APPENDIX

APPENDIX A

No. 22-5006

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 13, 2022
DEBORAH S. HUNT, Clerk

UNITED STATES of AMERICA,

Plaintiff-Appellee,

v.

TAVARIS BETTS,

Defendant-Appellant.

O R D E R

BEFORE: SUTTON, Chief Judge; BATCHELDER and DONALD, Circuit Judges.

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

Therefore, the petition is denied. Judge Donald would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

Case No. 22-5006

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES of AMERICA,

Plaintiff - Appellee,

v.

TAVARIS BETTS,

Defendant - Appellant.

FILED
August 05, 2022
DEBORAH S. HUNT, Clerk

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

OPINION

Before: SUTTON, Chief Judge; BATCHELDER and DONALD, Circuit Judges.

BATCHELDER, J., delivered the opinion of the court in which SUTTON, C.J., joined. DONALD, J. (pp. 3–5), delivered a separate dissenting opinion.

ALICE M. BATCHELDER, Circuit Judge. When sentencing Tavaris Betts as a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), the district court found that three of his prior convictions were predicate felonies under the Armed Career Criminal Act, § 924(e)(2)(B)(ii), triggering the mandatory minimum sentence, § 924(e)(1). Betts's prior convictions were for aggravated assault in violation of T.C.A. § 39-13-102, robbery in violation of § -3-401, and aggravated burglary, in violation of

§ -14-403. Under our precedent, all three are ACCA predicate felonies. *Lowe v. United States*, 920 F.3d 414, 416 n.1 (6th Cir. 2019) (§ -13-102 aggravated assault); *United States v. Southers*, 866 F.3d 364, 367 (6th Cir. 2017) (§ -13-401 robbery); *Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019) (§ -14-403 aggravated burglary).

Betts argues that aggravated burglary under T.C.A. § 39-14-403(a)(3) should not be an ACCA predicate. Even if he were correct, this panel cannot overrule published circuit precedent. *See Brumbach*, 929 F.3d at 795. Betts concedes as much in his appellate brief, and urges en banc review of *Brumbach* and its progeny. *See* Appellant Brief at 2, 4, 6, 7, 19, 33, and 39.

Given this posture, we AFFIRM the judgment of the district court.

BERNICE BOUIE DONALD, Circuit Judge, dissenting. I disagree with the majority that prior precedent forecloses our consideration of whether aggravated burglary under T.C.A. § 39-14-403(a)(3) qualifies as a predicate felony under the Armed Career Criminal Act, and therefore, I respectfully dissent.

For a decision by a prior panel to be holding, "it must be clear that the court intended to rest the judgment (if necessary) on its conclusion about the issue." *Wright v. Spaulding*, 939 F.3d 695, 701 (6th Cir. 2019). If the decision does not contribute to the judgment, then it is only dicta and not binding authority. *Id.* at 701. Rampant dictum can produce a snowballing effect and "is usually a bad idea, because judges think differently — more

carefully, more focused, more likely to think things through — when our words bring real consequences to the parties before us." *United States v. Burris*, 912 F.3d 386, 410 (6th Cir. 2019) (en banc) (Kethledge, J., concurring). However, the majority is again kicking the can down the road by failing to apply the *Wright* standard to the case at bar and summarily treating the issue as foreclosed.

The faulty path of foreclosure can be traced back to *United States v. Sawyers*, 409 F.3d 732 (6th Cir. 2007). Curiously, however, *Sawyers* was a facilitation case, not an aggravated burglary case. The court in *Sawyers* was asked to address whether a Tennessee conviction for facilitation of aggravated burglary constituted a "violent felony" under the ACCA. *Id.* at 737-40. The panel determined that "while aggravated burglary in Tennessee meets this standard, its facilitation does not." *Id.* at 737. Had the *Sawyers* panel rested its decision on this statement, our issue could be considered foreclosed. But the panel instead rested its judgment on the now-unconstitutional residual clause in the ACCA statute, finding that facilitation of aggravated burglary did not qualify under the enumerated clause. *Id.* at 738; *see Johnson v. United States*, 576 U.S. 591 (2015). Following the *Wright* standard, the *Sawyers* panel's statement must be considered dicta, not binding precedent.

Sawyers created a slippery slope of opinions simply deferring to the analysis provided therein. *United States v. Nance* was the first in the long line of cases. 481 F.3d 882 (6th Cir. 2007). *Nance* cited the *Sawyers* definition of aggravated burglary under Tennessee law and determined that it "clearly comport[ed]" with generic burglary under the ACCA without any further analysis of

the issue. *Id.* at 888. Next came *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015). *Priddy* missed the opportunity to independently analyze the (a)(3) subsection, choosing instead to defer to the broad ruling in *Nance* that the first three variants of Tennessee burglary constitute generic burglary. *Id.* at 864-65. The mistake was further compounded by *United States v. Ferguson*, in which the panel held that "*Priddy* dictates that [Tennessee burglary convictions] are violent felonies." 868 F.3d 514, 515 (6th Cir. 2017). Finally, we arrive at *United States v. Brumbach*, which, just like the cases before it, deferred to prior panels as having foreclosed the issue. 929 F.3d 791, 794 (6th Cir. 2019). The issue before us in *Brumbach*, however, was one specifically concerned with the definition of "entry," not the actor's state of mind under the (a)(3) subsection. *Id.* at 795.

Since *Brumbach*, panel after panel has mistakenly treated this issue as foreclosed without providing a reasoned basis for doing so. *See e.g., United States v. Brown*, 957 F.3d 679 (6th Cir. 2020) (deferring to *Brumbach* and *Ferguson* instead of analyzing Brown's argument that subsection (a)(3) does not qualify as an ACCA predicate); *United States v. Buie*, 960 F.3d 767 (6th Cir. 2020) (citing *Brumbach* as foreclosure precedent for consideration). Justice Sotomayor highlighted this mistake in a recent statement respecting the denial of certiorari. *See Gann v. United States*, 142 S. Ct. 1 (2021) (Sotomayor, J., concurring in denial of certiorari). She found that *Brumbach* "had rejected different arguments for why different elements of Tennessee's aggravated burglary did not match the elements of generic burglary" and noted that "the Sixth Circuit neither discussed nor

decided, whether Tennessee aggravated burglary also comports with the requirement that generic burglary include the intent to commit a crime." *Id.* at *2. Justice Sotomayor "expect[ed] the Sixth Circuit to give the argument full and fair consideration in a future case." *Id.* Unfortunately, the majority fails to do so here in its conclusory, two-paragraph opinion.

It is crucially important that we distinguish dicta from binding precedent, and more importantly, that each issue before the court "is investigated with care, and considered in its full extent." *Cohens v. State of Virginia*, 19 U.S. 264, 399 (1821). To foreclose an issue simply because prior panels have done the same continues to entrench a troublesome precedent. For the aforementioned reasons, I respectfully dissent.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT OF FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

UNITED STATES OF AMERICA,	
v.	**Case No. 3:20-cr-00033**
TAVARIS BETTS	**Judge Aleta A. Trauger**

MEMORANDUM and ORDER

Defendant Tavaris Betts seeks a ruling that Tennessee aggravated burglary in violation of Tenn. Code Ann. § 39-14-403 (2016)[1] does not qualify as a violent felony for purposes of the Armed Career Criminal Act (ACCA). The court finds that it is required by controlling Sixth Circuit precedent to reject his arguments, based on *United States v. Brumbach*, 929 F.3d 791 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 974 (2020).

The Sixth Circuit has repeatedly held that *Brumbach* "closed the book on Tennessee aggravated burglary," *United States v. Tigue*, 811 F. App'x 970, 975 (6th Cir. 2020), *cert. denied sub nom. McClurg v. United States*, 141 S. Ct. 937 (2020), insofar as *Brumbach* held, in a published opinion, that *United States v. Nance*, 481 F.3d 882 (6th Cir. 2007), is controlling. In *Nance*, the court held that an aggravated burglary conviction under Tennessee law categorically counts as a burglary under the Supreme

[1] The aggravated burglary statute in effect at the time of Betts' conviction has been superseded and is no longer in effect.

Court's generic definition and so may count as a predicate offense under the ACCA. *Nance*, 481 F.3d at 888. *Accord United States v. Gann*, 827 F. App'x 566, 568 (6th Cir. 2020), *cert. denied*, 142 S. Ct. 1 (2021); *United States v. Brown*, 957 F.3d 679, 683 (6th Cir. 2020) ("*Nance* is 'once again the law of this circuit.'" (quoting *Brumbach*, 929 F.3d at 794–95)); *Lurry v. United States*, 823 F. App'x 350, 355 (6th Cir. 2020) ("Simply stated, this court's precedent . . . forecloses [the defendant's] arguments that his prior Tennessee convictions do not qualify as violent felonies under the ACCA." (citing *Brumbach*, 929 F.3d at 794)); *United States v. Morris*, 812 F. App'x 341, 347 (6th Cir. 2020) (Moore, J., concurring) ("Until this court grants en banc review, we must follow *Brumbach*, no matter how 'weighty' the underlying substantive issues or how thoughtfully the issues are addressed.").

Betts' citation to *United States v. Cartwright*, 12 F.4th 572 (6th Cir. 2021), has no bearing on his case, because Cartwright was convicted under a prior version of the Tennessee burglary statute, which permitted a conviction for burglary without unlawful or unprivileged entry into a building or structure and, therefore, was broader than "generic burglary." *Id.* at 581–82.

Betts also argues aggravated burglary does not qualify as generic burglary, because the statute permits a conviction based on a mere "reckless" violation of the statute. (Doc. No. 55, at 5.) He argues that, although he pleaded guilty, he did not "admit that the burglary was intentional." (*Id.* at 4.) The court is cognizant that, when the Supreme Court denied certiorari in *Gann*, Justice Sotomayor issued a statement acknowledging that the Sixth Circuit has not yet addressed the question of "whether Tennessee aggravated burglary also comports

with the requirement that generic burglary include the intent to commit a crime." *Gann v. United States*, 142 S. Ct. 1, 2 (Oct. 4, 2021). Nonetheless, regardless of the merits of Betts' argument, this court is bound by Sixth Circuit precedent to conclude that Tennessee aggravated burglary is a crime of violence under the ACCA. *See United States v. Gann*, 827 F. App'x at 569 ("Gann also argues that . . . Tennessee aggravated burglary does not qualify as generic burglary because it lacks generic burglary's intent-to-commit-a-crime element. But several panels of this court have also treated this argument as foreclosed by *Brumbach*. In light of *Brumbach*, we do the same." (internal citations omitted)).

Based on *Gann* and *Brumach*, the court finds that Tennessee aggravated burglary, Tenn. Code Ann. § 39-14-403 (2016), qualifies as a crime of violence under the ACCA.

It is so **ORDERED**.

Aleta A. Trauger
ALETA A. TRAUGER
United States District Judge

APPENDIX D

[1] UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 3:20-cr-033
VS	)	
TAVARIS BETTS	)	

BEFORE THE HONORABLE ALETA A. TRAUGER, DISTRICT JUDGE

TRANSCRIPT OF PROCEEDINGS

December 17, 2021

APPEARANCES:

For the Government:	ROBERT E. McGUIRE US Attorney's Office 110 Ninth Ave S., Suite A961 Nashville, TN 37203
For the Defendant:	JAMES KEVIN CARTWRIGHT 120 S Second Street Suite 201 Clarksville, TN 37040

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[2] The above-styled cause came to be heard on December 17, 2021, before the Hon. Aleta A. Trauger, District Judge, when the following proceedings were had at 10:31 a.m. to-wit:

THE COURT: Good morning. We're here on sentencing in *United States versus Tavaris Betts*. We have Rob McGuire for the government and Kevin Cartwright for Mr. Betts.

Mr. Betts, have you read the presentence report?

THE DEFENDANT: Yes.

THE COURT: Feel you understand it?

THE DEFENDANT: Yes.

THE COURT: Okay. We have one pending objection. I am issuing a written opinion on that objection, which I am overruling, despite Mr. Cartwright's heroic, heroic efforts on that objection. I really feel bound by the Sixth Circuit pronouncements in this area.

MR. CARTWRIGHT: Your Honor, there are a couple things. And I've discussed this with the US attorney. We would ask that the Court make a point in its order that the *Shepherd* documents be made in [3] the record. I think they may already be because they're in the second addendum to the PSR.

THE COURT: Let me see. I believe they are.

MR. CARTWRIGHT: If they're not, I'd like to file them as attachments to my motion.

THE COURT: They're attached.

MR. CARTWRIGHT: And I'd ask that they be

entered into the record.

THE COURT: They are attached to the second addendum, so they will go forward.

MR. CARTWRIGHT: Second, Your Honor, sad to say, in my 30 years I've never been up to the Supreme Court or done an en banc, so I would ask the Court if you could make a finding that this is a -- an important enough issue that it would justify appointment of a second counsel or substitution of counsel if that should prove necessary.

THE COURT: I really think that's up to the Sixth Circuit to determine.

MR. CARTWRIGHT: Yes, ma'am. I was just hoping for a district finding to support it.

THE COURT: Yeah. I think the fact that I am issuing a written opinion on it I think will show that it is an important issue, but that will be up to [4] the Sixth Circuit to decide.

MR. CARTWRIGHT: Thank you.

THE COURT: So with that ruling, there are no further objections, and I'm going to accept the presentence report as my findings of fact on all issues and on the application of the guidelines.

The offense level is a 30. The Criminal History Category is IV. The resulting guideline range is 135 to 168 months, but there's a minimum mandatory of 15 years, and so the guideline becomes 15 years or 180 months.

This is a -- Congress has passed this armed career criminal statute, and it's a tough – it's a tough result. And I can't say I agree with it, but I don't have any choice. At

any rate the guideline is 180 months. The supervised release term is two to five years.

There is no agreement in this case. Does the government have anything further to say before I pronounce sentence?

MR. McGUIRE: No, Your Honor.

THE COURT: Anything further, Mr. Cartwright?

MR. CARTWRIGHT: Your Honor, Mr. Betts did not wish to make a statement to the Court, but I [5] would like to ask the Court to recommend that the BOP place him as close as possible to Nashville. And I would like to ask the Court to recommend drug treatment, mental health evaluation and a recommendation for educational opportunities and vocational opportunity training.

THE COURT: Okay. I will make all those recommendations.

All right. The Court's obligation is to impose a sentence that is sufficient but not greater than necessary to comply with the purposes of the sentencing statute, taking into account the nature and circumstances of the offense and the history and characteristics of the defendant.

Mr. Betts pled guilty without a plea agreement to being a felon in possession of a firearm on January 9 of 2020. The factual circumstances are that he wanted money from an ex-girlfriend and threatened her with a gun.

In terms of his background, he's 28. He completed the eighth grade. He's a member of the 52 Hoover Crip gang. His criminal history reflects that he was in a lot of

trouble at 17 for various crimes and was placed into DCS custody for a period of time.

At 18 he was convicted of aggravated [6] assault on the driver of a car and received a four-year probation sentence, which was -- the terms of which he violated on many occasions. At 22 he received a six-year sentence for an armed robbery, and for aggravated burglary he received a three-year sentence. A month before this offense in December of 2019, he assaulted a different ex-girlfriend, so we have a lot of domestic violence here, which the Court always is very sad to see.

In terms of his personal background, he has -- his parents were not married, but they lived together basically their whole lives and married a few years ago. He has two brothers. He was raised in a tough neighborhood. His father apparently had drug issues.

He has mental health issues dating as early as elementary school. He had learning issues; had an IEP, was expelled from Hillwood. Again, he only completed the eighth grade. Very little employment.

Started using marijuana daily at 17 and cocaine daily at 18. Has had lots of trouble complying with supervision. And I'm sure that that is, in part, because of his young age.

It is common knowledge that the frontal [7] lobe of the brain, which gives us judgment and common sense, doesn't mature until the mid 20s, and if you have been using substances, that is postponed even further than the mid 20s. And so the Court feels that Mr. Betts's behavior, at least in part, is due to the fact that he is young and he is not mature yet and his brain has not matured yet. By

the time he gets out, he will be very mature. And also accounting for his behavior is his upbringing in a violent neighborhood and his drug use.

I have taken account of all arguments in the defense memorandum, but there is in place, because I have ruled that the armed career criminal statute applies, a minimum mandatory of 180 months. The Court's hands are tied, regardless of mitigating factors that I do see in this case, which I've already articulated. I can't do anything but give him the minimum mandatory sentence. So my sentence will be 180 months in the custody of the Bureau of Prisons, to be followed by three years of supervised release.

I don't levy a fine because I find he's financially unable to pay a fine. The $100 special assessment must be paid.

The forfeiture will appear in the judgment.

[8] The special conditions of his supervised release are drug testing and substance abuse treatment; mental health treatment; furnish all financial records and tax returns; and be required to participate in vocational and/or adult education programs in order to get his GED if he does not get his GED while he is incarcerated, which I hope he does.

I will recommend mental health treatment, substance abuse treatment, vocational and educational training. And I will recommend that he be housed close to Nashville.

I believe that this sentence will comport with all the purposes of federal sentencing. It will reflect the seriousness of the offense, promote respect for the law, be

a just punishment, protect the public from further crimes of the defendant, and provide him with needed treatment. It will not result in unwarranted sentencing disparities because it is a guideline sentence.

Mr. Cartwright, could you tell me who is here with -- on behalf of the defendant today?

MR. CARTWRIGHT: Your Honor, his mother and father are here. And outside are some other relatives, I'm sorry I didn't get the names of, but [9] his mother and father are here today.

THE COURT: Okay. Are there any objections from the government not previously raised?

MR. McGUIRE: No, Your Honor.

THE COURT: Any objections from the defense not previously raised?

MR. CARTWRIGHT: None not previously raised, Your Honor.

THE COURT: Okay. Mr. Betts, this is a tough sentence, and I wish you good luck coping with it and I hope that you are able to make good use of your time. You haven't served any federal time, and at least I believe that the resources in the Federal Bureau of Prisons, that those resources are better than in state systems.

I hope that you will take advantage of them and receive helpful drug treatment and mental health treatment, vocational training. Try to get your GED when you're in there so you'll have that when you get out. There are lots of employers now, and there will probably be many more when you get out, who are employing people with felony convictions. They are finding they are

often very good workers, and so I hope when you get out you can make a legitimate living and I wish you good luck.

[10] THE DEFENDANT: Thank you.

THE COURT: You have the right to appeal your sentence. Any appeal must be filed within 14 days. You may appeal to apply under the pauper's oath and the clerk will file your notice of appeal if you request the clerk to do so.

We're in recess.

(Which were all of the proceedings had in the above-captioned cause on the above-captioned date.)

[11] **REPORTER'S CERTIFICATE PAGE**

I, Roxann Harkins, Official Court Reporter for the United States District Court for the Middle District of Tennessee, in Nashville, do hereby certify:

That I reported on the stenotype shorthand machine the proceedings held in open court on December 17, 2021, in the matter of UNITED STATES OF AMERICA v. TAVARIS BETTS, Case No. 3:20-cr-033; that said proceedings were reduced to typewritten form by me; and that the foregoing transcript is a true and accurate transcript of said proceedings.

This is the 8th day of February, 2022.

s/ Roxann Harkins
ROXANN HARKINS, RPR, CRR
Official Court Reporter