. App'x 373 \(6th Cir. 2015\)](#).

In June 2016, Kemmerling filed a motion to vacate arguing that his aggravated-burglary convictions no longer qualified as predicate offenses in light of *Johnson v. United States*, [135 S. Ct. 2551, 192 L. Ed. 2d 569 \(2015\)](#), and *United States v. Stitt*, a then-pending appeal before the en banc court. After the en banc court overruled *United States v. Nance*, [481 F.3d 882 \(6th Cir. 2007\)](#), and held that aggravated burglary in Tennessee, see [Tenn. Code Ann. §§ 39-14-401, 39-14-402, 39-14-403](#), does not qualify as a violent felony pursuant to [18 U.S.C. § 924\(e\)\(2\)\(B\)\(ii\)](#) due to the overbreadth of its definition of a "habitation," *United States v.*

[\*Stitt, 860 F.3d 854 \(6th Cir. 2017\)\*](#) (en banc) ("*Stitt I*"), Kemmerling filed a supplement requesting that the district court immediately grant his motion. The government conceded that Kemmerling was entitled to relief if the decision in *Stitt I* stood but preserved its argument that *Stitt I* was wrongly decided and might [\*3] be overturned by the Supreme Court. The district court then granted the motion to vacate and resentenced Kemmerling to 84 months of imprisonment and 2 years of supervised release. The government appealed, and this court held the case in abeyance pending the Supreme Court's evaluation of *Stitt I*. On December 10, 2018, the Supreme Court held that burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation qualifies as the enumerated violent felony of burglary for purposes of [18 U.S.C. § 924\(e\)\(2\)\(B\)\(ii\)](#). *United States v. Stitt, 139 S. Ct. 399, 403-04, 202 L. Ed. 2d 364 (2018)* ("*Stitt II*").

In light of the Supreme Court's decision, the government argues that this court should reverse the district court's grant of Kemmerling's motion and remand to the district court to reinstate the original sentence. In response, Kemmerling claims for the first time on appeal that Tennessee aggravated burglary does not qualify as a predicate offense because Tennessee's interpretation of "entry" creates an overbroad definition when compared to generic burglary. Kemmerling also seeks permission to file a surreply on the basis that the government raises new arguments in its reply, but the government's reply simply responds to his newly raised

argument, and [\*4] his proposed surreply expands on the arguments made in his response brief. A surreply is not justified here. *See Modesty v. Shockley, 434 F. App'x 469, 472 (6th Cir. 2011)*.

We review the district court's decision de novo. *See Davis v. United States, 900 F.3d 733, 735 (6th Cir. 2018)*, cert. denied, 139 S. Ct. 1374, 203 L. Ed. 2d 612 (2019).

Kemmerling argues that his aggravated burglary conviction should no longer count as an ACCA predicate because the Tennessee courts define the entry element of the State's burglary statutes more broadly than generic burglary by including intrusions by instrument that are the functional equivalent of attempted burglary. But as the government argues—and we recently held—*Nance* "is once again the law of this circuit." [Brumbach v. United States, 929 F.3d 791, 794 \(6th Cir. 2019\)](#).

Accordingly, even if there were merit to Kemmerling's argument, [HN1](#) a panel of this court cannot overrule *Nance*'s holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the ACCA. *See id.* Rather, that "can only be done by an 'inconsistent decision' of the Supreme Court or, like we did briefly with *Stitt I*, a decision of the en banc court." *Id. at 795* (quoting [Salmi v. Sec'y of Health & Human Servs., 774 F.2d 685, 689 \(6th Cir. 1985\)](#)).<sup>1</sup>

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<sup>1</sup> Kemmerling briefly argues without development that Tennessee aggravated burglary sweeps more broadly than generic burglary because it does not contain an element of criminal intent at the time of entry, but that argument is also foreclosed by binding precedent. *See United States v. Ferguson, 868 F.3d 514, 515 (6th Cir. 2017)* (citing [United States v. Priddy, 808 F.3d 676, 684-85 \(6th Cir.](#)

## United States v. Kemmerling

Accordingly, we *REVERSE* the district court's judgment granting the motion to vacate and **REMAND** to the district court with instructions to reinstate Kemmerling's original sentence. The motions [\*5] to file a surreply and to file a supplemental brief are **DENIED**.

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*United States v. Rogers*

United States Court of Appeals for the Sixth Circuit

September 17, 2019, Filed

Nos. 17-5914/5917/6489

**Reporter**

2019 U.S. App. LEXIS 27956 \*

UNITED STATES OF AMERICA,  
Plaintiff-Appellant, v. DEMARCUS  
ROGERS, Defendant-  
Appellee. DEMARCUS ROGERS,  
Petitioner-Appellee, v. UNITED STATES  
OF AMERICA, Respondent-Appellant.

**Notice:** NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**Prior History:** [\*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

*United States v. Rogers, 261 Fed. Appx. 849, 2008 U.S. App. LEXIS 1026 (6th Cir.) (6th Cir. Ky., Jan. 10, 2008)*

**Counsel:** For United States of America (**17-5914**, 17-6489, 17-5917), Plaintiff - Appellant: Kevin G. Ritz, Assistant U.S. Attorney, Office of the U.S. Attorney, Western District of Tennessee, Memphis, TN.

For Demarcus Rogers (**17-5914**, 17-6489), Defendant - Appellee: Tyrone Jemal Paylor, Federal Public Defender, Federal Defender, Memphis, TN.

For Demarcus Rogers, Petitioner - Appellee (17-5917): Kevin G. Ritz, Assistant U.S. Attorney, Office of the U.S. Attorney, Western District of Tennessee, Memphis, TN.

**Judges:** Before: GUY, COOK, and GRIFFIN, Circuit Judges.

**Opinion**

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**ORDER**

In these consolidated cases, the government appeals a district court order granting relief under 28 U.S.C. § 2255 to DeMarcus Rogers from his enhanced sentence under

the [Armed Career Criminal Act](#) (ACCA) (No. 17-5917), the amended judgment entered in the criminal case (No. [17-5914](#)), and the subsequent judgment entered by the district court in the [§ 2255](#) proceeding (No. 17-6489). The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a).*

In 2006, Rogers pleaded guilty to being a felon in possession of a firearm, in violation of [18 U.S.C. § 922\(g\)](#), and [\[\\*2\]](#) was sentenced as an armed career criminal to 327 months in prison, followed by three years of supervised release. We affirmed his conviction and sentence, [United States v. Rogers, 261 F. App'x 849, 850 \(6th Cir. 2008\)](#), and the denial of his first [§ 2255](#) motion, [Rogers v. United States, 561 F. App'x 440, 444 \(6th Cir. 2014\)](#).

In 2016, Rogers received permission to file a second or successive [§ 2255](#) motion challenging his armed career criminal designation based on [Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 \(2015\)](#), on the ground that his Tennessee aggravated burglary conviction no longer qualified as a violent felony for purposes of the ACCA. While that [§ 2255](#) motion was pending, we overruled circuit precedent, *see United States v. Nance, 481 F.3d 882 (6th Cir. 2007)*, and held that a conviction under Tennessee's aggravated burglary statute did not qualify as an ACCA predicate because the statute swept more broadly than generic burglary by including habitable vehicles and movable enclosures. [United States v. Stitt, 860 F.3d 854, 858 \(6th Cir. 2017\)](#) (en banc) ("*Stitt I*"). Based on that decision, the

district court granted Rogers's [§ 2255](#) motion, resentencing him to time served and the same three-year period of supervised release.

The government appealed, and we granted its request to hold the case in abeyance while it sought Supreme Court review in *Stitt*. The Supreme Court granted certiorari and reversed our decision in *Stitt I*, holding that Tennessee's aggravated burglary statute is not rendered [\[\\*3\]](#) overly broad by its coverage of movable structures "designed or adapted for overnight use." [United States v. Stitt, 139 S. Ct. 399, 407, 202 L. Ed. 2d 364 \(2018\)](#) ("*Stitt II*").

The government now argues that, in light of the Supreme Court's decision, Rogers is no longer entitled to relief from his ACCA sentence, so the district court's judgment should be reversed and the case remanded for reinstatement of his original sentence. Rogers does not dispute that he is no longer entitled to relief based on *Stitt I* but offers two alternative arguments for why the district court's judgment should be affirmed: 1) the entry element of Tennessee's burglary statutes is defined more broadly than the entry element of generic burglary, and 2) Tennessee's burglary statutes are overly broad because their "remaining in" variants do not require the perpetrator to have the intent to commit a crime at the time of entry.

We review the district court's decision de novo. *See Davis v. United States, 900 F.3d 733, 735 (6th Cir. 2018)*, cert. denied, 139 S. Ct. 1374, 203 L. Ed. 2d 612 (2019).

Rogers first argues that his aggravated

burglary conviction should no longer count as an ACCA predicate because the Tennessee courts define the entry element of the state's burglary statutes more broadly than generic burglary by including intrusions by instrument that are the functional equivalent [\*4] of attempted burglary. But as the government argues—and we recently held—*Nance* "is once again the law of this circuit." *Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019). Accordingly, even if there were merit to Rogers's argument, a panel of this court cannot overrule *Nance*'s holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the ACCA. See *id. at 795*. Rather, that "can only be done by an 'inconsistent decision' of the Supreme Court or, like we did briefly with *Stitt I*, a decision of the en banc court." *Id.* (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)).

Rogers's second argument—that the "remaining in" variants of Tennessee's burglary statutes are broader than generic burglary because they do not contain an element of criminal intent at the time of entry—is also foreclosed by binding precedent. See *United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017) (citing *United States v. Priddy*, 808 F.3d 676, 684-85 (6th Cir. 2015)), cert. denied, 139 S. Ct. 2712 (2019); see also *Quarles v. United States*, 139 S. Ct. 1872, 1880, 204 L. Ed. 2d 200 (2019).

For these reasons, we **REVERSE** the district court's grant of [§ 2255](#) relief and **REMAND** with instructions to reinstate the

original sentence. Rogers's motion to file a supplemental brief is **DENIED**.

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**Finch v. United States**

United States Court of Appeals for the Sixth Circuit

September 18, 2019, Filed

No. 17-5965

**Reporter**

2019 U.S. App. LEXIS 28335 \*

OWEN LEWIS FINCH, Petitioner-Appellee, v. UNITED STATES OF AMERICA, Respondent-Appellant.

**Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION.** *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**Prior History:** [\*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

**HOLDINGS:** [1]-A petitioner was not entitled to relief under [28 U.S.C.S. § 2255](#) from his enhanced sentence under the Armed Career Criminal Act (ACCA) because a panel of the U.S. Court of Appeals for the Sixth Circuit could not overrule United States v. Nance's holding that a Tennessee conviction for aggravated burglary was a violent felony for purposes of the ACCA; [2]-The petitioner's argument that the "remaining in" variants of Tennessee's burglary statutes were broader than generic burglary because they did not contain an element of criminal intent at the time of entry was also foreclosed by binding precedent.

**Outcome**

Judgment reversed and remanded.

**LexisNexis® Headnotes**

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[Finch v. United States, 2017 U.S. Dist. LEXIS 131134 \(W.D. Tenn., Aug. 17, 2017\)](#)

**Case Summary**

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**Overview**

Criminal Law &  
Procedure > Appeals > Procedural  
Matters > Notice of Appeal

## **HN1** [blue square] Procedural Matters, Notice of Appeal

A mistake in designating the judgment appealed from is not always fatal, so long as the intent to appeal from a specific ruling can fairly be inferred by probing the notice and the other party was not misled or prejudiced.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

Governments > Courts > Judicial Precedent

Criminal Law & Procedure > ... > Burglary & Criminal Trespass > Burglary > Penalties

## **HN2** [blue square] Adjustments & Enhancements, Armed Career Criminals

United States v. Nance is once again the law of the U.S. Court of Appeals for the Sixth Circuit. A panel of the Sixth Circuit cannot overrule Nance's holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the ACCA. Rather, that can only be done by an inconsistent decision of the U.S. Supreme Court or a decision of the en banc court.

**Counsel:** For Owen Lewis Finch, Petitioner - Appellee: Tyrone Jemal Paylor, Federal Public Defender, Federal Defender, Memphis, TN.

For United States of America, Respondent -

Appellant: Annie Tauer Christoff, Office of the U.S. Attorney, Western District of Tennessee, Memphis, TN.

**Judges:** Before: GUY, COOK, and GRIFFIN, Circuit Judges.

## **Opinion**

### **ORDER**

The government appeals a district court judgment granting relief under [28 U.S.C. § 2255](#) to Owen Finch from his enhanced sentence under the [Armed Career Criminal Act \("ACCA"\)](#). The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*.

The district court sentenced Finch as an armed career criminal to 180 months of imprisonment followed by three years of supervised release after he pleaded guilty to being a felon in possession of a firearm, in violation of [18 U.S.C. § 922\(g\)](#). *United States v. Finch*, No. 1:07-cr-10099 (W.D. Tenn. May 21, 2008). Subsequently, Finch filed a [§ 2255](#) motion, arguing that, in light of the Supreme Court's decision in [Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 \(2015\)](#), his Tennessee conviction for aggravated burglary no longer qualified as an enumerated offense under the ACCA. While the [§ 2255](#) motion was pending, we overruled [\*2] prior circuit precedent, *see United States v. Nance, 481 F.3d 882 (6th Cir. 2007)*, and held that a conviction under Tennessee's aggravated burglary statute did not qualify as an ACCA predicate offense

because the statute swept more broadly than generic burglary by including habitable vehicles and movable enclosures. *United States v. Stitt*, 860 F.3d 854, 858 (6th Cir. 2017) (en banc) ("*Stitt I*"). Based on that decision, the district court granted Finch's § 2255 motion and resentenced him to time served followed by three years of supervised release.

The government appealed, and briefing was held in abeyance pending the Supreme Court's decision in *United States v. Stitt*, 139 S. Ct. 399, 202 L. Ed. 2d 364 (2018) ("*Stitt II*"). In *Stitt II*, the Supreme Court reversed this court's decision, holding that Tennessee's aggravated burglary statute was not rendered overly broad by its coverage of mobile structures "designed or adapted for overnight use." *Id.* at 407. The government now argues that, in light of the Supreme Court's decision in *Stitt II*, Finch is no longer entitled to relief under § 2255 and that the case should be remanded for reinstatement of Finch's original sentence. Finch does not dispute that he is no longer entitled to relief based on *Stitt I* but argues that (1) this court lacks jurisdiction over an appeal of his amended judgment; (2) the entry element of Tennessee's [\*3] burglary statutes is defined more broadly than the entry element of generic burglary; and (3) Tennessee's burglary statutes are overly broad because their "remaining in" variants do not require the perpetrator to have the intent to commit a crime at the time of entry.

We review the district court's decision de novo. *See Davis v. United States*, 900 F.3d 733, 735 (6th Cir. 2018), cert. denied, 139

S. Ct. 1374, 203 L. Ed. 2d 612 (2019).

Finch first argues that because the government failed to appeal the amended judgment entered in his criminal case, we lack jurisdiction to hear this appeal. However, *HN1*[\*4] "[a] mistake in designating the judgment appealed from is not always fatal, so long as the intent to appeal from a specific ruling can fairly be inferred by probing the notice and the other party was not misled or prejudiced." *Ramsey v. Penn Mut. Life Ins.*, 787 F.3d 813, 819 (6th Cir. 2015) (alteration in original) (quoting *Sanabria v. United States*, 437 U.S. 54, 67 n.21, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978)). Because the notice of appeal filed by the government references both the civil and criminal cases, the government's intent is clear and we have jurisdiction over the appeal.

Finch also argues that his aggravated burglary conviction should no longer count as an ACCA predicate offense because Tennessee courts define the entry element of the state's burglary statutes more broadly than generic burglary by including intrusions by instrument [\*4] that are the functional equivalent of attempted burglary. But as the government argues—and we recently *HN2*[\*5] *held—Nance* "is once again the law of this circuit." *Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019). Accordingly, even if there were merit to Finch's argument, a panel of this court cannot overrule *Nance*'s holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the ACCA. *See id.* Rather, that "can only be done by an 'inconsistent decision' of the

Supreme Court or, like we did briefly with *Stitt I*, a decision of the en banc court." *Id. at 795* (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)).

Finally, Finch's argument that the "remaining in" variants of Tennessee's burglary statutes are broader than generic burglary because they do not contain an element of criminal intent at the time of entry is also foreclosed by binding precedent. See *United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017) (citing *United States v. Priddy*, 808 F.3d 676, 684-85 (6th Cir. 2015)); see also *Quarles v. United States*, 139 S. Ct. 1872, 1880, 204 L. Ed. 2d 200 (2019).

For these reasons, we **REVERSE** the district court's grant of § 2255 relief and **REMAND** with instructions to reinstate the original sentence. Additionally, we **DENY** the motion to supplement.

**Norris v. United States**

United States Court of Appeals for the Sixth Circuit

September 19, 2019, Filed

Nos. 17-5983/5985

**Reporter**

2019 U.S. App. LEXIS 28491 \*

TEDDY NORRIS, Petitioner-Appellee, v.  
UNITED STATES OF AMERICA,  
Respondent-Appellant. & UNITED  
STATES OF AMERICA, Plaintiff-  
Appellant, v. TEDDY NORRIS, Defendant-  
Appellee.

**Notice:** NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**Prior History:** [\*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

[United States v. Norris, 2011 U.S. App. LEXIS 26927 \(6th Cir. Tenn., Dec. 16, 2011\)](#)

**Counsel:** For Teddy Norris, Petitioner - Appellee (17-5983): Ross A. Sampson, Memphis, TN.

For United States of America, Respondent - Appellant (17-5983): Kevin G. Ritz, Assistant U.S. Attorney, Office of the U.S. Attorney, Memphis, TN.

For United States of America, Plaintiff - Appellant (17-5985): Kevin G. Ritz, Assistant U.S. Attorney, Office of the U.S. Attorney, Memphis, TN.

For Teddy Norris, Defendant - Appellee (17-5985): Tyrone Jemal Paylor, Federal Public Defender, Memphis, TN.

**Judges:** Before: NORRIS, SILER, and SUTTON, Circuit Judges.

**Opinion**

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**ORDER**

In these consolidated cases, the government appeals a district court order granting relief under [28 U.S.C. § 2255](#) to Teddy Norris from his enhanced sentence under the

Armed Career Criminal Act (ACCA) (No. 17-5983) and the amended judgment entered in the criminal case (No. 17-5985). The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*.

After pleading guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g), Norris was sentenced as an armed career criminal to 180 months in prison. We affirmed that sentence. United States v. Norris, No. 10-6548, 2011 U.S. App. LEXIS 26927 (6th Cir. Dec. 16, 2011) (unpublished) [\*2].

Norris later filed his § 2255 motion challenging his armed career criminal designation based on Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), on the ground that his Tennessee aggravated burglary convictions no longer qualified as violent felonies for purposes of the ACCA, 18 U.S.C. § 924(e). While that § 2255 motion was pending, we overruled circuit precedent, *see United States v. Nance, 481 F.3d 882 (6th Cir. 2007)*, and held that a conviction under Tennessee's aggravated burglary statute did not qualify as an ACCA predicate because the statute swept more broadly than generic burglary by including habitable vehicles and movable enclosures. United States v. Stitt, 860 F.3d 854, 858 (6th Cir. 2017) (en banc) ("Stitt I"). Based on that decision, the district court granted Norris's § 2255 motion, resentencing him to time served.

The government appealed, and we granted its request to hold the case in abeyance

while it sought Supreme Court review in *Stitt*. The Supreme Court granted certiorari and reversed our decision in *Stitt I*, holding that Tennessee's aggravated burglary statute is not rendered overly broad by its coverage of movable structures "designed or adapted for overnight use." United States v. Stitt, 139 S. Ct. 399, 407, 202 L. Ed. 2d 364 (2018) ("Stitt II").

The government now argues that, in light of the Supreme Court's decision, Norris is no longer entitled to relief from his ACCA [\*3] sentence, so the district court's judgment should be reversed and the case remanded for reinstatement of his original sentence. Norris does not dispute that he is no longer entitled to relief based on *Stitt I* but offers two alternative arguments for why the district court's judgment should be affirmed: 1) the entry element of Tennessee's burglary statutes is defined more broadly than the entry element of generic burglary, and 2) Tennessee's burglary statutes are overly broad because their "remaining in" variants do not require the perpetrator to have the intent to commit a crime at the time of entry.

We review the district court's factual findings for clear error and its conclusions of law de novo. Davis v. United States, 900 F.3d 733, 735 (6th Cir. 2018), cert. denied, 139 S. Ct. 1374, 203 L. Ed. 2d 612 (2019).

Norris first argues that his aggravated burglary convictions should no longer count as ACCA predicates because the Tennessee courts define the entry element of the state's burglary statutes more broadly than generic burglary by including intrusions by

instrument that are the functional equivalent of attempted burglary. But as the government argues—and we recently held—*Nance* "is once again the law of this circuit." *Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019). Accordingly, even if there were merit to Norris's argument, [\*4] a panel of this court cannot overrule *Nance*'s holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the ACCA. *See id. at 794-95*. Rather, that "can only be done by an 'inconsistent decision' of the Supreme Court or, like we did briefly with *Stitt I*, a decision of the en banc court." *Id. at 795* (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)).

Norris's second argument—that the "remaining in" variants of Tennessee's burglary statutes are broader than generic burglary because they do not contain an element of criminal intent at the time of entry—is also foreclosed by binding precedent. *See United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017) (citing *United States v. Priddy*, 808 F.3d 676, 684-85 (6th Cir. 2015)); *see also Quarles v. United States*, 139 S. Ct. 1872, 1880, 204 L. Ed. 2d 200 (2019).

For these reasons, we **REVERSE** the district court's grant of § 2255 relief and **REMAND** with instructions to reinstate the original sentence. We also **DENY** Norris's motion to supplement his appellate brief.

*Mann v. United States*

United States Court of Appeals for the Sixth Circuit

July 18, 2019, Filed

File Name: 19a0371n.06

Case Nos. 17-6486/6487

**Reporter**

773 Fed. Appx. 308 \*; 2019 U.S. App. LEXIS 21252 \*\*; 2019 FED App. 0371N (6th Cir.); 2019 WL 3229130

MARCUS MANN, Petitioner-Appellee, v.  
UNITED STATES OF AMERICA,  
Respondent-Appellant.UNITED STATES  
OF AMERICA, Plaintiff-Appellant, v.  
MARCUS MANN, Defendant-Appellee.

**Notice:** NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**Subsequent History:** Rehearing denied by, En banc *Mann v. United States, 2019 U.S. App. LEXIS 29062 (6th Cir., Sept. 25, 2019)*

**Prior History:** \*\*1 ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.

**Counsel:** For MARCUS MANN (#24539-076) (**17-6486**, 17-6487), Petitioner - Appellee(**17-6486**): Tyrone Jemal Paylor, Federal Public Defender, Federal Defender, Memphis, TN.

For UNITED STATES OF AMERICA (**17-6486**, 17-6487), Respondent - Appellant, Plaintiff - Appellant: Naya Bedini, Office of the U.S. Attorney, Memphis, TN; James W. Powell, Assistant U.S. Attorney, Office of the U.S. Attorney, Jackson, TN.

**Judges:** BEFORE: GUY, THAPAR, and NALBANDIAN, Circuit Judges.

**Opinion**

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[\*309] PER CURIAM. Marcus Mann pled guilty to possessing a firearm as a convicted felon. See 18 U.S.C. § 922(g). Because he already had several prior convictions under Tennessee law (two for aggravated burglary, one for simple burglary, and one for aggravated assault), the district court enhanced Mann's sentence to the fifteen-

year minimum under the *Armed Career Criminal Act (ACCA)*. See *id.* § 924(e)(1).

Several years later, Mann challenged his sentence through a motion for post-conviction relief. See [28 U.S.C. § 2255](#).

While his [§ 2255](#) motion was pending, the en banc Sixth Circuit determined that Tennessee aggravated burglary was not an ACCA predicate. [United States v. Stitt, 860 F.3d 854, 856 \(6th Cir. 2017\)](#) (en banc).

Relying on *Stitt*, the district court reviewing Mann's [\*\*2] [§ 2255](#) motion determined that he no longer qualified for an ACCA enhancement and reduced his sentence to ten years. But Mann's victory was short-lived because the government filed a protective appeal, and a few months later the Supreme Court reversed *Stitt*. [United States v. Stitt, 139 S. Ct. 399, 406-08, 202 L. Ed. 2d 364 \(2018\)](#).

The Supreme Court's reversal means that our circuit returns to its pre-*Stitt* precedent.

[Brumbach v. United States, Nos. 18-5703/5705, 2019 U.S. App. LEXIS 20612, 2019 WL 3024727, at \\*3, 929F.3d791 \(6th Cir. July 11, 2019\)](#). And under that precedent, Tennessee aggravated burglary is an ACCA predicate. *Id.* (citing [United States v. Nance, 481 F.3d 882, 888 \(6th Cir. 2007\)](#)).

Thus, although the district court was right to reduce Mann's sentence, the law has changed during this appeal and made Mann's original sentence proper again. Therefore, we VACATE and REMAND with instructions to reinstate the original sentence.

**Mann v. United States**

United States Court of Appeals for the Sixth Circuit

September 25, 2019, Filed

Nos. 17-6486/6487

**Reporter**

2019 U.S. App. LEXIS 29062 \*

MARCUS MANN, Petitioner-Appellee, v.  
UNITED STATES OF AMERICA,  
Respondent-Appellant.UNITED STATES  
OF AMERICA, Plaintiff-Appellant, v.  
MARCUS MANN Defendant-Appellee.

**Prior History:** [Mann v. United States, 773 Fed. Appx. 308, 2019 U.S. App. LEXIS 21252 \(6th Cir.\) \(6th Cir. Tenn., July 18, 2019\)](#)

**Counsel:** [\*1] For Marcus Mann, Petitioner - Appellee (17-6486): Tyrone Jemal Paylor, Federal Public Defender, Federal Defender, Memphis, TN.

For United States of America, Respondent - Appellant (17-6486): Naya Bedini, Kevin G. Ritz, Assistant U.S. Attorney, Office of the U.S. Attorney, Memphis, TN; James W. Powell, Assistant U.S. Attorney, Office of the U.S. Attorney, Jackson, TN.

For Marcus Mann, Defendant - Appellee (17-6487): Tyrone Jemal Paylor, Federal Public Defender, Federal Defender, Memphis, TN.

For United States of America, Respondent - Appellant (17-6487): Naya Bedini, Kevin G. Ritz, Assistant U.S. Attorney, Office of

the U.S. Attorney, Memphis, TN; James W. Powell, Assistant U.S. Attorney, Office of the U.S. Attorney, Jackson, TN.

**Judges:** BEFORE: GUY, THAPAR, and NALBANDIAN, Circuit Judges.

**Opinion**

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**ORDER**

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

Therefore, the petition is denied.

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\* Judge Donald recused herself from participation in this ruling.

*Williams v. United States*

United States Court of Appeals for the Sixth Circuit

September 26, 2019, Filed

Nos. 17-5921/5923

**Reporter**

2019 U.S. App. LEXIS 29209 \*

JERMEL FRANKLIN WILLIAMS,  
Petitioner-Appellee, v. UNITED STATES  
OF AMERICA, Respondent-  
Appellant.UNITED STATES OF  
AMERICA, Plaintiff-Appellant, v.  
JERMEL FRANKLIN WILLIAMS,  
Defendant-Appellee.

**Notice:** NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**Prior History:** [\*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

*United States v. Williams*, 238 F.3d 426,  
2000 U.S. App. LEXIS 36273 (6th Cir.  
Tenn., Dec. 15, 2000)

**Case Summary**

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**Overview**

**HOLDINGS:** [1]-The court reversed the district court's order granting defendant relief under [28 U.S.C.S. § 2255](#) from his enhanced sentence under the Armed Career Criminal Act (ACCA) because the U.S. Supreme Court granted certiorari and reversed the court's decision in *United States v. Stitt* (*Stitt I*), making *United States v. Nance* once again the law of the Sixth Circuit, under which a Tennessee conviction for aggravated burglary was a violent felony for purposes of the ACCA; [2]-Defendant's remaining argument—that his aggravated burglary convictions might not qualify as generic burglaries because it might be that the applicable law did not require contemporaneous intent at the time of entry—was also foreclosed by binding precedent.

**Outcome**

Motion to supplement denied, order granting [28 U.S.C.S. § 2255](#) relief reversed

and remanded with instructions, and amended judgment vacated.

[2255](#) relief, the appellate court reviews its conclusions of law de novo.

## LexisNexis® Headnotes

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

Criminal Law & Procedure > ... > Burglary & Criminal Trespass > Burglary > Elements

### [HN1](#) Adjustments & Enhancements, Armed Career Criminals

Tennessee's aggravated burglary statute is not rendered overly broad,, for purposes of the Armed Career Criminal Act, by its coverage of movable structures designed or adapted for overnight use.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

Criminal Law & Procedure > Postconviction Proceedings > Motions to Set Aside Sentence

### [HN2](#) De Novo Review, Conclusions of Law

When a district court grants [28 U.S.C.S. §](#)

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

Governments > Courts > Judicial Precedent

Criminal Law & Procedure > ... > Burglary & Criminal Trespass > Burglary > Elements

### [HN3](#) Adjustments & Enhancements, Armed Career Criminals

United States v. Nance is once again the law of the U.S. Court of Appeals for the Sixth Circuit. A panel of the Sixth Circuit cannot overrule Nance's holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the Armed Career Criminal Act. Rather, that can only be done by an inconsistent decision of the U.S. Supreme Court or a decision of the en banc court.

**Counsel:** For Jermel Franklin Williams (**17-5921**, 17-5923), Petitioner - Appellee: Tyrone Jemal Paylor, Federal Public Defender, Federal Defender, Memphis, TN. For United States of America (**17-5921**, 17-5923), Respondent - Appellant: Naya Bedini, Office of the U.S. Attorney, Western District of Tennessee, Memphis, TN.

**Judges:** Before: MOORE, McKEAGUE,

and READER, Circuit Judges.

## Opinion

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### ORDER

In these consolidated cases, the government appeals a district court order granting relief under [28 U.S.C. § 2255](#) to Jermel Franklin Williams from his enhanced sentence under the [Armed Career Criminal Act \(ACCA\)](#) (No. 17-5921) and the amended judgment entered in his criminal case (No. 17-5923). The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*. Williams filed a motion to supplement his appellate brief, the government responded in opposition, and Williams filed a reply supporting his motion to supplement.

In 1999, with the benefit of a written plea agreement, Williams pleaded guilty to possession of a firearm by a felon, in violation of [18 U.S.C. § 922\(g\)](#), and possession of a stolen firearm, in violation of [18 U.S.C. § 922\(j\)](#). He was [\*2] sentenced under the ACCA, [18 U.S.C. § 924\(e\)](#), to serve a total of 326 months of imprisonment followed by five years of supervised release. Williams appealed his sentence, and we affirmed. *United States v. Williams*, 238 F.3d 426 (6th Cir. 2000) (table). The United States Supreme Court denied certiorari.

In 2016, Williams filed a [§ 2255](#) motion challenging his armed career criminal designation based on [Johnson v. United](#)

[States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 \(2015\)](#). Williams was sentenced as an armed career criminal based, in part, on eight prior Tennessee convictions for aggravated burglary. Williams argued that all eight predicate offenses for Tennessee aggravated burglary might no longer qualify as violent felonies for purposes of the ACCA in light of the then-pending en banc decision of this court in [United States v. Stitt, 860 F.3d 854 \(6th Cir. 2017\)](#) (en banc) ("*Stitt I*").

While his [§ 2255](#) motion was pending, we overruled circuit precedent, *see United States v. Nance, 481 F.3d 882 (6th Cir. 2007)*, in *Stitt I*, and held that a conviction under Tennessee's aggravated burglary statute did not qualify as an ACCA predicate because the statute swept more broadly than generic burglary by including habitable vehicles and movable enclosures. [Stitt I, 860 F.3d at 858](#). Based on that decision, the district court granted Williams's [§ 2255](#) motion, vacated his original sentence imposed in 1999, resentenced him to time served followed by three years of supervised release, and [\*3] denied a certificate of appealability. The district court entered an amended judgment in Williams's criminal case, resentencing him to time served followed by three years of supervised release.

The government appealed, and briefing was held in abeyance pending the Supreme Court's resolution of the government's petition for a writ of certiorari in *Stitt I*. The Supreme Court granted certiorari and reversed our decision in *Stitt I*, holding that [HNL](#) Tennessee's aggravated burglary statute was not rendered overly broad by its

coverage of movable structures "designed or adapted for overnight use." *United States v. Stitt*, 139 S. Ct. 399, 407, 202 L. Ed. 2d 364 (2018) ("*Stitt II*").

The government now argues that, in light of the Supreme Court's decision in *Stitt II*, Williams is no longer entitled to relief from his ACCA sentence, so the district court's order in the [§ 2255](#) civil case and the amended judgment in the criminal case should be vacated and the cases remanded for reinstatement of his original sentence. Williams does not dispute that he is no longer entitled to relief based on *Stitt I* but argues that the district court's order should be affirmed on the alternative ground that the Tennessee courts have defined the "entry" element of the state's burglary statutes [\*4] more broadly than generic burglary by including intrusions by instrument that are the functional equivalent of attempted burglary. In addition, Williams argues that Tennessee's aggravated burglary statute is overly broad because it does not require the perpetrator to have the intent to commit a crime at the time of entry.

**HN2**[] When a district court grants [§ 2255](#) relief, we review "its conclusions of law de novo." *Davis v. United States*, 900 F.3d 733, 735 (6th Cir. 2018) (quoting *Braden v. United States*, 817 F.3d 926, 929 (6th Cir. 2016)), cert. denied, 139 S. Ct. 1374, 203 L. Ed. 2d 612 (2019).

As to Williams's argument regarding the entry element, we recently held, **HN3**[] *Nance* "is once again the law of this circuit." *Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019). Accordingly, even if

there were merit to Williams's argument, a panel of this court cannot overrule *Nance*'s holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the ACCA. *See id.* Rather, that "can only be done by an 'inconsistent decision' of the Supreme Court or, like we did briefly with *Stitt I*, a decision of the en banc court." *Id.* (quoting [Salmi v. Sec'y of Health & Human Servs.](#), 774 F.2d 685, 689 (6th Cir. 1985)).

Williams's remaining argument—that his aggravated burglary convictions may not qualify as generic burglaries because "[i]t may be that . . . the applicable law did not require contemporaneous intent" at the time of entry—is also foreclosed by binding precedent. [\*5] *See United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017) (citing [United States v. Priddy](#), 808 F.3d 676, 684-85 (6th Cir. 2015)); *see also Quarles v. United States*, 139 S. Ct. 1872, 1880, 204 L. Ed. 2d 200 (2019).

Accordingly, we **DENY** the motion to supplement appellate brief; **REVERSE** the district court's order granting [§ 2255](#) relief and **REMAND** with instructions to reinstate Williams's original sentence (No. **17-5921**); and **VACATE** the amended judgment in Williams's criminal case (No. 17-5923).

**McKinney v. United States**

United States Court of Appeals for the Sixth Circuit

September 26, 2019, Filed

Nos. 17-5956

**Reporter**

2019 U.S. App. LEXIS 29208 \*

KEVOUS RAMON MCKINNEY,  
Petitioner-Appellee, v. UNITED STATES  
OF AMERICA, Respondent-Appellant.

**Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION.** *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**Prior History:** [\*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

[McKinney v. United States, 2017 U.S. Dist. LEXIS 107455 \(W.D. Tenn., July 12, 2017\)](#)

**Case Summary**

**Overview**

**HOLDINGS:** [1]-The court reversed the district court's order granting defendant's motion to vacate, set aside, or correct his sentence under [28 U.S.C.S. § 2255](#) because United States v. Nance was once again the law of the Sixth Circuit, and a panel of the court could not overrule Nance's holding that a Tennessee conviction for aggravated burglary was a violent felony for purposes of the Armed Career Criminal Act.

**Outcome**

Judgment reversed and remanded with instructions to reinstate original sentence. Motion to supplement brief denied.

**LexisNexis® Headnotes**

Criminal Law &  
Procedure > ... > Sentencing  
Guidelines > Adjustments &  
Enhancements > Armed Career  
Criminals

Criminal Law &  
Procedure > ... > Burglary & Criminal

Trespass > Burglary > Elements

## **HN1** **Adjustments & Enhancements, Armed Career Criminals**

Tennessee's aggravated burglary statute is not rendered overly broad, for purposes of the Armed Career Criminal Act, by its coverage of mobile structures "designed or adapted for overnight use."

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Criminal Law & Procedure > Postconviction Proceedings > Motions to Set Aside Sentence

## **HN2** **Appellate Jurisdiction, Final Judgment Rule**

A judgment or order in a [28 U.S.C.S. § 2255](#) proceeding that vacates a sentence but defers resentencing is not appealable until the defendant has been resentenced.

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Criminal Law & Procedure > Postconviction Proceedings > Motions to Set Aside Sentence

## **HN3** **Appellate Jurisdiction, Final Judgment Rule**

A district court's order that either enters the

result of a resentencing or corrects the prisoner's sentence completes the [28 U.S.C.S. § 2255](#) proceeding and is therefore immediately appealable.

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > Postconviction Proceedings > Motions to Set Aside Sentence

## **HN4** **Standards of Review, De Novo Review**

The court of appeals reviews the district court's order in a [28 U.S.C.S. § 2255](#) proceeding de novo.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

Governments > Courts > Judicial Precedent

Criminal Law & Procedure > ... > Burglary & Criminal Trespass > Burglary > Elements

## **HN5** **Adjustments & Enhancements, Armed Career Criminals**

United States v. Nance is once again the law of the Sixth Circuit. A panel of the court cannot overrule Nance's holding that a Tennessee conviction for aggravated

burglary is a violent felony for purposes of the Armed Career Criminal Act. Rather, that can only be done by an inconsistent decision of the U.S. Supreme Court or a decision of the en banc court.

**Counsel:** For Kevous Ramon McKinney, Petitioner - Appellee: Tyrone Jemal Paylor Federal Public Defender, Federal Defender, Memphis, TN.

For United States of America, Respondent - Appellant: Annie Tauer Christoff, Office of the U.S. Attorney, Western District of Tennessee, Memphis, TN.

**Judges:** Before: MOORE, McKEAGUE, and READLER, Circuit Judges.

## Opinion

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### ORDER

The United States appeals the district court's order granting Kevous Ramon McKinney's motion to vacate, set aside, or correct his sentence under [28 U.S.C. § 2255](#). The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a).*

In 2004, McKinney pleaded guilty to being a felon in possession of a firearm, in violation of [18 U.S.C. § 922\(g\)](#). The district court found that he was an armed career criminal under the [Armed Career Criminal Act \("ACCA"\)](#) based, in part, on three prior Tennessee convictions for aggravated burglary. *See 18 U.S.C. § 924(e)*. The district court ultimately sentenced him to

211 months of imprisonment, followed by three years of supervised release. We affirmed. [United States v. McKinney, 187 F. App'x 563, 566 \(6th Cir. 2006\)](#) (per curiam). His petition for a writ of certiorari was denied. *McKinney v. United States, 549 U.S. 1026, 127 S. Ct. 570, 166 L. Ed. 2d 421 (2006)* (mem.).

In June 2016, McKinney filed [\*2] a motion to vacate arguing that his aggravated-burglary convictions no longer qualified as predicate offenses in light of [Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 \(2015\)](#), and *United States v. Stitt*, a then-pending appeal before the en banc court. After the en banc court overruled [United States v. Nance, 481 F.3d 882 \(6th Cir. 2007\)](#), and held that aggravated burglary in Tennessee, *see Tenn. Code Ann. §§ 39-14-401, 39-14-402, 39-14-403*, does not qualify as a violent felony pursuant to [§ 924\(e\)\(2\)\(B\)\(ii\)](#) due to the overbreadth of its definition of a "habitation," [United States v. Stitt, 860 F.3d 854, 862 \(2017\)](#) (en banc) ("*Stitt I*"), McKinney filed a motion requesting an immediate ruling. The government conceded that McKinney was entitled to relief if the decision in *Stitt I* stood but preserved its argument that *Stitt I* was wrongly decided and might be overturned by the Supreme Court. The district court then granted the motion to vacate and resentenced McKinney to time served, followed by three years of supervised release. The government appealed, and this court ordered the appeal held in abeyance pending the Supreme Court's evaluation of *Stitt I*. The Supreme Court eventually granted the petition and reversed this court's

decision, holding that [HN1](#) Tennessee's aggravated burglary statute was not rendered overly broad by its coverage of mobile structures "designed or adapted for overnight use." *United States v. Stitt*, 139 S. Ct. 399, 407, 202 L. Ed. 2d 364 (2018) [\*3] ("Stitt II").

The appeal has been reopened, and the government argues that, in light of the Supreme Court's decision, we should reverse the district court's grant of McKinney's [§ 2255](#) motion and remand to the district court to reinstate the original sentence. In response, McKinney argues that this court lacks subject matter jurisdiction because the government appealed only the order granting [§ 2255](#) relief, not the amended judgment in the criminal case. McKinney also claims for the first time on appeal that Tennessee aggravated burglary does not qualify as a predicate offense because Tennessee's interpretation of "entry" creates an overbroad definition when compared to generic burglary. McKinney moves to file a supplemental brief raising yet another new argument.

As a threshold matter, we reject McKinney's jurisdictional argument. The cases on which he relies stand for the well-established proposition that [HN2](#) a judgment or order in a [§ 2255](#) proceeding that vacates a sentence but defers resentencing is not appealable until the defendant has been resentenced. *See Andrews v. United States*, 373 U.S. 334, 339, 83 S. Ct. 1236, 10 L. Ed. 2d 383 (1963); *Haynes v. United States*, 873 F.3d 954, 956-57 (7th Cir. 2017) (citing cases). In contrast, the district court here

expressly declined to order a resentencing hearing and instead imposed a sentence of time [\*4] served, effective immediately. This completed the [§ 2255](#) proceeding and was thus a final order conferring jurisdiction on this court. *See Andrews*, 373 U.S. at 339-40; *United States v. Hadden*, 475 F.3d 652, 663 (4th Cir. 2007) [HN3](#) ("[A] district court's order that either enters the result of a resentencing or corrects the prisoner's sentence completes the [§ 2255](#) proceeding and is therefore immediately appealable.").

[HN4](#) We review the district court's order de novo. *See Davis v. United States*, 900 F.3d 733, 735 (6th Cir. 2018), cert. denied, 139 S. Ct. 1374, 203 L. Ed. 2d 612 (2019).

McKinney argues that his aggravated burglary conviction should no longer count as an ACCA predicate because the Tennessee courts define the entry element of the state's burglary statutes more broadly than generic burglary by including intrusions by instrument that are the functional equivalent of attempted burglary. But as the government argues — and we recently held — [HN5](#) *Nance* "is once again the law of this circuit." *Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019). Accordingly, even if there were merit to McKinney's argument, a panel of this court cannot overrule *Nance*'s holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the ACCA. *See id.* Rather, that "can only be done by an 'inconsistent decision' of the Supreme Court or, like we did briefly with *Stitt I*, a decision of the en banc court." *Id.* (quoting *Salmi v. Sec'y of Health & Human*

*Servs., 774 F.2d 685, 689 (6th Cir. 1985)).<sup>1</sup>*

For these reasons, we **REVERSE** the district court's grant of *§ 2255* relief and **REMAND** with instructions to reinstate the original sentence. McKinney's motion to supplement his brief is **DENIED**.

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<sup>1</sup> McKinney briefly asserts without development that Tennessee aggravated burglary sweeps more broadly than generic burglary because it does not contain an element of criminal intent at the time of entry, but that argument is also foreclosed by binding precedent. See *United States v. Ferguson, 868 F.3d 514, 515 (6th Cir. 2017)* (citing *United States v. Priddy, 808 F.3d 676, 684-85 (6th Cir. 2015)*); see also [\*5] *Quarles v. United States, 139 S. Ct. 1872, 1880, 204 L. Ed. 2d 200 (2019)*.

**United States v. Ammons**

United States Court of Appeals for the Sixth Circuit

October 25, 2019, Decided

17-5920 ) 17-5922 ) TENNESSEE

**Reporter**

2019 U.S. App. LEXIS 32243 \*

UNITED STATES OF AMERICA,  
Plaintiff-Appellant, v. LARRY EUGENE  
AMMONS, Defendant-Appellee. LARRY  
EUGENE AMMONS, Petitioner-Appellee,  
v. UNITED STATES OF AMERICA,  
Respondent-Appellant.

**Notice:** Decision text below is the first available text from the court; it has not been editorially reviewed by LexisNexis. Publisher's editorial review, including Headnotes, Case Summary, *Shepard's* analysis or any amendments will be added in accordance with LexisNexis editorial guidelines.

**Opinion**

[\*1]  
THE UNITED  
COURT FOR  
DISTRICT OF

ON APPEAL FROM  
STATES DISTRICT  
THE WESTERN

**ORDER**

Before: KETHLEDGE, BUSH, and  
MURPHY, Circuit Judges.

In these consolidated cases, the government appeals a district court judgment granting

relief under [28 U.S.C. § 2255](#) to Larry Eugene Ammons from his enhanced sentence under the

Armed Career Criminal Act ("ACCA") (No. 17-5922) and the amended judgment entered in his

Nos. 17-5920/5922

- 2 -

criminal case (No. 17-5920). The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*.

The district court sentenced Ammons as an armed career criminal to 215 months of imprisonment followed by 3 years of supervised release after he was convicted by a jury of five counts of being a felon in possession of a firearm, in violation of [18 U.S.C. § 922\(g\)](#). *United States v. Ammons*, No. 2:06-cr-20062 (W.D. Tenn. Dec. 22, 2008). We affirmed his conviction and sentence, [United States v. Ammons, 419 F. App'x 550, 551 \(6th Cir. 2011\)](#), and declined to issue a certificate of appealability from the denial of his first [§ 2255](#) motion, *Ammons v. United States*, No. 14-5426 (6th Cir. Aug. 14, 2014) (order).

Subsequently, this court granted Ammons leave to file a second or successive [\*2] [§ 2255](#) motion and transferred the application to the district court for consideration. *In re Ammons*, No. 16-5862 (6th Cir. Dec. 28, 2016) (order).

Ammons then filed a successive [§ 2255](#) motion, arguing that, in light of the Supreme

Court's decision in [Johnson v. United States, 135 S. Ct. 2551 \(2015\)](#), his Tennessee conviction for aggravated burglary no longer qualified as an enumerated offense under the ACCA. While the [§ 2255](#) motion was pending, we overruled prior circuit precedent, *see United States v. Nance*, 481

F.3d 882 (6th Cir. 2007), and held that a conviction under Tennessee's aggravated burglary statute did not qualify as an ACCA predicate offense because the statute swept more broadly than generic burglary by including habitable vehicles and movable enclosures. *United States v. Stitt*, 860 F.3d

854, 858 (6th Cir. 2017) (en banc) ("*Stitt I*"). Based on that decision, the district court granted Ammons's [§ 2255](#) motion and resentenced him to time served followed by 3 years of supervised release.

The government appealed both the grant of [§ 2255](#) relief and the amended judgment, and briefing was held in abeyance pending the Supreme Court's decision in *United States v. Stitt*, 139

S. Ct. 399 (2018) ("*Stitt II*"). In *Stitt II*, the Supreme Court reversed this court's decision, holding that [\*3] Tennessee's

aggravated burglary statute was not rendered overly broad by its coverage of mobile structures "designed or adapted for overnight use." *Id.* at 407. The government now argues that, in light of the Supreme Court's decision in *Stitt II*, Ammons is no longer entitled to relief under [§ 2255](#) and that the case should be remanded for reinstatement of Ammons's original

Nos. 17-5920/5922

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sentence. Ammons does not dispute that he is no longer entitled to relief based on *Stitt I* but argues that (1) the entry element of Tennessee's burglary statutes is defined more broadly than the entry element of generic burglary; and (2) Tennessee's burglary statutes are overly broad because their "remaining in" variants do not require the perpetrator to have the intent to commit a crime at the time of entry.

We review the district court's determination of whether a predicate offense qualifies as a violent felony de novo. *See Davis v. United States, 900 F.3d 733, 735 (6th Cir. 2018)*, *cert. denied*, 139 S. Ct. 1374 (2019).

Ammons first argues that his aggravated burglary conviction should no longer count as an

ACCA predicate offense because Tennessee courts define the entry element of the state's burglary statutes more broadly than generic burglary by including intrusions by instrument that are [\*4] the functional equivalent of attempted burglary. But as the government argues—and we recently held—*Nance* "is once again the law of this circuit."

*Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019). Accordingly, even if there were merit to Ammons's argument, "a panel of this court cannot overrule" *Nance*'s holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the ACCA. *Id.* at 795. Rather, that "can only be done by an

'inconsistent decision' of the Supreme Court or, like we did briefly with *Stitt I*, a decision of the en banc court." *Id.* (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)).

Ammons's second argument, that that the "remaining in" variants of Tennessee's burglary statutes are broader than generic burglary because they do not contain an element of criminal intent at the time of entry, is also foreclosed by binding precedent. See *United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017) (citing *United States v. Priddy*, 808 F.3d 676, 684-85 (6th Cir. 2015)); see also *Quarles v. United States*, 139 S. Ct. 1872, 1880 (2019).

Nos. 17-5920/5922

- 4 -

For these reasons, we **REVERSE** the district court's grant of § 2255 relief and **REMAND** with instructions to reinstate the original sentence. Additionally, we **DENY** the motion to supplement.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

**Lemons v. United States**

United States Court of Appeals for the Sixth Circuit

October 25, 2019, Decided

17-5945 ) 17-5947 )

**Reporter**

2019 U.S. App. LEXIS 32244 \*

MICHAEL R. LEMONS, Petitioner-  
Appellee, v. UNITED STATES OF  
AMERICA, Respondent-Appellant.  
UNITED STATES OF AMERICA,  
Plaintiff-Appellant, v. MICHAEL R.  
LEMONS, Defendant-Appellee.

**Notice:** Decision text below is the first available text from the court; it has not been editorially reviewed by LexisNexis. Publisher's editorial review, including Headnotes, Case Summary, Shepard's analysis or any amendments will be added in accordance with LexisNexis editorial guidelines.

**Opinion**

[\*1] ON APPEAL FROM  
THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN  
DISTRICT OF TENNESSEE

**ORDER**

Before: KETHLEDGE, BUSH, and  
MURPHY, Circuit Judges.

The United States appeals the district court's order granting the motion to vacate, set

aside,

or correct his sentence under [28 U.S.C. § 2255](#) filed by Michael R. Lemons, a federal prisoner

represented by counsel. (No. **17-5945**). It also appeals the amended judgment imposed following

Nos. **17-5945**/5947

- 2 -

the grant of [§ 2255](#) relief. (No. 17-5947). The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a).*

In 2009, Lemons pleaded guilty to being a felon in possession of a firearm, in violation of [18 U.S.C. § 922\(g\)](#). The district court found that he was an armed career criminal under the Armed

Career Criminal Act ("ACCA") based on three prior Tennessee convictions for aggravated burglary. The district court therefore sentenced him, pursuant to [18 U.S.C. § 924\(e\), to 180](#) months of imprisonment and 3 years of supervised release. This court affirmed. *United States v.*

Lemons,

480 F. App'x 400, 405 (6th Cir. 2012).

In June 2016, Lemons filed a motion to vacate, arguing that his aggravated-burglary convictions no longer qualified as predicate [\*2] offenses in light of Johnson v. United States, 135 S. Ct. 2551 (2015), and United States v. Stitt, a then-pending appeal before the en banc court. After the en banc court overruled United States v. Nance, 481 F.3d 882 (6th Cir. 2007), and held that aggravated burglary in Tennessee, see Tenn. Code Ann. §§ 39-14-401, 39-14-402, 39-14-403, does not qualify as a violent felony pursuant to § 924(e)(2)(B)(ii) due to the overbreadth of its definition of a "habitation," United States v. Stitt, 860 F.3d 854, 862 (2017) (en banc) ("Stitt I"), Lemons filed a motion requesting an immediate ruling. The government conceded that Lemons was entitled to relief if the decision in *Stitt I* stood but preserved its argument that *Stitt I* was wrongly decided and might be overturned by the Supreme Court. The district court then granted the motion to vacate and resentenced Lemons to time served, followed by 2 years of supervised release. The government appealed, and this court ordered the appeal held in abeyance pending the Supreme

Court's evaluation of *Stitt I*. The Supreme Court eventually granted the petition and reversed this court's decision, holding that Tennessee's aggravated burglary statute was not rendered overly broad by its coverage of mobile structures "designed or adapted for overnight use." United States v. Stitt, 139 S.

Ct. 399, 407 (2018) ("Stitt II").

Lemons's appeal has been reopened and the government argues that, in light of the Supreme Court's decision, [\*3] this court should reverse the district court's grant of Lemons's motion and remand to the district court to reinstate the original sentence. In response, Lemons claims for the first time on appeal that Tennessee aggravated burglary does not qualify as a predicate offense

Nos. 17-5945/5947

- 3 -

because Tennessee's interpretation of "entry" creates an overbroad definition when compared to

generic burglary. Lemons also moves to supplement his brief to raise yet another new argument.

We review the district court's decision de novo. See Davis v. United States, 900 F.3d 733,

735 (6th Cir. 2018), cert. denied, 139 S. Ct. 1374 (2019).

Lemons argues that his aggravated burglary conviction should no longer count as an ACCA

predicate because the Tennessee courts define the entry element of the state's burglary statutes

more broadly than generic burglary by including intrusions by instrument that are the functional

equivalent of attempted burglary. But as the government argues—and we recently held—*Nance*

"is once again the law of this circuit." *Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019).

2019). Accordingly, even if there were merit to Lemons's argument, a panel of this court cannot

overrule *Nance*'s holding that a Tennessee conviction for aggravated burglary is a violent felony

for purposes of the [\*4] ACCA. See *id. at 795*. Rather, that "can only be done by an 'inconsistent

decision' of the Supreme Court or, like we did briefly with *Stitt I*, a decision of the en banc court."

*Id.* (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)).<sup>1</sup>

For these reasons, we **REVERSE** the district court's grant of § 2255 relief and **REMAND**

with instructions to reinstate the original sentence. Lemons's motion to supplement his brief is

**DENIED.**

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

<sup>1</sup>Lemons briefly questions without development whether Tennessee aggravated burglary sweeps more broadly than generic

burglary because it does not contain an element of criminal intent at the time of entry, but that argument is also foreclosed by binding precedent. See *United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017) (citing *United States v. Priddy*, 808 F.3d 676, 684-85 (6th Cir. 2015)); see also *Quarles v. United States*, 139 S. Ct. 1872, 1880 (2019).

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**United States v. Roberts**

United States Court of Appeals for the Sixth Circuit

August 23, 2019, Filed

No. 17-6412

**Reporter**

2019 U.S. App. LEXIS 25500 \*

UNITED STATES OF AMERICA,  
Plaintiff-Appellant, v. MICHAEL  
ROBERTS, Defendant-Appellee.

**Notice:** NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**Prior History:** [\*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

**Counsel:** For United States of America,  
Plaintiff - Appellant: Annie Tauer Christoff,  
Office of the U.S. Attorney, Memphis, TN.

For Michael Roberts, Defendant - Appellee:  
Tyrone Jemal Paylor, Federal Public  
Defender, Memphis, TN.

**Judges:** Before: GUY, COOK, and GRIFFIN, Circuit Judges.

**Opinion**

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**ORDER**

The United States appeals the district court's amended judgment following the district court's order granting the motion to vacate, set aside, or correct sentence under [28 U.S.C. § 2255](#) filed by Michael Roberts, a federal prisoner represented by counsel. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a).*

In 2012, Roberts pleaded guilty to being a felon in possession of a firearm, in violation of [18 U.S.C. § 922\(g\)](#). The district court found that he was an armed career criminal under the [Armed Career Criminal Act \("ACCA"\)](#) based on prior Tennessee convictions for aggravated burglary, burglary, and selling a controlled substance. The district court therefore sentenced him, pursuant to [18 U.S.C. § 924\(e\)](#), to 140

months of imprisonment and 2 years of supervised release. Roberts did not appeal. *Ed. 2d 364 (2018) ("Stitt II").*

In June 2016, Roberts filed a motion to vacate [\*2] arguing that his aggravated burglary conviction no longer qualified as a predicate offense in light of [Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 \(2015\)](#), and *United States v. Stitt*, a then-pending appeal before the en banc court. After the en banc court overruled [United States v. Nance, 481 F.3d 882 \(6th Cir. 2007\)](#), and held that aggravated burglary in Tennessee, *see Tenn. Code Ann. §§ 39-14-401, 39-14-402, 39-14-403*, does not qualify as a violent felony pursuant to § 924(e)(2)(B)(ii) due to the overbreadth of its definition of a "habitation," [United States v. Stitt, 860 F.3d 854 \(2017\)](#) (en banc) ("Stitt I"), Roberts filed a motion to set a resentencing hearing. The government conceded that Roberts was entitled to relief if the decision in *Stitt I* stood, but preserved its argument that *Stitt I* was wrongly decided and might be overturned by the Supreme Court. The district court then granted the motion to vacate and resentenced Roberts to 85 months of imprisonment and 2 years of supervised release. The government appealed the resentencing, and this court ordered the appeal held in abeyance pending the Supreme Court's evaluation of *Stitt I*. On December 10, 2018, the Supreme Court issued its decision, holding that burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation qualifies as the enumerated violent felony of burglary for purposes of [\*3] [18 U.S.C. § 924\(e\)\(2\)\(B\)\(ii\)](#). *United States v. Stitt, 139 S. Ct. 399, 403-04, 202 L.*

In light of the Supreme Court's decision, the government argues that this court should reverse the district court's grant of Roberts's motion and remand to the district court to reinstate the original sentence. In response, Roberts claims for the first time on appeal that Tennessee aggravated burglary does not qualify as a predicate offense because Tennessee's interpretations of "entry" and "contemporaneous intent" create an overbroad definition when compared to generic burglary.

We review the district court's decision de novo. *See Davis v. United States, 900 F.3d 733, 735 (6th Cir. 2018)*, cert. denied, 139 S. Ct. 1374, 203 L. Ed. 2d 612 (2019).

Roberts first argues that his aggravated burglary conviction should no longer count as an ACCA predicate because the Tennessee courts define the entry element of the state's burglary statutes more broadly than generic burglary by including intrusions by instrument that are the functional equivalent of attempted burglary. But as the government argues—and we recently held—[Nance](#) "is once again the law of this circuit." [Brumbach v. United States, 929 F.3d 791, 794 \(6th Cir. 2019\)](#). Accordingly, even if there were merit to Roberts's argument, a panel of this court cannot overrule *Nance*'s holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the ACCA. [\*4] *See id.* Rather, that "can only be done by an 'inconsistent decision' of the Supreme Court or, like we did briefly with *Stitt I*, a decision of the en banc court."

*Id. at 795* (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)).

Roberts's second argument—that the "remaining in" variants of Tennessee's burglary statutes are broader than generic burglary because they do not contain an element of criminal intent at the time of entry—is also foreclosed by binding precedent. *See United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017) (citing *United States v. Priddy*, 808 F.3d 676, 684-85 (6th Cir. 2015)), cert. denied, 139 S. Ct. 2712, 2019 WL 2493932 (U.S. June 17, 2019) (No. 17-7496); *see also Quarles v. United States*, 139 S. Ct. 1872, 1880, 204 L. Ed. 2d 200 (2019).

Accordingly, we **REVERSE** the district court's amended judgment and order granting the motion to vacate and **REMAND** to the district court with instructions to reinstate Roberts's original sentence.

**United States v. Roberts**

United States Court of Appeals for the Sixth Circuit

October 25, 2019, Filed

No. 17-6412

**Reporter**

2019 U.S. App. LEXIS 32240 \*

UNITED STATES OF AMERICA,  
Plaintiff-Appellant, v. MICHAEL  
ROBERTS, Defendant-Appellee.

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**Counsel:** [\*1] For United States of  
America, Plaintiff - Appellant: Annie Tauer  
Christoff, Office of the U.S. Attorney,  
Memphis, TN.

For Michael Roberts, Defendant - Appellee:  
Tyrone Jemal Paylor, Federal Public  
Defender, Memphis, TN.

**Judges:** BEFORE: GUY, COOK, and  
GRIFFIN, Circuit Judges.

**Opinion**

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**ORDER**

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

Therefore, the petition is denied.

**United States v. Merriweather**

United States Court of Appeals for the Sixth Circuit

October 29, 2019, Decided

No.18-5567

**Reporter**

2019 U.S. App. LEXIS 32520 \*

UNITED STATES OF AMERICA,  
Plaintiff-Appellant, v. DARRYL  
MERRIWEATHER, Defendant-Appellee.

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**Opinion**

[\*1] ON APPEAL FROM THE  
UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF  
TENNESSEE

**ORDER**

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

The government appeals the amended judgment resentencing Darryl Merriweather to sixty-two months in prison following an order granting relief under [28 U.S.C. § 2255](#) from his enhanced sentence under the

Armed Career Criminal Act (ACCA). The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*.

After pleading guilty to being a felon in possession of ammunition, in violation of [18 U.S.C. § 922\(g\)](#), Merriweather was sentenced as an armed career criminal to 180 months in prison. He did not appeal.

Merriweather later filed his [§ 2255](#) motion challenging his armed career criminal designation based on [Johnson v. United States, 135 S. Ct. 2551 \(2015\)](#), on the ground that his Tennessee aggravated burglary and attempted aggravated burglary convictions no longer qualified as violent felonies for purposes of the ACCA, [18 U.S.C. § 924\(e\)](#). While that [§ 2255](#) motion was

No. **18-5567**

- 2 -

pending, we overruled circuit precedent, *see United States v. Nance, 481 F.3d 882 (6th Cir. 2007)*, and held that a conviction under Tennessee's aggravated burglary statute did not qualify as an

ACCA predicate because the statute swept more broadly than generic [\*2] burglary by including habitable vehicles and movable enclosures. *United States v. Stitt*, 860 F.3d 854, 858 (6th Cir. 2017) (en banc) ("*Stitt I*"). Based on that decision, the district court granted Merriweather's § 2255 motion, resentencing him to sixty-two months in prison.

The government appealed, and we granted its request to hold the case in abeyance while it sought Supreme Court review in *Stitt*. The Supreme Court granted certiorari and reversed our decision in *Stitt I*, holding that Tennessee's aggravated burglary statute is not rendered overly broad by its coverage of movable structures "designed or adapted for overnight use." *United States v. Stitt*, 139 S. Ct. 399, 407 (2018) ("*Stitt II*").

The government now argues that, in light of the Supreme Court's decision, Merriweather is no longer entitled to relief from his ACCA sentence, so the district court's judgment should be vacated and the case remanded for reinstatement of his original sentence. Merriweather does not dispute that he is no longer entitled to relief based on *Stitt I* but offers two alternative arguments for why the district court's judgment should be affirmed: 1) the entry element of Tennessee's burglary statutes is defined more broadly than the entry element of generic burglary, and 2) Tennessee's burglary statutes are overly [\*3] broad because their "remaining in" variants do not require the perpetrator to have the intent to commit a crime at the time of entry.

We review the district court's decision de

novo. See *Davis v. United States*, 900 F.3d 733, 735 (6th Cir. 2018), cert. denied, 139 S. Ct. 1374 (2019).

Merriweather first argues that his aggravated burglary and attempted aggravated burglary convictions should no longer count as ACCA predicates because the Tennessee courts define the entry element of the state's burglary statutes more broadly than generic burglary by including intrusions by instrument that are the functional equivalent of attempted burglary. But as the government argues—and we recently held—*Nance* "is once again the law of this circuit."

*Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019). Accordingly, even if there were merit to Merriweather's argument, a panel of this court cannot overrule *Nance*'s holding that a

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- 3 -

Tennessee conviction for aggravated burglary is a violent felony for purposes of the ACCA. See *id. at 794-95*. Rather, that "can only be done by an 'inconsistent decision' of the Supreme Court or, like we did briefly with *Stitt I*, a decision of the en banc court." *Id. at 795* (quoting *Salmi v.*

*Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)).

Merriweather's second argument—that the "remaining in" variants of Tennessee's burglary statutes are broader than generic [\*4] burglary because they do not contain an element of criminal intent at the

time of entry—is also foreclosed by binding precedent. See *United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017) (citing *United States v. Priddy*, 808 F.3d 676, 684-85 (6th Cir. 2015)); see also *Quarles v. United States*, 139 S. Ct. 1872, 1880 (2019).

For these reasons, we **VACATE** the amended judgment and **REMAND** with instructions to reinstate the original sentence. We also **DENY** Merriweather's motion to supplement his appellate brief.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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**Hughes v. United States**

United States Court of Appeals for the Sixth Circuit

October 30, 2019, Decided

No.17-5913

**Reporter**

2019 U.S. App. LEXIS 32585 \*

RICHARD HUGHES, Petitioner-Appellee,  
v. UNITED STATES OF AMERICA,  
Respondent-Appellant.

**Notice:** Decision text below is the first available text from the court; it has not been editorially reviewed by LexisNexis. Publisher's editorial review, including Headnotes, Case Summary, Shepard's analysis or any amendments will be added in accordance with LexisNexis editorial guidelines.

**Opinion**

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[\*1] ON APPEAL FROM THE  
UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF  
TENNESSEE

**ORDER**

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

The government appeals a district court order granting relief under [28 U.S.C. § 2255](#) to Richard Hughes from his enhanced sentence under the Armed Career Criminal Act (ACCA) and the amended judgment

entered in the criminal case. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*.

After pleading guilty to being a felon in possession of a firearm, in violation of [18 U.S.C. § 922\(g\)](#), Hughes was sentenced as an armed career criminal to 180 months in prison. We affirmed that sentence. [\*United States v. Hughes, 458 F. App'x 427 \(6th Cir. 2012\)\*](#) (unpublished).

Hughes later filed his [§ 2255](#) motion challenging his armed career criminal designation based on [\*Johnson v. United States, 135 S. Ct. 2551 \(2015\)\*](#), on the ground that his Tennessee

No. **17-5913**

- 2 -

aggravated burglary conviction no longer qualified as a violent felony for purposes of the ACCA, [18 U.S.C. § 924\(e\)](#). While that [§ 2255](#) motion was pending, we overruled circuit precedent, *see* [\*United States v. Nance, 481 F.3d 882 \(6th Cir. 2007\)\*](#), and held that a conviction under Tennessee's aggravated burglary statute did not qualify as an ACCA predicate because the statute swept more

broadly than generic burglary by including habitable [\*2] vehicles and movable enclosures. *United States v. Stitt*, 860 F.3d 854, 858 (6th Cir. 2017) (en banc) ("*Stitt I*"). Based on that decision, the district court granted Hughes's § 2255 motion, resentencing him to time served.

The government appealed, and we granted its request to hold the case in abeyance while it sought Supreme Court review in *Stitt*. The Supreme Court granted certiorari and reversed our decision in *Stitt I*, holding that Tennessee's aggravated burglary statute is not rendered overly broad by its coverage of movable structures "designed or adapted for overnight use." *United States v. Stitt*, 139 S. Ct. 399, 407 (2018) ("*Stitt II*").

The government now argues that, in light of the Supreme Court's decision, Hughes is no longer entitled to relief from his ACCA sentence, so the district court's judgment should be reversed and the case remanded for reinstatement of his original sentence. Hughes does not dispute that he is no longer entitled to relief based on *Stitt I* but offers two alternative arguments for why the district court's judgment should be affirmed:

1) the entry element of Tennessee's burglary statutes is defined more broadly than the entry element of generic burglary, and 2) Tennessee's burglary statutes are overly broad because their "remaining in" variants do not require the [\*3] perpetrator to have the intent to commit a crime at the time of entry.

We review the district court's decision de novo. See *Davis v. United States*, 900 F.3d 733, 735 (6th Cir. 2018), cert. denied, 139

S. Ct. 1374 (2019).

Hughes' jurisdictional argument is without merit. He claims that the court of appeals lacks jurisdiction because the government appealed from the civil judgment granting his § 2255 motion rather than from the amended judgment in his criminal case. Hughes relies on *Andrews v. United States*, which held that a judgment granting a motion to vacate was not immediately appealable where resentencing had yet to take place. 373 U.S. at 339-40 (1963). However, the jurisdictional issue in *Andrews* is not present here, where the district court entered simultaneous civil and

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criminal judgments *after* Hughes was resentenced. Thus, by the time the government appealed the civil judgment, the habeas proceeding had become final. Moreover, the civil judgment contained

Hughes' revised sentence and was therefore substantively identical to its criminal counterpart.

Even assuming the government appealed from the wrong judgment, "a mistake in designating the judgment appealed from is not always fatal, so long as the intent to appeal from a specific ruling can fairly be inferred by probing [\*4] the notice and the other party was not misled or prejudiced."

*Ramsey v. Penn Mut. Life Ins. Co.*, 787 F.3d 813, 819 (6th Cir. 2015) (brackets omitted) (quoting

*Sanabria v. United States, 437 U.S. 54, 67 n.21 (1978)).* The government's intent to appeal the district court's amended criminal judgment can "fairly be inferred" from its appeal of the civil judgment. Accordingly, the court has jurisdiction over this appeal.

Hughes first argues that his aggravated burglary conviction should no longer count as an

ACCA predicate because the Tennessee courts define the entry element of the state's burglary statutes more broadly than generic burglary by including intrusions by instrument that are the functional equivalent of attempted burglary. But as the government argues-and we recently held-*Nance* "is once again the law of this circuit."

*Brumbach v. United States, 929 F.3d 791,*

794 (6th Cir. 2019). Accordingly, even if there were merit to Hughes's argument, a panel of this court cannot overrule *Nance*'s holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the ACCA. *See id. at 794-95.* Rather, that "can only be done by an

'inconsistent decision' of the Supreme Court or, like we did briefly with *Stitt I*, a decision of the en banc court." *Id. at 795* (quoting *Salmi v. Sec'y of Health & Human Servs., 774 F.2d 685, 689 (6th Cir. 1985)).*

Hughes's second argument-that the "remaining in" variants of Tennessee's burglary [\*5] statutes are broader than generic burglary because they do not contain an element of criminal intent at the time of entry-is also foreclosed by binding precedent. *See United States v. Ferguson,*

*868 F.3d 514, 515 (6th Cir. 2017)* (citing *United States v. Priddy, 808 F.3d 676, 684-85 (6th Cir. 2015)*); *see also Quarles v. United States, 139 S. Ct. 1872, 1880 (2019).*

No. 17-5913

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For these reasons, we **REVERSE** the district court's grant of § 2255 relief and **REMAND** with instructions to reinstate the original sentence. We also **DENY** Hughes's motion to supplement his appellate brief.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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**United States v. Justice**

United States Court of Appeals for the Sixth Circuit

August 15, 2019, Filed

No. 17-6465

**Reporter**

2019 U.S. App. LEXIS 24497 \*

UNITED STATES OF AMERICA,  
Plaintiff-Appellant, v. AZAVIUS  
SHONDALE JUSTICE, Defendant-  
Appellee.

**Notice:** NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**Prior History:** [\*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

**Counsel:** For United States of America,  
Plaintiff - Appellant: Kevin G. Ritz,  
Assistant U.S. Attorney, Office of the U.S.  
Attorney, Memphis, TN.

For Azavius Shondale Justice, Defendant - Appellee: Madelyn Dianne Smothers, Federal Public Defender, Federal Public Defender, Memphis, TN.

**Judges:** Before: KETHLEDGE, BUSH, and MURPHY, Circuit Judges.

**Opinion**

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**ORDER**

The government appeals the 72-month sentence imposed by the district court after Azavius Shondale Justice pled guilty to violating [18 U.S.C. § 922\(g\)](#) for being a felon in possession of a firearm. The parties have waived oral argument, and the panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*.

The grand jury indicted Justice under [§ 922\(g\)](#) after police officers saw him with a .38 caliber revolver tucked in his pants. Justice pled guilty. The probation officer reported that Justice had one prior felony conviction in Tennessee for robbery and three prior felony convictions in Tennessee for aggravated burglary. Under the [Armed Career Criminal Act \(ACCA\)](#), [18 U.S.C. § 924\(e\)\(1\)](#), a defendant who violates [§ 922\(g\)](#) and who has three or more prior "violent felony" convictions must serve at least fifteen years in prison. When [\*2] Justice came before the district court for

sentencing in December 2017, the law in this circuit was that a conviction for aggravated burglary in Tennessee was not a "violent felony." *See United States v. Stitt, 860 F.3d 854, 857 (6th Cir. 2017)* (en banc) (*Stitt I*). Thus, at the time of sentencing, Justice did not qualify for an ACCA sentence. The district court sentenced Justice to 72 months of imprisonment pursuant to the United States Sentencing Guidelines and [18 U.S.C. § 3553\(a\)](#). The government noted that it had petitioned the United States Supreme Court to review our decision in *Stitt I*, but it did not object to Justice's sentence.

The government appealed, arguing that the district court erred in not sentencing Justice under the ACCA. While the government's appeal was pending, the Supreme Court reversed *Stitt I*, holding that Tennessee's aggravated burglary statute is not broader than generic burglary, and therefore that it is a "violent felony" under the ACCA. *See United States v. Stitt, 139 S. Ct. 399, 405-08, 202 L. Ed. 2d 364 (2018) (Stitt II).*

Because the government did not object to the district court's decision not to sentence Justice under the ACCA, we review for plain error. *See United States v. Vonner, 516 F.3d 382, 385 (6th Cir. 2008)* (en banc). To establish plain error, the government must show an error, that is obvious or clear, and that affects its substantial rights and [\*3] the fairness, integrity, or public reputation of the judicial proceedings. *See id. at 386.* Correcting a plain error is discretionary. *See United States v. Graham, 275 F.3d 490, 521 (6th Cir. 2001).*

Justice's aggravated-burglary convictions were not ACCA predicate offenses under the law of this circuit when he was sentenced. The district court thus understandably concluded that Justice was not eligible for an ACCA sentence. But the law changed while the government's appeal was pending, so that Justice's three aggravated-burglary convictions are now ACCA predicates. *See Stitt II, 139 S. Ct. at 405-08.* "[A]n appellate court must apply the law in effect at the time it renders its decision." *Henderson v. United States, 568 U.S. 266, 271, 133 S. Ct. 1121, 185 L. Ed. 2d 85 (2013)* (quoting *Thorpe v. Hous. Auth. of Durham, 393 U.S. 268, 281, 89 S. Ct. 518, 21 L. Ed. 2d 474 (1969)*). The district court's decision not to impose an ACCA sentence was therefore a plain error, even though the error did not become plain until the case was on appeal. *See id. at 273-74, 279.*

This case satisfies the remaining elements of plain-error review. The district court's error affects the government's substantial rights because, absent the error, Justice would have been sentenced under the ACCA. *See United States v. Barajas-Nunez, 91 F.3d 826, 833 (6th Cir. 1996)* (holding that an error affects the government's substantial rights if it affected the outcome of the district court proceedings). And the error affects the fairness, integrity, and public reputation of the [\*4] judicial proceedings because Justice's non-ACCA sentence is illegal. *See id.* ("Permitting sentencing courts to disregard governing law would diminish the integrity and public reputation of the judicial system.").

Consequently, we exercise our discretion to correct the district court's plain error.

Justice argues we should affirm his sentence despite the plain error on that ground that the Tennessee burglary statute is broader than generic burglary because it also treats attempted burglary as a completed burglary. We are bound, however, by *Stitt II* and prior circuit decisions holding that the Tennessee statute qualifies as an ACCA predicate. *See Brumbach v. United States, 929 F.3d 791, 792 (6th Cir. 2019)*.

Accordingly, we **VACATE** Justice's sentence and **REMAND** this case to the district court for resentencing proceedings consistent with this order.

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**United States v. Justice**

United States Court of Appeals for the Sixth Circuit

October 31, 2019, Filed

No. 17-6465

**Reporter**

2019 U.S. App. LEXIS 32752 \*

UNITED STATES OF AMERICA,  
Plaintiff-Appellant, v. AZAVIUS  
SHONDALE JUSTICE, Defendant-  
Appellee.

Therefore, the petition is denied.

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**Counsel:** [\*1] For United States of America, Plaintiff - Appellant: Kevin G. Ritz, Assistant U.S. Attorney, Office of the U.S. Attorney, Western District of Tennessee, Memphis, TN.

For Azavius Shondale Justice, Defendant - Appellee: Madelyn Dianne Smothers, Federal Public Defender, Federal Public Defender, Memphis, TN.

**Judges:** BEFORE: KETHLEDGE, BUSH, and MURPHY, Circuit Judges.

**Opinion**

---

**ORDER**

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

*United States v. Keglar*

United States Court of Appeals for the Sixth Circuit

August 15, 2019, Filed

Nos. 17-6021/6113

**Reporter**

2019 U.S. App. LEXIS 24498 \*

UNITED STATES OF AMERICA,  
Plaintiff-Appellant, v. KEITH KEGLAR  
**(17-6021)**, Defendant-Appellee. KEITH  
KEGLAR, Petitioner-Appellee, v. UNITED  
STATES OF AMERICA (17-6113),  
Respondent-Appellant.

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PARTIES AND THE COURT. THIS  
NOTICE IS TO BE PROMINENTLY  
DISPLAYED IF THIS DECISION IS  
REPRODUCED.

**Prior History:** [\*1] ON APPEAL FROM  
THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT  
OF TENNESSEE.

*United States v. Keglar, 535 Fed. Appx.  
494, 2013 U.S. App. LEXIS 20598 (6th  
Cir.), 2013 FED App. 873N (6th Cir.) (6th  
Cir. Tenn., Oct. 7, 2013)*

**Counsel:** For Keith Keglar (17-6113, **17-  
6021**), Petitioner - Appellee: Mary C.  
Jermann-Robinson, Assistant Federal Public  
Defender, Federal Public Defender, Federal  
Defender, Memphis, TN.

For United States of America (17-6113, **17-  
6021**), Respondent - Appellant: Naya  
Bedini, Office of the U.S. Attorney,  
Western District of Tennessee, Memphis,  
TN.

**Judges:** Before: KETHLEDGE, BUSH, and  
MURPHY, Circuit Judges.

**Opinion**

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**ORDER**

The United States appeals the district court's judgments in these consolidated cases granting petitioner Keith Keglar's motion to vacate, set aside, or correct his sentence under *28 U.S.C. § 2255* and resentencing him to 120 months of imprisonment. The parties have waived oral argument, and the panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a).*

In 2012, a jury convicted Keglar of being a felon in possession of a firearm, in violation of [18 U.S.C. § 922\(g\)](#). The district court determined that Keglar was subject to a fifteen-year mandatory minimum sentence under the [Armed Career Criminal Act \(ACCA\)](#), [18 U.S.C. § 924\(e\)](#), because he had three or more prior "violent felony" convictions in Tennessee, specifically aggravated burglary (two), aggravated assault (two), [<sup>2</sup>] and attempted aggravated burglary (one). The district court sentenced Keglar to 235 months of imprisonment, which was at the bottom of the Sentencing Guidelines range. We affirmed. *See United States v. Keglar*, [535 F. App'x 494 \(6th Cir. 2013\)](#) (per curiam). Keglar unsuccessfully moved to vacate his sentence in 2014. *See Keglar v. United States*, No. 2:14-cv-02180 (W.D. Tenn. May 19, 2014) (order).

In December 2016, we gave Keglar permission to file a second motion to vacate in order to raise a claim that his aggravated-burglary and attempted aggravated-burglary convictions no longer qualified as ACCA predicate offenses in view of [Johnson v. United States](#), [135 S. Ct. 2551, 192 L. Ed. 2d 569 \(2015\)](#). *See In re Keglar*, No. 16-5848 (6th Cir. Dec. 21, 2016) (order).<sup>1</sup> The district court then granted Keglar relief from his sentence pursuant to our en banc decision in [United States v. Stitt](#), [860 F.3d 854, 858 \(6th Cir. 2017\) \(Stitt I\)](#), which held that Tennessee aggravated burglary is not an ACCA predicate offense pursuant to [Mathis](#)

[v. United States](#), [136 S. Ct. 2243, 195 L. Ed. 2d 604 \(2016\)](#), because it is broader than ACCA generic burglary. The district court resentenced Keglar to 120 months of imprisonment, the statutory maximum sentence without the ACCA enhancement.

The government appeals Keglar's new sentence in No. **17-6021**. In No. 17-6113, the government appeals the district court's judgment granting Keglar's motion [<sup>3</sup>] to vacate. The clerk of court consolidated these two cases for disposition.

We review de novo a district court's conclusion that a prior conviction is an ACCA predicate offense. *See United States v. Mitchell*, [743 F.3d 1054, 1058 \(6th Cir. 2014\)](#) (citing [United States v. Benton](#), [639 F.3d 723, 729 \(6th Cir. 2011\)](#)).

After the government filed the two appeals at issue, the Supreme Court reversed our decision in [Stitt](#), holding that Tennessee's aggravated burglary statute is not broader than generic burglary, and therefore that it is a "violent felony" under the ACCA. *See United States v. Stitt*, [139 S. Ct. 399, 405-08, 202 L. Ed. 2d 364 \(2018\) \(Stitt II\)](#). Consequently, the district court erred in granting Keglar relief from his ACCA sentence and resentencing him to 120 months of imprisonment. Keglar argues that the Tennessee burglary statute is broader than generic burglary because it also treats attempted burglary as a completed burglary, but we are bound by *Stitt II* and prior circuit decisions holding that the statute qualifies as an ACCA predicate. *See Brumbach v. United States*, [929 F.3d 791, 792 \(6th Cir. 2019\)](#).

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<sup>1</sup>The government conceded that *Johnson* invalidated Keglar's attempted-aggravated-burglary conviction as an ACCA predicate. *See Keglar*, No. 16-5848, slip op. at 2.

Accordingly, we **VACATE** the district court's judgments granting Keglar relief from his ACCA sentence and resentencing him to 120 months of imprisonment and **REMAND** this case to the district court with instructions to reinstate his original sentence.

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**United States v. Keglar**

United States Court of Appeals for the Sixth Circuit

October 31, 2019, Filed

No. 17-6021/17-6113

**Reporter**

2019 U.S. App. LEXIS 32751 \*

UNITED STATES OF AMERICA,  
Plaintiff-Appellant, v. KEITH KEGLAR,  
Defendant-Appellee.

**Counsel:** [\*1] For United States of  
America, Plaintiff - Appellant (17-6021):  
Naya Bedini Office of the U.S. Attorney,  
Western District of Tennessee, Memphis,  
TN.

For Keith Keglar, Defendant - Appellee (17-  
6021): Mary C. Jermann-Robinson,  
Assistant Federal Public Defender, Federal  
Public Defender, Memphis, TN.

For Keith Keglar, Petitioner - Appellee (17-  
6113): Mary C. Jermann-Robinson,  
Assistant Federal Public Defender, Federal  
Public Defender, Memphis, TN.

For United States of America, Respondent -  
Appellant (17-6113): Naya Bedini, Office  
of the U.S. Attorney, Western District of  
Tennessee, Memphis, TN.

**Judges:** BEFORE: KETHLEDGE, BUSH,  
and MURPHY, Circuit Judges.

**Opinion**

**ORDER**

The court received a petition for rehearing

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

Therefore, the petition is denied.

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**Bohannon v. United States**

United States Court of Appeals for the Sixth Circuit

November 04, 2019, Decided

No.17-5962

**Reporter**

2019 U.S. App. LEXIS 33019 \*

TIMOTHY WAYNE BOHANNON,  
Petitioner-Appellee, v. UNITED STATES  
OF AMERICA, Respondent-Appellant.

**Notice:** Decision text below is the first available text from the court; it has not been editorially reviewed by LexisNexis. Publisher's editorial review, including Headnotes, Case Summary, Shepard's analysis or any amendments will be added in accordance with LexisNexis editorial guidelines.

**Opinion**

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[\*1] ON APPEAL FROM THE  
UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF  
TENNESSEE

**ORDER**

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

The United States appeals a district court judgment granting Timothy Wayne Bohannon's motion to vacate his sentence under [28 U.S.C. § 2255](#). The parties have waived oral argument, and this panel

unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*.

In 2008, a jury convicted Bohannon of two counts of being a felon in possession of a firearm. Because he had four prior convictions of aggravated burglary in Tennessee state courts, he was sentenced under the Armed Career Criminal Act (ACCA) to 180 months of imprisonment.

In his motion to vacate, Bohannon argued that his prior aggravated burglary convictions in Tennessee did not qualify as violent felonies under the ACCA. Based on our decision in [\*United States v. Stitt, 860 F.3d 854, 858 \(6th Cir. 2017\)\*](#) (en banc), the district court granted the motion. The judgment in the criminal case was amended to sentence Bohannon to time served. This appeal followed. It was held in abeyance pending the Supreme Court's consideration of *Stitt*, which it reversed in [\*United States v. Stitt, 139 S. Ct. 399, 406 \(2018\)\*](#). The government's brief requests that

No. **17-5962**

- 2 -

the district court's order be vacated. [\*2] Bohannon has raised new claims arguing that his aggravated burglary convictions do

not qualify under the ACCA because the Tennessee law defines the entry of a habitation to include an entry by an instrument not intended to be used to commit a felony, and because intent may be formed while remaining in a building rather than at the time of entry. Bohannon also argues that we lack jurisdiction over the appeal because the government did not appeal the amended judgment in the criminal case.

We review the district court's decision de novo. *Davis v. United States*, 900 F.3d 733, 735 (6th Cir. 2018), cert. denied, 139 S. Ct. 1374 (2019).

Bohannon's jurisdictional argument is without merit. He claims that the court of appeals lacks jurisdiction because the government appealed from the civil judgment granting his § 2255 motion rather than from the amended judgment in his criminal case. Bohannon relies on *Andrews v. United States*, which held that a judgment granting a motion to vacate was not immediately appealable where resentencing had yet to take place. 373 U.S. at 339-40 (1963). However, the jurisdictional issue in *Andrews* is not present here, where the district court entered simultaneous civil and criminal judgments *after* Bohannon was resentenced. Thus, by the time the government appealed the civil [\*3] judgment, the habeas proceeding had become final. Even assuming the government's notice of appeal identified the wrong judgment and is technically deficient, it is nevertheless sufficient to comply with *Federal Rule of Appellate Procedure* 3(c). That rule requires would-be appellants to

"designate the judgment, order, or part thereof being appealed."

*Fed. R. App. P.* 3(c)(1)(B). "An appeal referencing an order that directs entry of judgment in a case is a sufficient equivalent to appealing the judgment itself." *Caudill v. Hollan*, 431 F.3d 900,

905 (6th Cir. 2005). By appealing the district court's civil judgment, which provided that "an amended judgment shall be entered in [the] criminal file," the government effectively appealed the criminal judgment. Accordingly, the court has jurisdiction over this appeal.

In *United States v. Nance*, 481 F.3d 882, 888 (6th Cir. 2007), we held that Tennessee's aggravated burglary statute constituted a violent felony for purposes of the ACCA. See *United States v. Priddy*, 808 F.3d 676, 684 (6th Cir. 2015). Our decision in *Stitt*, overruling *Nance*, has

No. 17-5962

- 3 -

now been reversed by the Supreme Court, and *Nance* is once again the law of this circuit.

*Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019).

Bohannon's new arguments were not presented in the district court and are not properly before the court. See *Weinberger v. United States*, 268 F.3d 346, 352 (6th Cir. 2001). In any event, a panel of this court cannot overrule *Nance*'s holding. See *Brumbach*, 929 F.3d at 795;

*United States v. Elbe, 774 F.3d 885, 891 (6th Cir. 2014)*. Also, the Supreme Court has [\*4] now held that criminal intent for burglary can be formed at any time while unlawfully remaining in a building. *Quarles v. United States, 139 S. Ct. 1872, 1880 (2019)*.

Accordingly, we **VACATE** the district court's judgment and **REMAND** this matter for further proceedings. Bohannon's motion to file a supplemental brief is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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**Bearden v. United States**

United States Court of Appeals for the Sixth Circuit

November 6, 2019, Filed

No. 17-5927

**Reporter**

2019 U.S. App. LEXIS 33528 \*

LEO BEARDEN, Petitioner-Appellee, v.  
UNITED STATES OF AMERICA,  
Respondent-Appellant.

**Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION.** *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**Prior History:** [\*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

*Bearden v. United States, 2017 U.S. Dist. LEXIS 116881 (W.D. Tenn., July 26, 2017)*

**Case Summary**

**Overview**

**HOLDINGS:** [1]-In a [\*28 U.S.C.S. § 2255\*](#)

case, a district court was instructed to reinstate defendant's original sentence because, while he argued that his aggravated burglary conviction should no longer count as an ACCA predicate because the Tennessee courts defined the entry element of the state's burglary statutes more broadly than generic burglary, under the Nance decision, his aggravated burglary was a violent felony for purposes of the ACCA, and his argument was foreclosed by precedent that the "remaining in" variants of Tennessee's burglary statutes were broader than generic burglary because they did not contain an element of criminal intent at the time of entry, and his motion to supplement his appellate briefs as denied since his new claim was subject to the statutory limitations placed on second or successive [\*28 U.S.C.S. § 2255\*](#) claims.

**Outcome**

Reversed and remanded, and motion denied.

**LexisNexis® Headnotes**

Criminal Law &  
Procedure > ... > Appeals > Standards of

Review > De Novo Review

## **HN1** Standards of Review, De Novo Review

An appellate court reviews a district court's decision to grant [28 U.S.C.S. § 2255](#) relief de novo.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

Governments > Courts > Judicial Precedent

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > Prior Felonies

Criminal Law & Procedure > ... > Theft & Related Offenses > Burglary & Criminal Trespass > Burglary

## **HN2** Adjustments & Enhancements, Armed Career Criminals

A panel of the United States Court of Appeals for the Sixth Circuit cannot overrule the holding in the Nance decision that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the Armed Career Criminal Act. Rather, that can only be done by an inconsistent decision of the United States Supreme Court or a decision of the en banc United States Court of Appeals for the Sixth Circuit.

Criminal Law & Procedure > Habeas Corpus > Procedural Defenses > Successive Petitions

## **HN3** Procedural Defenses, Successive Petitions

When a movant seeks to raise a new claim after his [28 U.S.C.S. § 2255](#) motion has been denied and is no longer pending before the district court, that claim is second or successive and is subject to the statutory limitations placed on second or successive claims.

**Counsel:** For Leo Bearden, Petitioner - Appellee: Tyrone Jemal Paylor, Federal Public Defender, Memphis, TN.

For United States of America, Respondent - Appellant: Naya Bedini, Office of the U.S. Attorney, Western District of Tennessee, Memphis, TN.

**Judges:** Before: MOORE, SUTTON, and NALBANDIAN, Circuit Judges.

## Opinion

### ORDER

The government appeals a district court order granting relief under [28 U.S.C. § 2255](#) to Leo Bearden from his enhanced sentence under the [Armed Career Criminal Act \("ACCA"\)](#). The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a).*

In 2005, Bearden pleaded guilty to being a

felon in possession of a firearm in violation of [18 U.S.C. § 922\(g\)](#). At sentencing, the district court found that Bearden was an armed career criminal based on prior Tennessee convictions for (1) aggravated burglary, (2) aggravated robbery, and (3) aggravated robbery and second-degree murder. It sentenced Bearden as an armed career criminal to 180 months of imprisonment. We affirmed Bearden's conviction and sentence. [United States v. Bearden](#), 213 F. App'x 410 (6th Cir.), cert. denied, 550 U.S. 950, 127 S. Ct. 2287, 167 L. Ed. 2d 1118 (2007). In 2008, Bearden filed a [§ 2255](#) motion, which the district court denied. *See Bearden v. United States*, No. 2:08-cv-02166, R. 1, 14 (W.D. Tenn.) [\*2]. We dismissed Bearden's appeal because his notice of appeal was untimely. [Bearden v. United States](#), No. 11-5184, slip op. at 1-2, 2011 U.S. App. LEXIS 26929 (6th Cir. Apr. 25, 2011) (order).

In 2016, Bearden received permission to file a second or successive [§ 2255](#) motion challenging his armed career criminal designation based on [Johnson v. United States](#), 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), on the ground that his Tennessee aggravated burglary conviction might no longer qualify as a violent felony for purposes of the ACCA. *See In re Bearden*, No. 16-5933, slip op. at 2-3, 2016 U.S. App. LEXIS 24469 (6th Cir. Oct. 31, 2016) (order). While that motion was pending, we overruled circuit precedent, *see United States v. Nance*, 481 F.3d 882 (6th Cir. 2007), and held that a conviction under Tennessee's aggravated burglary statute did not qualify as an ACCA predicate because

the statute swept more broadly than generic burglary by including habitable vehicles and movable enclosures. [United States v. Stitt](#), 860 F.3d 854, 858 (6th Cir. 2017) (en banc) ("*Stitt I*"). Based on that decision, the district court granted Bearden's [§ 2255](#) motion and resentenced him to time served followed by three years of supervised release. The district court entered an amended judgment in Bearden's criminal case sentencing him to time served.

The government appealed, and briefing was held in abeyance pending the Supreme Court's resolution of the government's petition for a writ of [\*3] certiorari in *Stitt I*. The Supreme Court eventually granted the petition and reversed our decision in *Stitt I*, holding that Tennessee's aggravated burglary statute was not rendered overly broad by its coverage of mobile structures "designed or adapted for overnight use." [United States v. Stitt](#), 139 S. Ct. 399, 407, 202 L. Ed. 2d 364 (2018) ("*Stitt II*").

The government now argues that, in light of the Supreme Court's decision in *Stitt II*, Bearden is no longer entitled to relief from his ACCA sentence, so the district court's judgment should be reversed and the case remanded for reinstatement of his original sentence. Bearden does not dispute that he is no longer entitled to relief based on *Stitt I*, but he offers two alternative arguments for why the district court's judgment should be affirmed: (1) the entry element of Tennessee's burglary statutes is defined more broadly than the entry element of generic burglary, and (2) Tennessee's burglary statutes are overly broad because their "remaining in" variants do not require

the perpetrator to have the intent to commit a crime at the time of entry. He also argues that this court lacks jurisdiction to hear the government's challenge to the district court's grant of relief under [§ 2255](#) because the government did [\*4] not separately appeal the duration of the sentence that Bearden received after this grant occurred.

We have jurisdiction to hear this appeal. The government complied with the prescribed procedure when it appealed the district court's grant of relief under [§ 2255](#). That's all we require. And none of the cases Bearden cites are to the contrary. Those cases either examined whether defendants had properly obtained certificates of appealability for their specific appeal, *see* [United States v. Hadden, 475 F.3d 652, 663 \(4th Cir. 2007\)](#); [Ajan v. United States, 731 F.3d 629, 631 \(6th Cir. 2013\)](#), or else concerned appeals from non-final orders. *See* [Andrews v. United States, 373 U.S. 334, 83 S. Ct. 1236, 10 L. Ed. 2d 383 \(1963\)](#); [United States v. Futch, 518 F.3d 887 \(11th Cir. 2008\)](#). Neither line of authority has anything to do with this case. With respect to the merits of the appeal, [HN1](#) we review the district court's decision de novo. *See* [Davis v. United States, 900 F.3d 733, 735 \(6th Cir. 2018\)](#), cert. denied, 139 S. Ct. 1374, 203 L. Ed. 2d 612 (2019) (mem.). Bearden first argues that his aggravated burglary conviction should no longer count as an ACCA predicate because the Tennessee courts define the entry element of the state's burglary statutes more broadly than generic burglary by including intrusions by instrument that are the functional equivalent of attempted burglary.

But we recently held that *Nance* "is once again the law of this circuit." [Brumbach v. United States, 929 F.3d 791, 794 \(6th Cir. 2019\)](#). Accordingly, even if there were merit to Bearden's argument, [HN2](#) a panel of this court cannot overrule [\*5] *Nance's* holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the ACCA. *See id.* Rather, that "can only be done by an 'inconsistent decision' of the Supreme Court or, like we did briefly with *Stitt I*, a decision of the en banc court." *Id.* (quoting [Salmi v. Sec'y of Health & Human Servs., 774 F.2d 685, 689 \(6th Cir. 1985\)](#)).

Bearden's second argument—that the "remaining in" variants of Tennessee's burglary statutes are broader than generic burglary because they do not contain an element of criminal intent at the time of entry—is also foreclosed by precedent. *See* [United States v. Ferguson, 868 F.3d 514, 515 \(6th Cir. 2017\)](#) (citing [United States v. Priddy, 808 F.3d 676, 684-85 \(6th Cir. 2015\)](#)); *see also* [Quarles v. United States, 139 S. Ct. 1872, 1880, 204 L. Ed. 2d 200 \(2019\)](#).

Finally, Bearden seeks permission to supplement his appellate brief to include a challenge to his conviction based on [Rehaif v. United States, 139 S. Ct. 2191, 204 L. Ed. 2d 594 \(2019\)](#). But [HN3](#) when a movant seeks to raise a new claim after his [§ 2255](#) motion has been denied and is no longer pending before the district court, that claim is second or successive and is subject to the statutory limitations placed on second or successive claims. *See* [Moreland v. Robinson, 813 F.3d 315, 324-25 \(6th Cir. 2016\)](#).

2016).

Accordingly, we **REVERSE** the district court's grant of § 2255 relief, **REMAND** with instructions to reinstate Bearden's original sentence, and **DENY** the motion to supplement.

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## Cox v. United States

United States Court of Appeals for the Sixth Circuit

November 13, 2019, Filed

No. 17-5953

### **Reporter**

2019 U.S. App. LEXIS 33934 \*

MICHAEL DEWAYNE COX, Petitioner-Appellee, v. UNITED STATES OF AMERICA, Respondent-Appellant.

**Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION.** *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**Prior History:** [\*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

### **Case Summary**

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#### **Overview**

**HOLDINGS:** [1]-A district court improperly granted [28 U.S.C.S. § 2255](#) relief since defendant unsuccessfully argued that his aggravated burglary conviction should no longer count as an ACCA

predicate because the Tennessee courts defined the entry element of the state's burglary statutes more broadly than generic burglary by including intrusions by instrument that were the functional equivalent of attempted burglary, the Nance decision was again the law of the United States Sixth Circuit, and defendant's Tennessee conviction for aggravated burglary was a violent felony for purposes of the ACCA.

### **Outcome**

Reversed and remanded with instructions.

### **LexisNexis® Headnotes**

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Criminal Law & Procedure > Habeas Corpus > Appeals

### [HNI](#) **Habeas Corpus, Appeals**

A judgment or order in a [28 U.S.C.S. § 2255](#) proceeding that vacates a sentence but defers resentencing is not appealable until the defendant has been resentenced.

Criminal Law & Procedure > Habeas Corpus > Appeals

## **HN2** Habeas Corpus, Appeals

A district court's order that either enters the result of a resentencing or corrects the prisoner's sentence completes the [28 U.S.C.S. § 2255](#) proceeding and is therefore immediately appealable.

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

## **HN3** Standards of Review, De Novo Review

An appellate court reviews a district court's decision in a [28 U.S.C.S. § 2255](#) case de novo.

**Counsel:** For Michael Dewayne Cox, Petitioner - Appellee: Madelyn Dianne Smothers, Federal Public Defender, Federal Public Defender, Memphis, TN.

For United States of America, Respondent - Appellant: Annie Tauer Christoff, Office of the U.S. Attorney, Western District of Tennessee, Memphis, TN.

**Judges:** Before: MOORE, McKEAGUE, and READLER, Circuit Judges.

## **Opinion**

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## **ORDER**

The government appeals the district court's judgment granting relief under [28 U.S.C. §](#)

[2255](#) to Michael DeWayne Cox from his enhanced sentence under the [Armed Career Criminal Act \(ACCA\)](#). The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*.

In 2008, Cox pleaded guilty to being a felon in possession of a firearm, in violation of [18 U.S.C. § 922\(g\)](#). The district court determined that he qualified as an armed career criminal and sentenced him to 180 months of imprisonment, the minimum sentence mandated by the ACCA, [18 U.S.C. § 924\(e\)](#). The predicate offenses for his armed career criminal designation included five Tennessee convictions for and one for burglary.

In 2016, Cox filed a [§ 2255](#) motion, challenging his armed career criminal designation based on [Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 \(2015\)](#), and arguing that [\*2] his aggravated burglary convictions no longer qualified as violent felonies for purposes of the ACCA. While that motion was pending, we overruled circuit precedent, *see United States v. Nance, 481 F.3d 882 (6th Cir. 2007)*, and held that a conviction under Tennessee's aggravated burglary statute did not qualify as an ACCA predicate because the statute swept more broadly than generic burglary by including habitable vehicles and movable enclosures. [United States v. Stitt, 860 F.3d 854, 858 \(6th Cir. 2017\)](#) (en banc) ("Stitt 1"). Based on that decision, the district court granted Cox's motions and sentenced him to time served.

The government appealed, and we granted

its request to hold the case in abeyance while it sought Supreme Court review in *Stitt*. The Supreme Court granted certiorari and reversed our decision in *Stitt I*, holding that Tennessee's aggravated burglary statute is not rendered overly broad by its coverage of movable structures "designed or adapted for overnight use." *United States v. Stitt*, 139 S. Ct. 399, 407, 202 L. Ed. 2d 364 (2018) ("Stitt IT").

The government now argues that, in light of *Stitt II*, Cox is no longer entitled to relief from his ACCA sentence, so the district court's judgment should be reversed and the case remanded for reinstatement of Cox's original sentence. Cox argues that we lack jurisdiction to decide the issue raised by the [\*3] government on appeal because it filed its notice of appeal from the district court's order granting his § 2255 motion rather than the amended judgment in the criminal case. And although he does not dispute that he is no longer entitled to relief based on *Stitt I*, he argues that the district court's judgment should be affirmed on the alternative basis that the entry element of Tennessee's burglary statutes has been defined by the Tennessee courts more broadly than the entry element of generic burglary.

As a threshold matter, we reject Cox's jurisdictional argument. The cases on which he relies stand for the well-established proposition that *HN1*[↑] a judgment or order in a § 2255 proceeding that vacates a sentence but defers resentencing is not appealable until the defendant has been resentenced. See *Andrews v. United States*, 373 U.S. 334, 339, 83 S. Ct. 1236, 10 L. Ed.

2d 383 (1963); *Haynes v. United States*, 873 F.3d 954, 956-57 (7th Cir. 2017) (citing cases). In contrast, the district court here expressly declined to order a resentencing hearing and instead imposed a sentence of time served, effective immediately. This completed the § 2255 proceeding and was thus a final order conferring jurisdiction on this court. See *Andrews*, 373 U.S. at 339-40; *United States v. Hadden*, 475 F.3d 652, 663 (4th Cir. 2007) (*HN2*[↑] "[A] district court's order that either enters the result of a resentencing or corrects the prisoner's sentence completes the § 2255 proceeding [\*4] and is therefore immediately appealable.").

*HN3*[↑] We review the district court's decision de novo. See *Davis v. United States*, 900 F.3d 733, 735 (6th Cir. 2018), cert. denied, 139 S. Ct. 1374, 203 L. Ed. 2d 612 (2019).

Cox now argues that his aggravated burglary conviction should no longer count as an ACCA predicate because the Tennessee courts define the entry element of the state's burglary statutes more broadly than generic burglary by including intrusions by instrument that are the functional equivalent of attempted burglary. But as the government argues—and we recently *held*—*Nance* "is once again the law of this circuit." *Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019). Accordingly, even if there were merit to Cox's argument, a panel of this court cannot overrule *Nance's* holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the ACCA. See *id.* Rather, that "can only be done by an

'inconsistent decision' of the Supreme Court or, like we did briefly with *Stitt I*, a decision of the en banc court." *Id. at 795* (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)).

For these reasons, we **REVERSE** the district court's grant of § 2255 relief and **REMAND** with instructions to reinstate the original sentence. Cox's motion to file a supplemental brief is **DENIED**.

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**Jones v. United States**

United States Court of Appeals for the Sixth Circuit

November 14, 2019, Filed

Nos. 18-5844/5845

**Reporter**

2019 U.S. App. LEXIS 34085 \*

WILSON JONES, Petitioner-Appellee, v.  
UNITED STATES OF AMERICA,  
Respondent-Appellant.

**Notice:** NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**Prior History:** [\*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

*United States v. Jones, 476 Fed. Appx. 651, 2012 U.S. App. LEXIS 16959 (6th Cir.), 2012 FED App. 883N (6th Cir.) (6th Cir. Tenn., Aug. 10, 2012)*

**Counsel:** For Wilson Jones (18-5845, **18-5844**), Petitioner - Appellee: Tyrone Jemal Paylor, Federal Public Defender, Memphis,

TN.

For United States of America (18-5845, **18-5844**), Respondent - Appellant: Kevin G. Ritz, Assistant U.S. Attorney, Office of the U.S. Attorney, Western District of Tennessee, Memphis, TN.

**Judges:** Before: MOORE, McKEAGUE, and READLER, Circuit Judges.

**Opinion**

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**ORDER**

The United States appeals the district court's judgments in these consolidated cases granting petitioner Wilson Jones's motion to vacate, set aside, or correct his sentence under *28 U.S.C. § 2255* and resentencing him to 84 months of imprisonment. The parties have waived oral argument, and the panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*.

In 2011, Jones pleaded guilty to being a felon in possession of a firearm, in violation of *18 U.S.C. § 922(g)*. The district court determined that Jones was subject to a fifteen-year mandatory minimum sentence

under the *Armed Career Criminal Act (ACCA)*, 18 U.S.C. § 924(e), because he had three or more prior "violent felony" convictions in Tennessee for robbery, second-degree burglary, third-degree burglary, aggravated burglary, and escape. The district [\*2] court sentenced Jones to 180 months of imprisonment, the mandatory minimum sentence under the ACCA, and we affirmed. *See United States v. Jones*, 476 F. App'x 651 (6th Cir. 2012) (per curiam).

In September 2014, Jones moved to vacate his sentence under 28 U.S.C. § 2255, claiming that his convictions for second-degree burglary, third-degree burglary, aggravated burglary, and escape were not ACCA predicate offenses in view of *Descamps v. United States*, 570 U.S. 254, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013).

In October 2015, Jones filed an amended motion to vacate, claiming in relevant part that he was entitled to relief from his sentence because his convictions for robbery, second-degree burglary, and aggravated burglary were not ACCA predicate offenses in view of *Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015).

While Jones's motion to vacate was pending in the district court, we decided that Tennessee's aggravated-burglary statute did not qualify as an ACCA predicate, *see United States v. Stitt*, 860 F.3d 854, 856 (6th Cir. 2017) (en banc), and neither did Tennessee's third-degree-burglary statute, *see Cradler v. United States*, 891 F.3d 659, 671 (6th Cir. 2018). In response, the government conceded that under the then-current state of the law, Jones's aggravated

burglary, third-degree burglary, and escape convictions were no longer ACCA predicates. As a result, the government acknowledged that Jones was entitled to relief from his sentence because only his robbery and second-degree burglary convictions [\*3] remained as qualifying offenses. The government, however, preserved its objection that we wrongly decided *Stitt*. The district court granted Jones's motion to vacate in light of the government's concession that Jones did not have three qualifying predicate convictions and resentenced him to 84 months of imprisonment.

In No. 18-5844, the government appeals the district court's judgment granting Jones's motion to vacate. The government appeals Jones's new sentence in No. 18-5845. The clerk of court consolidated these two cases for disposition.

We review de novo a district court's conclusion that a prior conviction is an ACCA predicate offense. *See United States v. Mitchell*, 743 F.3d 1054, 1058 (6th Cir. 2014).

After the government's appeals were filed, the Supreme Court reversed our decision in *Stitt*, holding that Tennessee's aggravated burglary statute is not broader than generic burglary, and therefore that it is a "violent felony" under the ACCA. *See United States v. Stitt*, 139 S. Ct. 399, 405-08, 202 L. Ed. 2d 364 (2018) (*Stitt II*). Consequently, the district court erred in granting Jones relief from his ACCA sentence and resentencing him to 84 months of imprisonment. Jones argues that the Tennessee burglary statute is

broader than generic burglary because it also treats attempted burglary as a completed burglary, [\*4] but we are bound by *Stitt II* and prior circuit decisions holding that the statute qualifies as an ACCA predicate. *See Brumbach v. United States, 929 F.3d 791, 794-95 (6th Cir. 2019).*

Accordingly, we **VACATE** the district court's judgments granting Jones relief from his ACCA sentence and resentencing him to 84 months of imprisonment and **REMAND** this case to the district court with instructions to reinstate his original sentence. Jones's motion to file a supplemental brief is **DENIED**.

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End of Document

## Dawson v. United States

United States Court of Appeals for the Sixth Circuit

November 20, 2019, Filed

Nos. 17-5930/5931

### **Reporter**

2019 U.S. App. LEXIS 34627 \*

DERECK DAWSON, Petitioner-Appellee,  
v. UNITED STATES OF AMERICA,  
Respondent-Appellant.UNITED STATES  
OF AMERICA, Plaintiff-Appellant, v.  
DERECK DAWSON, Defendant-Appellee.

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**Prior History:** [\*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

### **Case Summary**

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### **Overview**

**HOLDINGS:** [1]-The court reversed the district court's order granting [28 U.S.C.S. § 2255](#) to petitioner from his sentence

enhancement under the Armed Career Criminal Act (ACCA), [18 U.S.C.S. § 924\(e\)](#), because the U.S. Supreme Court's reversal of the court's Stitt I decision left United States v. Nance as the law of the Sixth Circuit; under Nance, a Tennessee conviction for aggravated burglary was a violent felony for purposes of the ACCA, and a panel of the court could not overrule that holding absent an inconsistent decision of the Supreme Court or a decision of the en banc court.

### **Outcome**

Judgment reversed and remanded for reinstatement of original sentence.

### **LexisNexis® Headnotes**

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Criminal Law &  
Procedure > ... > Sentencing  
Guidelines > Adjustments &  
Enhancements > Armed Career  
Criminals

Criminal Law &  
Procedure > ... > Appeals > Standards of  
Review > De Novo Review

## **HN1** **Adjustments & Enhancements, Armed Career Criminals**

Whether an Armed Career Criminal Act predicate crime qualifies as a violent felony is a legal question that the court reviews de novo.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

Criminal Law & Procedure > ... > Theft & Related Offenses > Burglary & Criminal Trespass > Burglary

## **HN2** **Adjustments & Enhancements, Armed Career Criminals**

A defendant qualifies as an armed career criminal if he has three or more prior convictions for a violent felony. [18 U.S.C.S. § 924\(e\)\(1\)](#). A violent felony is defined as one that has as an element the use, attempted use, or threatened use of physical force against the person of another (the use-of-force clause) or that is burglary of a dwelling, arson, or extortion, or involves use of explosives (the enumerated-offenses clause). [18 U.S.C.S. § 924\(e\)\(2\)\(B\)](#). For a state burglary offense to qualify as a violent felony under the Armed Career Criminal Act's enumerated-offenses clause, the state offense's elements must be the same as, or narrower than, those of generic burglary, that is, an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

Governments > Courts > Judicial Precedent

Criminal Law & Procedure > ... > Theft & Related Offenses > Burglary & Criminal Trespass > Burglary

## **HN3** **Adjustments & Enhancements, Armed Career Criminals**

United States v. Nance is once again the law of the U.S. Court of Appeals for the Sixth Circuit. A panel of the court cannot overrule Nance's holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the Armed Career Criminal Act. Rather, that can only be done by an inconsistent decision of the U.S. Supreme Court or a decision of the en banc court.

**Counsel:** For Dereck Dawson, Petitioner - Appellee (17-5930): Mary C. Jermann-Robinson, Assistant Federal Public Defender, Federal Public Defender, Memphis, TN.

For United States of America, Respondent - Appellant (17-5930): Kevin G. Ritz, Assistant U.S. Attorney, Office of the U.S. Attorney, Western District of Tennessee, Memphis, TN.

For United States of America, Plaintiff - Appellant (17-5931): Kevin G. Ritz, Assistant U.S. Attorney, Office of the U.S.

Attorney, Western District of Tennessee, Memphis, TN.

For Dereck Dawson, Defendant - Appellee (17-5931); Mary C. Jermann-Robinson, Assistant Federal Public Defender, Federal Public Defender, Memphis, TN.

**Judges:** Before: MOORE, SUTTON, and NALBANDIAN, Circuit Judges.

## Opinion

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### ORDER

In these consolidated cases, the government appeals the district court's order (No. **17-5930**) granting relief under [28 U.S.C. § 2255](#) to Dereck Dawson from his sentence enhancement under the [Armed Career Criminal Act \("ACCA"\)](#), *see 18 U.S.C. § 924(e)*, and the third amended judgment (No. 17-5931) entered in Dawson's criminal case. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* [**\*2**] *Fed. R. App. P.* 34(a).

A jury convicted Dawson of possession of a firearm by a felon, in violation of [18 U.S.C. § 922\(g\)](#), and possession of a stolen firearm, in violation of [18 U.S.C. § 922\(j\)](#). At sentencing, Dawson was designated an armed career criminal under the ACCA based in part on a prior conviction for Tennessee aggravated burglary. The district court sentenced Dawson to 262 months of imprisonment. On remand, the district court sentenced Dawson, again under the ACCA, to 180 months of imprisonment. Dawson later filed an unsuccessful motion under [§](#)

[2255](#). *See Dawson v. United States*, [702 F.3d 347 \(6th Cir. 2012\)](#).

In 2016, we granted Dawson permission to file a second or successive [§ 2255](#) motion challenging his ACCA designation based on *Johnson v. United States*, [135 S. Ct. 2551, 192 L. Ed. 2d 569 \(2015\)](#). *In re Dawson*, No. 15-5955 (6th Cir. Mar. 24, 2016) (order). While Dawson's second [§ 2255](#) motion was pending, we overruled prior circuit precedent, *see United States v. Nance*, [481 F.3d 882 \(6th Cir. 2007\)](#), and held that a conviction for Tennessee aggravated burglary did not qualify as an ACCA predicate because the Tennessee statute swept more broadly than "generic" burglary by including habitable vehicles and movable enclosures. *United States v. Stitt*, [860 F.3d 854, 858 \(6th Cir. 2017\)](#) (en banc) ("Stitt I"), *rev'd*, *United States v. Stitt*, [139 S. Ct. 399, 202 L. Ed. 2d 364 \(2018\)](#) ("Stitt II"). Based on our decision in *Stitt I*, the district court granted Dawson's [§ 2255](#) motion, sentenced him to time served, and later entered a third amended judgment [**\*3**] reducing his term of supervised release.

After the district court entered its third amended judgment, the Supreme Court reversed our *Stitt I* decision in *Stitt II*. On appeal, the government argues that Dawson is no longer entitled to relief from his ACCA designation in light of *Stitt II*. Dawson does not dispute that he is no longer entitled to relief under *Stitt I*, but argues that his prior conviction for Tennessee aggravated burglary does not qualify as an ACCA predicate on alternative grounds. Dawson has also filed a motion for leave to file a supplemental brief

challenging his [§ 922\(g\)](#) conviction under [Rehaif v. United States, 139 S. Ct. 2191, 204 L. Ed. 2d 594 \(2019\)](#).

**HN1** [↑] "Whether an ACCA predicate crime qualifies as a violent felony . . . is a legal question that we review *de novo*." [Davis v. United States, 900 F.3d 733, 735 \(6th Cir. 2018\)](#), cert. denied, [139 S. Ct. 1374, 203 L. Ed. 2d 612 \(2019\)](#).

**HN2** [↑] A defendant qualifies as an armed career criminal if he has three or more prior convictions for, as relevant here, a "violent felony." [18 U.S.C. § 924\(e\)\(1\)](#). A "violent felony" is defined as one that "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the "use-of-force" clause) or that "is burglary of a dwelling, arson, or extortion, [or] involves use of explosives" (the "enumerated-offenses" clause). [18 U.S.C. § 924\(e\)\(2\)\(B\)](#). For a state burglary [\*4] offense to qualify as a violent felony under the ACCA's enumerated-offenses clause, the state offense's elements must be the same as, or narrower than, those of "generic" burglary, that is, "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." [Taylor v. United States, 495 U.S. 575, 598, 110 S. Ct. 2143, 109 L. Ed. 2d 607 \(1990\)](#); see [Mathis v. United States, 136 S. Ct. 2243, 2248, 195 L. Ed. 2d 604 \(2016\)](#).

Dawson argues that a Tennessee aggravated burglary conviction no longer qualifies as an ACCA predicate offense because the Tennessee courts define the "entry" element of the state's burglary statutes, *see Tenn.*

[Code Ann. §§ 39-14-402, 39-14-403](#), more broadly than generic burglary. But, as we recently held, [HN3](#) [↑] *Nance* "is once again the law of this circuit." [Brumbach v. United States, 929 F.3d 791, 794 \(6th Cir. 2019\)](#). Accordingly, even if there were merit to Dawson's argument, a panel of this court cannot overrule *Nance*'s holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the ACCA. *See id.* Rather, that "can only be done by an 'inconsistent decision' of the Supreme Court or, like we did briefly with *Stitt I*, a decision of the en banc court." *Id. at 795* (quoting [Salmi v. Sec'y of Health & Human Servs., 774 F.2d 685, 689 \(6th Cir. 1985\)](#)).

Dawson also argues that the "remaining in" variants of Tennessee's burglary statutes are broader than generic burglary. But that argument, too, is foreclosed by binding precedent. [\*5] *See United States v. Ferguson, 868 F.3d 514, 515 (6th Cir. 2017)* (citing [United States v. Priddy, 808 F.3d 676, 684-85 \(6th Cir. 2015\)](#)); *see also Quarles v. United States, 139 S. Ct. 1872, 1880, 204 L. Ed. 2d 200 (2019)*.

For these reasons, we **REVERSE** the district court's grant of [§ 2255](#) relief and **REMAND** with instructions to reinstate the original sentence. The motion for leave to file a supplemental brief is **DENIED**.