APPENDICES

APPENDIX
TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-5082

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

AL DORSEY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Tennessee at Chattanooga.
No. 1:21-cr-00077-1—Charles Edward Atchley, Jr., District Judge.

Decided and Filed: January 23, 2024

OPINION

Before: McKEAGUE, LARSEN, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge. The U.S. Sentencing Guidelines repeatedly instruct district courts to increase a defendant's sentence if the defendant has one or more prior convictions for a "crime of violence." *See*, *e.g.*, U.S.S.G. §§ 2K2.1; 4B1.1. They define "crime of violence" to mean, as relevant here, an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another[.]"

Id. § 4B1.2(a). In *United States v. Gloss*, 661 F.3d 317 (6th Cir. 2011), we interpreted language identical to this so-called "elements clause" to cover the Tennessee crime of facilitating aggravated robbery. *Id.* at 318-20.

Viewing itself bound by *Gloss*, the district court in this case treated Al Dorsey's prior convictions for facilitating aggravated robbery as "crimes of violence." Dorsey now offers two reasons why we need not follow *Gloss*. He first asserts that *Gloss* conflicts with an earlier decision holding that facilitation offenses (unlike aiding-and-abetting offenses) do not require defendants to harbor an intent to commit the crime that their conduct facilitated. *See United States v. Vanhook*, 640 F.3d 706, 713-14 (6th Cir. 2011). He next asserts that *Gloss* conflicts with a later Supreme Court decision holding that the elements clause does not reach reckless uses of force. *See Borden v. United States*, 593 U.S. 420, 429 (2021) (plurality opinion); *id.* at 44546 (Thomas, J., concurring in the judgment). Dorsey is wrong on both counts. Because we must follow *Gloss*, we affirm.

I

After midnight on January 1, 2021, Dorsey brought in the new year with a group of friends in Chattanooga, Tennessee. The group decided to shoot guns into the air as part of their celebration. Nearby livestream cameras recorded this dangerous activity. Chattanooga police who were monitoring the cameras from an intelligence center dispatched officers to the scene. The officers found shell casings on the ground near the group. They detained Dorsey and discovered a pistol on him. Their later review of the video confirmed that Dorsey had fired some of the shots.

Dorsey's prior felony convictions meant that he could not possess the pistol. The federal government

thus charged him with possessing a firearm as a felon in violation of 18 U.S.C. § 922(g)(1). He pleaded guilty.

When determining Dorsey's guidelines range, a probation officer calculated his base offense level as 24 because he had at least two prior convictions for a "crime of violence." U.S.S.G. § 2K2.1(a)(2). Specifically, Dorsey had two prior Tennessee convictions for facilitating aggravated robbery and one prior Tennessee conviction for robbery. In addition, the probation officer relied on these prior crimes of violence to add a point to Dorsey's criminal history score. *See id.* § 4A1.1(d) (previously codified under subsection (e)). These calculations produced a guidelines range of 84 to 105 months' imprisonment.

At sentencing, Dorsey objected to the probation officer's decision to treat his two facilitation offenses as "crimes of violence." If these offenses did not qualify, he argued, his guidelines range would fall to 46 to 57 months' imprisonment. The district court disagreed. Our prior decision in *Gloss*, the court reasoned, required it to treat Dorsey's Tennessee convictions for facilitating aggravated robbery as crimes of violence. That said, the court noted that it would "welcome" additional guidance from us on this topic. Sent. Tr., R.56, PageID 418. Ultimately, it varied below Dorsey's guidelines range by imposing a 72-month sentence.

Dorsey appeals the decision to treat his two facilitation offenses as "crimes of violence." We review the decision de novo. *See United States v. Hawkins*, 554 F.3d 615, 616 (6th Cir. 2009).

II

The applicable guideline defines "crime of violence" in part as follows: "The term 'crime of violence' means

any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—(1) has as an element the use, attempted use, or threatened use of physical force against the person of another[.]" U.S.S.G. § 4B1.2(a); *see id.* § 2K2.1 cmt. n.1. Some other statutes—including, most notably, the Armed Career Criminal Act (or "ACCA" for short)—contain an identically worded "elements clause." *See* 18 U.S.C. § 924(e)(2)(B)(i). And courts often rely on caselaw that interprets the ACCA's elements clause when deciding which offenses qualify as "crimes of violence" under the Sentencing Guidelines (or other similarly worded laws). *See United States v. Burris*, 912 F.3d 386, 392 (6th Cir. 2019) (en banc); *see also United States v. Harrison*, 54 F.4th 884, 890 (6th Cir. 2022).

To decide whether an offense falls within the "elements clause" under this caselaw, courts apply the ubiquitous "categorical approach." *United States v. Taylor*, 596 U.S. 845, 850 (2022). This approach turns on an offense's general elements, not a defendant's specific conduct. *See id.* Put another way, a criminal law "has as an element the use, attempted use, or threatened use of physical force against the person of another" only if *every* set of facts that could violate the law would include the use, attempted use, or threatened use of that force. *See Nicholson v. United States*, 78 F.4th 870, 877 (6th Cir. 2023). So we need not consider how Dorsey committed his two facilitation offenses in this case. *See Taylor*, 596 U.S. at 850. Rather, we must ask whether the least violent way that a defendant could commit this offense would include the required force. *See id.* If not, the offense does not qualify as a "crime of violence" under this clause. *See id.*

We thus start with the elements of Dorsey's two facilitation offenses. Tennessee law defines the generic

crime of "facilitation" as follows: "A person is criminally responsible for the facilitation of a felony, if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under [a separate aiding-and-abetting statute], the person knowingly furnishes substantial assistance in the commission of the felony." Tenn. Code Ann. § 39-11-403(a). As this language suggests, a facilitator has less culpability than an aider and abettor under Tennessee law. The facilitator must only *know* that the primary culprit intends to commit the underlying crime; the aider and abettor must *intend* for that culprit to commit the crime. *See United States v. Woodruff*, 735 F.3d 445, 450 (6th Cir. 2013); *Gloss*, 661 F.3d at 318.

The crime of aggravated robbery undergirded Dorsey's two facilitation offenses. Tennessee defines an ordinary robbery as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn. Code Ann. § 39-13-401(a). The robbery becomes "aggravated" when *either* the defendant commits this crime "with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon" *or* "the victim suffers serious bodily injury." *Id.* § 39-13-402(a)(1)-(2).

In *Gloss*, we held that the mix of statutory elements across the facilitation and aggravated-robbery statutes satisfied the elements clause's requirements. 661 F.3d at 318-20. Breaking this facilitation offense down into its component parts, *Gloss* began by examining the underlying crime of aggravated robbery (a robbery that uses a "real or disguised deadly weapon" or that results in a "serious bodily injury"). *Id.* at 319. We reasoned that this crime falls within the elements clause because it will always entail "the use, attempted use, or threatened use

of physical force against the person of another." *Id.* (citation omitted). Indeed, we have also held that an ordinary robbery in Tennessee falls within the clause. *See United States v. Hubbard*, 2023 WL 319604, at *2-3 (6th Cir. Jan. 19, 2023); *United States v. Belcher*, 40 F.4th 430, 431-32 (6th Cir. 2022). A robber who knowingly uses "violence" or knowingly puts a victim in "fear" of violence necessarily "use[s]" "physical force against" the victim or at least "threaten[s]" the use of that force within the meaning of the crime-of-violence definition. Tenn. Code Ann. § 39-13-401(a); U.S.S.G. § 4B1.2(a); *Belcher*, 40 F.4th at 431; *see also Stokeling v. United States*, 139 S. Ct. 544, 554-55 (2019).

The question then becomes whether a conviction for *facilitation* of aggravated robbery always will involve the "use" or "threatened use" of force within the meaning of the elements clause. *Gloss* answered yes. To begin with, a facilitation offense always requires the prosecution to prove that an aggravated robbery (that is, a crime of violence) has occurred. *See Gloss*, 661 F.3d at 319. This fact distinguishes facilitation from "inchoate" offenses like attempt or solicitation because one can commit those offenses without completing the underlying crime. *See*, *e.g.*, *Taylor*, 596 U.S. at 850-51; *United States v. Benton*, 639 F.3d 723, 731 (6th Cir. 2011). In contrast, a defendant does not "facilitate" a crime unless the primary culprit successfully completes it. *See*, *e.g.*, *State v. Kiser*, 2019 WL 2402962, at *11 (Tenn. Crim. App. June 6, 2019); *State v. Dych*, 227 S.W.3d 21, 40 (Tenn. Crim. App. 2006). *Gloss* held that this proof—that "*someone*" used or threatened to use force and that the defendant "knowingly provided substantial assistance to that person"—satisfied the elements clause. 661 F.3d at 318-19.

One can read *Gloss* broadly or narrowly. Broadly, one might read *Gloss* as holding that the robber (the main culprit) needs to be the only person who knowingly engages in the "use" or "threatened use" of force. So even if a facilitating defendant were convicted under a hypothetical statute penalizing those who recklessly (not knowingly) assist in a robbery, the facilitation offense might still satisfy the elements clause. That clause requires only that a crime have "as an element the use, attempted use, or threatened use" of the required force. U.S.S.G. § 4B1.2(a)(1). This text need not be interpreted to require defendants *themselves* to knowingly use or threaten force as long as "*someone*" does so. *Gloss*, 661 F.3d at 319. Narrowly, one might read *Gloss* as attributing the robber's "use" or "threatened use" of force to the facilitator. After all, *Gloss* also noted that Tennessee's facilitation offense requires the facilitator to *know* that the robber "intended" to commit the robbery and to "*knowingly*" give "substantial assistance" to that crime. *Id.* at 318-19 (emphasis added). And just as an armed assailant who shoots a victim knowingly uses the "force it takes for the bullet to injure the victim's body," *see Harrison*, 54 F.4th at 889, one might say that the facilitator knowingly uses the force (or threatened force) that the robber wields (or threatens to wield), *see Gloss*, 661 F.3d at 319.

We need not choose between these readings. Either way, the district court correctly held that *Gloss* required it to treat Dorsey's facilitation convictions as crimes of violence. True, *Gloss* was interpreting the ACCA's identical elements clause when it held that facilitating aggravated robbery satisfied the clause. *See id.* at 318 (citing 18 U.S.C. § 924(e)(2)(B)(i)). But Dorsey makes no attempt to distinguish *Gloss* on this (or any other) ground. He instead offers two theories why *Gloss* was

wrongly decided and does not bind us. Neither theory has merit.

Theory One: Dorsey argues that *Gloss* conflicts with our months-earlier decision in *Vanhook*. When finding that a facilitation offense fell outside the definition of "violent felony" in the ACCA, *Vanhook* rested on the fact that facilitation does not require an *intent* to commit the crime that the defendant facilitated (here, aggravated robbery). *See Vanhook*, 640 F.3d at 713-15; *see also Woodruff*, 735 F.3d at 449-50. And because a later panel cannot adopt a legal rule that conflicts with an earlier published decision, Dorsey claims, we must ignore *Gloss* and follow *Vanhook*. *See*, *e.g.*, *White v. Columbus Metro. Hous. Auth.*, 429 F.3d 232, 241 (6th Cir. 2005).

The conflict that he perceives is an illusion. *Vanhook* held that facilitating the *burglary of a building* did not qualify as a "violent felony" under the ACCA. *See* 640 F.3d at 708. But the case did not even interpret the elements clause because the parties agreed that burglary of a building did not require the use (or attempted or threatened use) of force. *Id.* at 710. Rather, *Vanhook* concerned the ACCA's "residual clause," a separate provision that the Supreme Court has since found void for vagueness. *Id.*; *see Johnson v. United States*, 576 U.S. 591, 593-606 (2015). That clause treated as a "violent felony" any offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another[.]" 18 U.S.C. § 924(e)(2)(B)(ii). For years, the Supreme Court had struggled to interpret the residual clause's language. *See Johnson*, 576 U.S. at 598-602. Near the time of *Vanhook*, the Court had suggested that the clause covered only offenses that were "purposeful, violent, and aggressive." *Vanhook*, 640 F.3d at 712 (quoting *Begay v. United States*, 553 U.S. 137, 144-45 (2008)). *Vanhook* concluded that Tennessee's facilitation

statute criminalized behavior that was not "sufficiently purposeful" to satisfy the residual clause. *Id.* at 713. We reasoned that the facilitation offense covered only defendants who *knowingly* assist the primary perpetrator. *Id.* at 713-14. Defendants who *purposefully* assisted would qualify as aiders and abettors subject to harsher punishments. *Id.*

Vanhook's logic does not reach the elements clause. Unlike the text of the (now-invalid) residual clause, the text of the elements clause cannot be read to cover only offenses undertaken purposefully. *See United States v. Farrow*, 574 F. App'x 723, 733 (6th Cir. 2014); *United States v. Elliott*, 757 F.3d 492, 496 (6th Cir. 2014). That is, even if a criminal offense does not require a defendant to intend a harmful result, the offense can still have "as an element the use, attempted use, or threatened use of physical force against the person of another[.]" U.S.S.G. § 4B1.2(a)(1). Consider an example from the Supreme Court. A "getaway driver" who *knowingly* runs over a pedestrian along the escape path uses the car's "force" against the victim even if the driver would have preferred a "clear road" and so did not *purposely* run over the pedestrian. *Borden*, 593 U.S. at 432 (plurality opinion). And here, the facilitation offense requires a facilitator to *know* that the aggravated robber will use or threaten force against the victim. *Gloss*, 661 F.3d at 318-19.

Dorsey's reliance on *Woodruff* fares no better. *Woodruff* asked whether a Tennessee conviction for facilitating a cocaine sale qualified as a "controlled substance offense" under U.S.S.G. § 4B1.2(b). 735 F.3d at 448-51. That guideline defines the phrase "controlled substance offense" in relevant part to cover any offense that "prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance … or the

possession of a controlled substance … with intent to manufacture, import, export, distribute, or dispense[.]" U.S.S.G. § 4B1.2(b)(1). At the time of *Woodruff*, the guideline's commentary also suggested that the phrase covered "the offenses of aiding and abetting, conspiring, and attempting to commit" those drug offenses. *Id.* § 4B1.2 cmt. n.1 (2013). *Woodruff* held that the district court had wrongly treated facilitation of the sale of cocaine as a controlled substance offense but that this error was not "plain" for purposes of plain-error review. 735 F.3d at 448-51. In doing so, we did not expressly consider whether an offense that bars the knowing facilitation of a cocaine sale qualified as an offense that "prohibits the … distribution" of cocaine under the guideline's *text*. U.S.S.G. § 4B1.2(b). Rather, we jumped to the guideline's *commentary*, explaining that facilitation does not require defendants to intend for a drug sale to occur (unlike aiding-and-abetting, conspiracy, and attempt offenses). 735 F.3d at 449-50. Because facilitation required only knowing conduct, we held that it was not "substantially equivalent to" these other crimes. *Id.* at 450.

Yet much has happened since *Woodruff*. Sitting en banc, we held that § 4B1.2(b)'s commentary (the commentary on which *Woodruff* relied) unlawfully enlarged the guideline's scope by including "attempt" crimes within the meaning of "controlled substance offense." *United States v. Havis*, 927 F.3d 382, 386-87 (6th Cir. 2019) (en banc). And the Sentencing Commission responded to *Havis* by adding language to the guideline similar to the commentary's prior text. Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28,254, 28,275-76 (May 3, 2023). The guideline itself now covers "the offenses of aiding and abetting, attempting

to commit, or conspiring to commit" any controlled substance offense or crime of violence. U.S.S.G. § 4B1.2(d).

All of this said, this case does not require us to consider how these changes affect *Woodruff* (if at all). That case does Dorsey no good even if it has continued vitality. If we assume that *Woodruff* remains good law, we can assume that *facilitating* the distribution of drugs does not count as *distributing* drugs under § 4B1.2(b). And we can assume that *facilitating* the distribution of drugs does not count as *aiding and abetting* that distribution under the newly minted § 4B1.2(d). *See Woodruff*, 735 F.3d at 449-50. Still, *Woodruff* and these assumptions say nothing about whether the distinct crime of facilitating an aggravated robbery "has as an element the use, attempted use, or threatened use of physical force against the person of another[.]" U.S.S.G. § 4B1.2(a)(1). *Woodruff* thus does not conflict with *Gloss*'s holding that it does. *Gloss*, 661 F.3d at 319; *see Farrow*, 574 F. App'x at 733.

Theory Two: Even if *Gloss* does not conflict with our own precedent, Dorsey next argues, it at least conflicts with the Supreme Court's later decision in *Borden*. He is again mistaken. *Borden* held that the ACCA's elements clause does not cover offenses that require only a "reckless" state of mind. 593 U.S. at 423 (plurality opinion); *id.* at 445-46 (Thomas, J., concurring in the judgment). The plurality in *Borden* reasoned that defendants have not used force "against" a victim unless the victim was the "conscious object" of that force. *Id.* at 430-31 (plurality opinion). But when a defendant's reckless act harms a victim, the defendant has not consciously directed the force against the victim. *Id.* at 427. Rather, the defendant has only "consciously disregard[ed]" the risk that the force might reach the victim. *Id.* (quoting Model Penal Code § 2.02(2)(c) (Am. L. Inst.

1985)); *see id.* at 432; *id.* at 445-46 (Thomas, J., concurring in the judgment).

This holding does not affect *Gloss*'s conclusion that facilitating aggravated robbery satisfies the elements clause. To begin with, *Borden*'s plurality opinion expressly disclaimed that it was addressing "accessory liability" crimes like Tennessee's facilitation offense. *Id.* at 426 n.3 (plurality opinion). Regardless, to convict a defendant of facilitation, the prosecution must prove more than that the defendant acted recklessly. A facilitator of aggravated robbery must knowingly assist the robber while also knowing of the robber's plan to commit the crime (and thus of the planned use or threatened use of force). *Gloss*, 661 F.3d at 318. So facilitation requires the defendant to harbor a *knowing* state of mind, not just a *reckless* one. And the *Borden* plurality made clear that the elements clause covers "knowing acts" in addition to "purposeful" ones. 593 U.S. at 432 (plurality opinion). Indeed, we have since held that the elements clause reaches crimes committed wantonly—a state of mind less than knowing but more than reckless. *See Harrison*, 54 F.4th at 890. In short, Dorsey's facilitation offenses required proof of his knowledge. An offense with that state of mind still meets the elements clause after *Borden*.

That leaves Dorsey's reliance on a recent remand order. *See United States v. Page*, 2022 U.S. App. LEXIS 2476, at *3 (6th Cir. Jan. 26, 2022) (order). There, the government successfully obtained a remand for the district court to consider whether facilitation of felony murder in Tennessee satisfied the elements clause after *Borden*. *See id.* at *2-3. Yet felony murder only requires a "killing" to have occurred during the course of one of several crimes, including "burglary," "theft," or "aggravated child neglect[.]" Tenn. Code Ann. § 39-13-

202(a)(2). The current version of this statute holds the defendant "strictly" liable for such a killing. *State v. Kimbrough*, 924 S.W.2d 888, 890 & n.2 (Tenn. 1996). The state courts have thus held that defendants can facilitate felony murder even if they lack knowledge of the murder. *State v. Lewis*, 919 S.W.2d 62, 68 (Tenn. Crim. App. 1995), *overruled on other grounds by State v. Williams*, 977 S.W.2d 101 (Tenn. 1998). Defendants need only know of (and assist in) the felony that led to the death, and the list of qualifying felonies do not all require the use (or threatened use) of force. *See State v. Robinson*, 2023 WL 2669906, at *12-13 (Tenn. Crim. App. Mar. 29, 2023); *see also State v. Ely*, 48 S.W.3d 710, 719-20 (Tenn. 2001). *Gloss* and this case, by comparison, concern facilitation of aggravated robbery—not felony murder. So our remand order in *Page* in no way calls *Gloss* into doubt or raises any concerns about the proper outcome of this case.

We affirm.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
CHATTANOOGA DIVISION

1:21-CR-77

UNITED STATES OF AMERICA,
Government,

v.

AL DORSEY,
Defendant.

January 12, 2023

FOR THE GOVERNMENT:
KEVIN BROWN
U.S. DEPARTMENT OF JUSTICE
OFFICE OF U.S. ATTORNEY
1100 Market Street
Suite 301
Chattanooga, Tennessee 37402

FOR THE DEFENDANT:
MYRLENE R. MARSA
FEDERAL DEFENDER SERVICES
835 Georgia Avenue
Suite 600
Chattanooga, Tennessee 37402

BEFORE:
THE HONORABLE CHARLES E. ATCHLEY, JR.
UNITED STATES DISTRICT JUDGE

SENTENCING HEARING

[2] THE COURT: Would counsel—I'm sorry.

Ms. Laster, would you please call the next case.

THE COURTROOM DEPUTY: Criminal action 1:21-CR-77, United States of America versus Al Terik Dorsey.

THE COURT: All right. Would counsel please make appearances for the record.

MR. BROWN: Kevin Brown for the United States.

MS. MARSA: Myrlene Marsa for Mr. Dorsey.

THE COURT: All right. And I believe we have a representative of the Probation Office here.

Good afternoon, Mr. Dorsey. This is your—

THE DEFENDANT: Good afternoon.

THE COURT:—sentencing hearing.

In preparation for this hearing, the Court has reviewed the following documents: The indictment, the notice of intent to plead guilty, the factual basis, notice of objections to the presentence report filed by the government, agreed preliminary order of forfeiture, both notices of objections to the presentence report filed on your behalf, revised presentence report, an addendum to the presentence report, government's response to your objections, reply to the government's response filed on your behalf, and the sentencing **[3]** recommendation of the probation officer.

Are there any additional materials to offer that the Court has not listed?

MR. BROWN: No, Your Honor.

MS. MARSA: No, Your Honor.

THE COURT: All right. Ms. Marsa, have you and your client read the presentence report?

MS. MARSA: Yes, we have.

THE COURT: All right. And have you had an opportunity to discuss the presentence report with your client?

MS. MARSA: Yes, I have.

THE COURT: All right. Mr. Dorsey, have you read the presentence report?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had sufficient time to discuss it with your attorney?

THE DEFENDANT: Yes, sir, I have. Yes, sir. Like, as in if I had a question I asked, or are you speaking on did I get my PSR and had a chance to talk to Ms. Myrlene?

THE COURT: Well, what I'm asking you is—is, have you had enough time to review the presentence report and to ask your lawyer any questions you may have about it?

[4] THE DEFENDANT: Yes, I have.

I—can I say something, please, sir?

THE COURT: Yes.

THE DEFENDANT: What if I have a question that I want to ask her now, though?

THE COURT: Well, then you can ask her.

THE DEFENDANT: Okay.

(Off-the-record discussion between the defendant and defense counsel.)

THE DEFENDANT: Thank you, sir.

THE COURT: All right. Have you had sufficient time to discuss it with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Has your attorney answered all of your questions?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Do you understand the presentence report?

THE DEFENDANT: Yes, sir.

THE COURT: All right. This is how we'll proceed this afternoon. First, the Court will hear the parties on any objections to the presentence report. I understand that there are several. Next, the Court will calculate the advisory guideline range. Third, the Court will hear parties on any motions for departure **[5]** under the guidelines.

Next, the Court will hear argument on the application of the 18 U.S.C. Section 3553(a) factors and any other sentencing recommendations. And then, finally, the Court will hear final statements, including an opportunity to hear from you, Mr. Dorsey, if you wish, and then pronounce sentence.

This might take a little bit of time, so I think Mr. Dorsey might be more comfortable sitting over here at counsel table while you argue these objections.

MS. MARSA: That's fine.

THE COURT: All right. First, the Court notes that objections to the presentence report have been filed by both the defendant and the government in this particular case.

Mr. Brown, the government's objection—which I believe has been resolved; is that correct?

MR. BROWN: Yes, Your Honor. The revised presentence report resolved that objection.

THE COURT: Okay. Additional criminal history point should be assessed in paragraph 6 pursuant to the guidelines.

Now, do you have anything you want to say on that, Ms. Marsa? I understand that you have your own objections.

[6] MS. MARSA: Your Honor, I—I think that my objection to whether or not the predicate in paragraph 36 is, in fact, a crime of violence under the guidelines would resolve that issue. If it—

THE COURT: Yeah.

MS. MARSA: If it is not a crime of violence, an additional point probably shouldn't be assessed there.

THE COURT: It goes from four to three.

MS. MARSA: Correct.

THE COURT: Yeah. No. I think I understand the sort of—they—they overlap, so—

MS. MARSA: Yes.

THE COURT: Okay. And so I'm going to move on to your objections. In particular—and I'm just going to—if I misstate this, you please let me know. Defendant objects to his paragraph 36 convictions being

characterized as crimes of violence under the sentencing guidelines.

Do you wish to go ahead and argue that now?

MS. MARSA: Yes, Your Honor. Specifically, we are arguing that in the aftermath of the Supreme Court case of *Borden*, it is clear that crimes which require less than a knowing or intentional mens rea that might otherwise be a crime of violence do not—do no longer **[7]** count as a crime of violence under the Supreme Court case of *Borden*.

In this particular case, the predicate that is at issue is in paragraph 36. Mr. Dorsey had conviction for two counts of facilitation to commit aggravated robbery. In Tennessee, the definition of the crime of facilitation is "A person is criminally responsible for facilitation if, knowing another person intends to commit a specific felony, but without the intent required for criminal responsibility, that person knowingly furnishes some type of substantial assistance in the commission of the felony."

So the definition of facilitation under Tennessee law specifically requires that in order for a person to be found guilty of facilitation, they cannot have the level of mens rea that's required for the underlying crime.

In this particular instance, the underlying crime is aggravated robbery. Aggravated robbery—if Mr. Dorsey were convicted of aggravated robbery, there would be no question that that is a crime of violence. It requires a non-reckless mens rea. However, facilitation, because it specifically requires that Mr. Dorsey did not have the necessary intent to commit the aggravated robbery, could not have a mens rea higher **[8]** than reckless by definition because the—if it was a reckless—if it's knowing or intentional, it's an aggravated robbery. If—

if he specifically is excluded from holding that mens rea under facilitation, the highest mens rea he could have would be a reckless or some type of criminal negligence below that.

So because the definition of facilitation specifically states that Mr. Dorsey could not hold the required mens rea for the underlying offense, it's our position that in order to be guilty of facilitation of aggravated robbery, the highest level of mens rea that Mr. Dorsey could hold by definition is reckless mens rea.

Reckless mens rea is insufficient to be a crime of violence after *Borden*. And, quite honestly, not very far before *Borden*, it was insufficient to have a crime of—of reckless mens rea in Tennessee. Also, it was after the *Voisine* and *Verweibe* line of cases where briefly Tennessee again included reckless conduct as an appropriate mens rea for a crime of violence or a violent felony under the ACCA.

But after *Borden*, the Supreme Court made it clear that because even—and the Tennessee application of that in *Verweibe* was inaccurate and that in order to be a crime of violence or a violent felony for purposes **[9]** of armed career criminal, under—after the court looked at it in *Borden*, a crime must have a mens rea of higher than reckless conduct.

Now, the government tries to argue in this case that Mr. Dorsey still should be on the hook because for him to be found guilty of facilitation of aggravated robbery, there must be a proving that somebody committed an aggravated robbery. And I don't disagree that that is an element of facilitation that somebody attempted or committed aggravated robbery.

The problem with the government's argument in this case is that in order for Mr. Dorsey to be found to have a predicate, there must be—under the definition of a crime of violence, it's either an enumerated offense or it has an element of the use, attempted use, or threatened use of physical force against another.

But the problem is—is that the government is trying to impute somebody else's intent to commit a crime of physical force to Mr. Dorsey. And facilitation, by definition in Tennessee, says that Mr. Dorsey did not have that mens rea himself. He did not have the mens rea necessary to commit the aggravated robbery.

And you—and in order for somebody to—and I apologize. I'm recovering from a cold. I feel like **[10]** I'm not arguing this coherently as normal.

But the element of force—the person with the predicate has to have committed a crime that has an element of force in it, and they—and it has to be force against a person. And that individual has to hold the necessary mens rea, not somebody else. You can't impute somebody else's mens rea onto Mr. Dorsey.

So the fact that somebody else had the intent to commit an aggravated robbery, that's that individual's problem. That criminal intent does not impute onto Mr. Dorsey.

And aside from that, the facilitation statute in Tennessee specifically says that he can't hold the mens rea necessary to commit the underlying offense in order to be found guilty of facilitation. So the government is trying to impute somebody else's mens rea onto Mr. Dorsey.

Now, I—I will tell the Court that in—they cite to a case in Kentucky in their—their response. I'm going to talk about that specifically.

But there's several types of situations in criminal law. There's the situation where an individual commits a crime and he's obviously responsible for whatever intent he has in that crime. There are situations where somebody can be responsible for **[11]** somebody else's criminal behavior.

Tennessee has crimes like that. Aiding and abetting, conspiracy. But facilitation is noticeably differently defined from those other events.

THE COURT: But isn't all that matters is that he intended to facilitate an aggravated robbery?

MS. MARSA: So I don't think that is how Tennessee defines it. It—he—he knowingly somehow gave aid, but he doesn't—I don't think that he has to be shown to intend to facilitate an aggravated robbery. He somehow gave assistance to an aggravated robbery.

Maybe he—I mean, I could think of a situation where somebody—'cause the definition—in Tennessee, the definition is—I'm just going to read the statute again.

THE COURT: Well, I was just—I was looking at the *Gloss* case. And I understand—

MS. MARSA: Right.

THE COURT:—that in this—in this particular area of the law, which changes so quickly—

MS. MARSA: Right.

THE COURT:—a 2000-—or a 2011 case is probably ancient.

MS. MARSA: Well—

THE COURT: But reading from it—

[12] MS. MARSA: Right.

THE COURT:—I'm—I'm—it makes no difference that the defendant was not the person who committed the aggravated robbery. All that matters is that someone did so and that the defendant knowingly provided substantial assistance to that person, which is required to convict him of that.

MS. MARSA: Well—all right. Let me just address the *Gloss* case directly. So there's a couple issues with the *Gloss* case. First of all, the *Gloss* case—first of all, in a recent case out of the Sixth Circuit, *U.S.* v. *Page*, the case was remanded back to the Middle District for a decision on this issue in light of the *Borden* decision, and the government agreed that it would be appropriate for the district court to consider that.

THE COURT: Are you talking about that *United States* v. *Timothy Page*?

MS. MARSA: Correct.

Okay. So—so while the Sixth Circuit has not taken—has not taken another direct look at *Gloss* yet, they—they at least take—in that response—in that motion to remand that case, they at least acknowledge that in light of *Borden*, things may be different now.

[13] Okay. The second thing I would say about *Gloss* is that *Gloss* was decided in 2011. It was decided after the case of *United States* v. *Vanhook*, which was also decided in 2011 but several months previously. *Vanhook* appears to have a completely different result than *Gloss*. When *Gloss* was issued, they didn't—that panel didn't even acknowledge *Vanhook*.

There is some rules about how appellate precedent must be interpreted when there's a conflict like that, and that—it's—it's arguable that *Gloss* shouldn't even be presented as the rule in the Sixth Circuit right now because it didn't appropriately deal with the *Vanhook* decision, which was issued prior to *Gloss*. Okay?

Second of all—I mean, third of all, with respect to *Gloss*, one of the problems with *Gloss* is that *Gloss*—I—I agree with the Court that *Gloss* says what you read. But the problem with that is that it very much appears that the *Gloss* court grouped facilitation into the same scenario as aiding or abetting.

Under Tennessee—aiding and abetting is a crime that you can commit in Tennessee for which the mens rea of the—of the other—of the other actor is imputed onto you. In other words, an individual can be **[14]** criminally responsible for another person's actions—okay?—under the definitions of aiding and abetting.

Facilitation, however, specifically says—unlike that scenario, specifically says—and this is what—I think *Gloss* just makes an error in their analysis. The statute for facilitation specifically says "if"—"but with"—"A person commits facilitation knowing somebody intends to commit a specific crime, but without the intent required for criminal responsibility."

That is, you cannot impute criminal responsibility to—this is an exception to the criminal responsibility rule in Tennessee that things like aiding and abetting, conspiracy fall under where you can impute somebody else's criminal responsibility, criminal mens rea onto a second party. Facilitation stands in distinction to that.

Gloss did not—*Gloss* seems to gloss right over that—that change in definition. And so, quite honestly, it is not at all clear to me that *Gloss* is internally consistent or—or makes proper analysis of the statute that's at issue, so—

THE COURT: Well, I mean, but isn't that for the Sixth Circuit to fix?

MS. MARSA: Well, it might be for the Sixth **[15]** Circuit to fix, but *Vanhook* supports my position. And *Vanhook* was decided before *Gloss*, and *Gloss* didn't overrule *Vanhook*. So I think that it's—this is not a situation where the government can say definitively, I don't think, that this Court is bound. I think the Sixth Circuit law is contradictory in this situation, which may not be a novelty out of the Sixth Circuit at times.

And—and I understand. If the Court rules against us, we will be appealing it, and—and the Sixth Circuit will have a chance to speak on it. But I do think that *Gloss* internally has some problems, and I think in the aftermath of *Borden*, *Gloss* is very much at issue at—at the moment.

The case that the government cited in its response, the Kentucky case, which was *United States* v. *Harrison*—in that particular case, they appear to address this issue on—the issue in a situation where a defendant was found guilty of complicity of—to commit murder under Kentucky law.

But, again, I think the problem that the government has with relying on *Harrison* is that the definition—the Kentucky statute for complicity is really a statute that details when an individual can be held liable for another person's conduct.

[16] And the government, I think, is going to stand up here and say I cited the statute in my response that there's part one and part two of the definition and that part one refers to facilitating. But I will say this: That with part one, it says "A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he does the following things." All right. Again, "the intention of promoting or facilitating."

Tennessee's definition of facilitation specifically says if Mr. Dorsey was convicted of facilitation, he did not hold the mens rea required to commit the underlying offense, which was aggravated robbery. And as such, we don't believe that there is an element of force with the necessary mens rea that can be accrued to Mr. Dorsey. The highest level of mens rea that can be accrued to him is reckless. Under *Borden*, that's—

THE COURT: But—but you can't recklessly commit an aggravated robbery.

MS. MARSA: Well, he committed facilitation; however—

THE COURT: I understand that, but—but, I mean—

MS. MARSA: And so you can recklessly commit **[17]** facilitation because by definition, you can't hold the mens rea required. So aggravated robbery requires knowing or intentional action. Facilitation, by definition, does not include those mens rea. So the only mens rea it could include are the lower ones, reckless or criminally negligent.

And so for that reason, we believe that it no longer counts after *Borden* as a crime of violence. It

should not be used to enhance Mr. Dorsey's guideline or criminal history in this case and also his guideline.

And—and, ultimately, the—you know, I cited in my objection that while the Sixth Circuit hasn't yet addressed this issue—

THE COURT: What page are you on?

MS. MARSA: Sorry. In my objection, page 10.

While the Sixth Circuit hasn't addressed this issue post-*Borden* yet, there was a case out of district of Arizona that provides a useful roadmap. And I talk about that case a little bit there.

And—and, again, I just point to the fact that in order for a crime to count as a crime of violence, the defendant must have intended the force—the use of force against another. And under *Borden*, that intent cannot be less than knowing or intentional. And in this case with facilitation, even if there is an **[18]** element of force, the highest mens rea that Mr. Dorsey could hold is recklessness, and that, under *Borden*, is insufficient.

THE COURT: All right. Thank you.

MS. MARSA: Thank you.

THE COURT: Mr.—Mr. Brown.

MR. BROWN: Judge, there is no element—or no mens rea of recklessness in a conviction for facilitation to commit aggravated robbery. It is knowing that a person—I'm reading from *United States* v. *Gloss*, which cites *State* v. *Parker*, a Tennessee Criminal Court of Appeals case that details the elements of facilitation to commit aggravated robbery.

"To convict an individual of facilitation of aggravated robbery, the State must establish: One, the

defendant knowingly provided substantial assistance to another whom he knew intended to steal property from a victim using a real or disguised weapon."

He knowingly provides assistance knowing that an individual intends to commit aggravated robbery, which requires a knowing or intentional mens rea.

Yes, *Gloss* is decided pre-*Borden*. But *United States* v. *Harrison*, which is a post-*Borden* Sixth Circuit case examining the Kentucky's complicity statute—yes, **[19]** Kentucky's complicity statute reads differently than Tennessee's facilitation statute. But what's important to note about Kentucky's complicity statute is, as Ms. Myrlene alluded—Ms. Marsa alluded to, there are two ways to commit complicity in Kentucky, one of which—this is subsection (1).

"When a person with the intention of promoting or facilitating the commission of the offense"—the other way is "A person who acts with a culpability of respect to that result is sufficient for the commission of the offense."

In—in the concurrence in this case by I believe it was Judge Cole, he addresses that very issue. He says that yes, there are two different ways to commit complicity. One way requires the same culpability as the individual who commits the offense that would be culpable in that case for—to commit Kentucky murder. In our case, that would be the mens rea to commit aggravated robbery. But he said it doesn't matter because we use the categorical approach and look at the least culpable conduct.

So even if we don't know which way of complicity that *Harrison* was convicted of, we have to look at the least culpable conduct, that being the first

subsection, the "with the intention of promoting or **[20]** facilitating," which I submit to the Court is an exact corollary and the same reasoning set forth in *Gloss*.

It's a different statute, and it's post-*Borden*, but the importance is it's the same reasoning as *Gloss*, and it says that *Borden* doesn't change that reasoning that in Tennessee, someone knowingly provided substantial assistance—to me, Judge, that sounds a lot like the person intentionally promoting or facilitating the offense.

THE COURT: What about her argument that—that being convicted of facilitation in Tennessee means that you don't have the requisite mens rea to commit the principal offense?

MR. BROWN: The court—the Sixth Circuit has made clear that that doesn't matter. They made clear that the knowing use of force required was committed as an element of the offense because that underlying offense, the knowing use of force required to commit an aggravated robbery, is an element of the offense of facilitation because the defendant knowingly provided substantial assistance knowing that an individual committed an aggravated robbery and that aggravated robbery actually occurred.

So *Borden's – Borden's* analysis of recklessness, it doesn't change *Gloss*. It doesn't **[21]** change *Gloss*. And the reasoning in *Gloss* is the exact same reasoning that the Sixth Circuit recently used in *Harrison* to—to find that a similarly worded statute, the complicity statute—it doesn't matter that the defendant—that *Harrison* did not actually use the force in the murder. He was complicit in it, and that the least culpable conduct that he—that he could have had was that he, with the intention of promoting or facilitating to commit, solicits, commands, engages, aids, counsels, attempts.

The reasoning of *Gloss* has been—has been approved by the Sixth Circuit post-*Borden*, and, frankly, Judge, that forecloses Ms. Marsa's argument. Mr.—Mr. Dorsey acted knowingly.

THE COURT: Let—go ahead, please.

MR. BROWN: Mr. Dorsey acted knowingly. He knew that an individual—he knowing—he knowingly provided substantial assistance while knowing an individual committed a crime that requires the knowing or intentional use of force. His conviction is a crime of violence under binding Sixth Circuit precedent.

Now, the Sixth Circuit may very well change that, but that's not what the status is of the law as postured in this case that is before Your Honor. Facilitation of aggravated robbery in Tennessee is and **[22]** remains a crime of violence. And I ask the Court overrule Mr. Dorsey's objection.

THE COURT: Thank you.

Ms. Marsa.

MS. MARSA: Just one quick response.

THE COURT: Sure. Take—take what time you need.

MS. MARSA: Back to this *Harrison* case, again, the Kentucky statute that is at play in that is a statute that defines, quote, "when a person is liable for conduct of another." Okay? That's the context of complicity in Kentucky. When is a person responsible criminally for the conduct of another? All right? Versus the facilitation statute in Tennessee where it says the person is guilty of facilitation when they know somebody intends to commit a specific offense, but without the intent

required for criminal responsibility as defined in Tennessee.

So what facilitation statute does is it says yes, in Tennessee we have a concept of criminal responsibility also. Sometimes people are, by definition, criminally responsible for other people's behavior. But specifically the definition of facilitation excludes that category.

It says specifically for facilitation the **[23]** person does not have the intent necessary to be criminally responsible for somebody else's behavior. Otherwise, they would be charged with something else under 39-11-402 subpart (2) in Tennessee Code Annotated.

So facilitation is different—the Tennessee facilitation statute is different from the Kentucky statute at issue in Mr.—in the *Harrison* case for the exact reason that we're arguing that this is not something that Mr. Dorsey is criminally responsible for. It's by definition in Tennessee that he's not.

And so we think that it's not a crime of violence, and we ask the Court to uphold our objection.

THE COURT: All right. Thank you.

The Court has spent quite some time reading through all of these—all of the pleadings in this case and re-reviewing the case law in this matter.

The—the law in the area of the ACCA is always changing and I suspect will continue to change. And the Court does recognize that the Tennessee facilitation statute is not exactly the same as the Kentucky statute.

However, the Court does believe that the—the same rationale does apply, and the Court does believe that the Sixth Circuit has spoken to this. Facilitation of

aggravated robbery in particular has been found by the Sixth Circuit to be a crime of violence.

[24] And the *Gloss* opinion is clear. It makes no difference the defendant was not the person who committed the aggravated robbery. All that matters is that someone did so and that the defendant knowingly provided substantial assistance to that person.

And by virtue of Mr. Dorsey's conviction, he has been convicted of that offense in Tennessee. And so the Court overrules his objection and finds—and adopts the presentence report without objection.

If, as—as has been stated in the court, it's Mr. Dorsey's intent to appeal that decision, if the Sixth Circuit wants to give this Court more clarity on that issue, the Court will welcome it. But as it stands right now, that's what the Court believes the law is.

Therefore, the Court adopts this presentence report without objections.

Does the United States wish to make a motion pursuant to the United States Sentencing Guidelines for the extra point?

MR. BROWN: So moved.

THE COURT: Given these findings and calculations, the Court calculates the following advisory guideline range: Defendant's offense level is a 25. Defendant's criminal history category is a IV. This results in an advisory guideline range of 84 to **[25]** 105 months, a potential supervised release range of one to three years, a potential fine range of 20,000 to $200,000, and a mandatory special assessment of $100.

Are there any objections to the Court's calculation for the record?

MR. BROWN: No—

THE DEFENDANT: Yeah.

MR. BROWN:—Your Honor.

MS. MARSA: Not as the Court has stated it.

THE COURT: Okay. I understand you object.

MS. MARSA: Yes. But I don't disagree the Court has calculated it correctly based on the Court's findings.

THE COURT: All right. Now—and I—Mr. Dorsey may have a question for you.

THE DEFENDANT: I got—I got a question, sir.

THE COURT: I can't—you can't ask me any questions. You can speak to your lawyer, though. If you'd like to take a moment to speak with her, you can.

THE DEFENDANT: Can I, please, sir?

THE COURT: Absolutely.

(Off-the-record discussion between the defendant and defense counsel.)

THE COURT: Ms. Marsa, are you ready?

MS. MARSA: Yes, Your Honor.

[26] THE COURT: After calculating the guideline, the Court must now consider the relevant factors set forth by Congress in 18 United States Code Section 3553(a) and ensure that it imposes a sentence sufficient but not greater than necessary to comply with the purposes of sentencing.

These purposes include the need for the sentence to reflect the seriousness of the crime and to

promote respect for the law and to provide just punishment for the offense. The sentence should also deter criminal conduct, protect the public from future crime by the defendant, and promote rehabilitation.

In addition to the guidelines and policy statements, the Court must consider the nature and circumstances of the offense, the history and characteristics of the defendant, the need to avoid unwarranted sentence disparities among similarly situated defendants, and the types of sentences available.

Court will now hear the parties on the application of the 18 U.S.C. Code—18 U.S.C. Section 3553(a) factors.

Ms. Marsa, I would like for you to speak to these first. And in particular—you can argue whatever you want on these issues obviously, but I would **[27]** like to hear more about the circumstances surrounding his—when he grew up and his circumstances of being placed into state custody at a very early age and his youth during the commission of what appears to be a large part of his criminal history and the circumstances surrounding his arrest for this particular offense.

And—and if you could speak to those factors, I would appreciate it.

MS. MARSA: Yes, Your Honor.

Your Honor, if I can start with—first of all, I just want to observe the wild disparity in the calculation of the guidelines. If—if the Court had sustained my objection, we would have been at 46 to 57 months. With him—not only the facilitation being counted as a crime of violence, but also because there was two instances of it receiving extra points, it swung to 84 to 105 months.

So the guidelines for gun possession can change dramatically because of the way the base level offense works in those guidelines.

THE COURT: Well—and—and I understand what you're saying, and I—and I think that that—that that probably has to do with the fact that an individual convicted of a violent offense should receive a guideline calculation that's more substantial than **[28]** someone, say, convicted of a felony offense but it be, you know, a theft or something.

MS. MARSA: I—I understand that there might be logical reasons for it.

I'd also note that the—the crimes of violence that are impacting his case are 10 years old from the events—

THE COURT: I'd like for you to talk about that a little bit too.

MS. MARSA: Yeah.

—that occurred here.

Let's just talk about the—the event that happened here. So on this particular occasion, it was New Year's. Mr. Dorsey was with a couple other individuals, friends of his. And more than one of them discharged a weapon at midnight for—in celebration. Okay?

And I understand that Mr. Dorsey is not allowed to have a gun. We're not taking argument with that. But the context of this event was that guns were discharged. Not just Mr. Dorsey. A couple guns were discharged in celebration of New Year's. That's the context of it.

It was captured on surveillance cameras that are positioned around the streets. It was seen there. **[29]** It resulted in Mr. Dorsey's arrest, and another

individual, I believe, was also arrested and charged with this. His ultimate sentence—his guidelines are ultimately much, much, much less than Mr. Dorsey's.

So Mr. Dorsey, in this particular instance, got enhanced for committing this offense, having the gun in connection with another felony offense. That would be reckless endangerment. I understand strictly speaking, this is probably reckless endangerment.

THE COURT: Very reckless—

MS. MARSA: Yeah.

THE COURT:—conduct.

MS. MARSA: But I don't believe that there was any—it wasn't in—it was, again, a group of people that were celebrating. Those were the people that were present. It—it wasn't as if there was—they were shooting in an area that was crowded or there's—the Court can—can conceive of reckless endangerment situations that would be much more serious than the one that we have in front of us where he was, albeit ill-advisedly, possessing a gun and shooting into the air in celebration of New Year's.

It—it, again, is something that, at least in this part of the country, is a—is a fairly common occurrence for New Year's.

[30] So that's the context of the crime. There was no—there was no active crime of violence being committed. Mr. Dorsey was not possessing the gun in furtherance of some type of drug offense or robbery or—or any other violent offense at that occasion.

The Court can see from Mr. Dorsey's personal characteristics that he was placed in juvenile custody at a very, very young age.

THE COURT: It's my understanding that he went into Department of Children's Services when he was six years old and that he was living—or he was taken away from, I think, his mother at the age of six years old, and then he was—lived with his aunt until her home burned down, and then he was placed in custody of the Department of Children's Services—

MS. MARSA: Right.

THE COURT:—and lived in several foster homes for three and a half years.

MS. MARSA: Yeah. And it—you know, as—as well meaning as the system can be, that—being in state's custody at that young age without loving family support is often a recipe for a lot of trauma in a young man's life.

Mr. Dorsey has—has grown up without the benefit of having a family. He's grown—grown up in a **[31]** situation that put him in juvenile—not only was he in foster care, but then he had delinquency problems when he was quite young and placed into juvenile custody.

I don't have—I have a book that I didn't even think about until I was standing right here about the juvenile system, but the—if somebody is incarcerated as a juvenile, their odds of being incarcerated as an adult are exponentially higher. That's the unfortunate reality of the juvenile system in this country. Maybe in other countries too, but I don't know other country's juvenile systems.

So we've got—we've got a young man who was—lost his family at age six, then came under the—

THE COURT: I believe he moved to Chattanooga approximately around the age of 10. Am I correct?

MS. MARSA: Right. Yeah.

THE COURT: And as far as I can determine, his first arrest was at the age of 13 for theft.

MS. MARSA: Yes, Your Honor.

THE COURT: And—and he was arrested again at 14 for theft.

MS. MARSA: Yes, Your Honor. I mean, this—

THE COURT: And then—and then—and then more thefts all as a juvenile.

[32] MS. MARSA: Right.

THE COURT: And for his adult criminal convictions, actually, one of them occurred as a juvenile; correct?

MS. MARSA: Yes, and that would be the facilitation.

And let me just talk about these facilitation cases for a second. He was—the facilitation situation was he—he was involved—if I'm not mistaken, he was involved with some—with a non-juvenile who was perhaps taking advantage of Mr. Dorsey to help him commit some crimes. So Mr. Dorsey was—at the time of this offense, the other individual involved was an adult who was—who was using Mr. Dorsey to commit crimes, and then Mr. Dorsey winds up with very serious convictions on his record.

Now, obviously one would hope that at age 17 somebody has the sense to know what is right and wrong, but we've got a young boy who was without his family from age six, then in juvenile custody for a period of time. He basically was raised on the streets is what it sounds like with—with other children who have

behavioral problems. Those were his role models. Those were his—that was his company. That's what he grew up with.

[33] And Mr. Dorsey at age 17 was certainly a very young individual still at that point without the skills necessary to grow into an adult man that we hope he would be. But he's much older now. He's been incarcerated before. He recognizes that he is not supposed to have a gun, and he recognizes the seriousness of this matter.

He—the Court has observed him in here. He's very upset by the level of the guidelines in this case. They are significantly higher than his, quote, "codefendant" who was also involved in this discharge of weapons for—and they have similar backgrounds, but I don't have the benefit of knowing the details of all of that. And—

THE COURT: It's—it's—his last conviction before his arrest on this was his guilty plea to an offense that occurred in August of 2011. He was convicted in October of 2012; is that correct?

Of course, he went into—

MS. MARSA: Yeah.

THE COURT:—Department of Corrections. How much time did he serve in TDOC?

MS. MARSA: Let me just verify that, please.

(Off-the-record discussion between the defendant and defense counsel.)

[34] MS. MARSA: He was released in May '19—May 2019. So he is a gentleman who's grown up in—in custody is really what the situation is.

I do think that when the Court is considering the seriousness of the conduct here, I—I think the guidelines, 84 to 105, really overstate the seriousness of the conduct in this particular instance.

It's based—again, as we've talked about, he gets enhanced for—for his facilitation record, but he gets enhanced both in the offense level and on the criminal history category. I mean, it moved him from a Category III to a Category IV. So he kind of got a double—a double whammo from the facilitation charges, which are the issue of the objection.

I do think that—I do think that the seriousness of the crime could be appropriately dealt with with a sentence that's below 84 months. I certainly think that Mr. Dorsey's personal characteristics are such that he would benefit more from assistance than longer incarceration.

And I know he can—I'm sure the Court will make recommendations for him to be involved in programming while he's in custody, but I think that as far as helping Mr. Dorsey—and—and, again, while he has old history 10 years ago of committing crimes that **[35]** are considered violent, that's certainly not the current situation. And—and I do—

THE COURT: I believe he was incarcerated for most of it.

MS. MARSA: I understand that. But he's been out since 2019, and, you know, this—this occurred, I guess, in 2021, so he was out for a few years. There's no indication that he was involved in any kind of violent behavior during those few years that he was out.

So I do think that—and—and, again, this particular instance is not—while it's reckless, it's not—it's not a violent type of behavior.

And so I do believe that the guidelines overstate the seriousness of this crime as well as overstate a term of imprisonment that would be necessary to address Mr. Dorsey's personal characteristics.

I think that given his upbringing and essentially his institutionalization from the age of six—I understand that can cut both—both directions, but I think that providing Mr. Dorsey with training while in custody and the opportunity to—to get out as—as a young adult still and try to overcome his past would be a just—a just sentence in this case, and we would ask for that.

THE COURT: Thank you.

[36] Mr. Brown, could you speak to the 3553(a) factors. And—

MR. BROWN: Yes, Your Honor.

THE COURT: And—and let me—let me just say this—and I realize this is certainly not your issue and it's not Ms. Marsa's issue, but we get individuals in court all the time charged with very similar types of offense. And I have to be honest with you. The guidelines, of course, are all over the map.

I had an individual sentenced in court last week. Three rape convictions on three separate occasions and three felony drug convictions, and he was not an armed career criminal. And I cannot—I have not seen anybody that probably should have been an armed career criminal more than him, but he was legally not. So I understand that this law is all over the place.

But would you speak to his personal circumstances and what sort of sentence you think, under the 3553(a) factors, would be an appropriate sentence in this case.

MR. BROWN: Yes, Your Honor.

Judge, I submit that a sentence at the—the bottom of the guideline, 84 months, is an appropriate sentence in this case and for two reasons, Judge: First, Mr. Dorsey's background and circumstances of his **[37]** childhood/adolescence are terrible. They're—they are—it is unimaginable. I'm certain—I'm sure the Court is certain that that had an effect on his choices—choices as—as a young man and his choices today. "Today" meaning the commission of the offense that brings him before you, before the Court.

But "choice" is the key word. Mr. Dorsey's adult criminal history is violent. Whether it—whether it ultimately gets classified as a crime of violence or a violent felony, it's violent.

Facilitating the taking of money from an individual by force is violent. His actual robbery conviction—taking money from an individual by force is violent.

Recidivist statutes such as the Armed Career Criminal Act or the reasoning behind enhancements for crimes of violence in the guideline, which—which we've argued a lot about today, are based on a recognition that those that engage in crimes of violence are more likely to recidivate and be a danger to the community and to others. And I think Mr. Dorsey's conduct that brings him before the Court show that.

After having been convicted of his initial facilitation of an aggravated robbery offense as a 17-year-old, transferred from juvenile court, he received probation. What's he do? Commits a robbery **[38]** and goes to prison. A substantial prison sentence for a young man. A 10-year sentence on a facilitation or an robbery conviction is—is a very substantial sentence that, in my

experience as a prosecutor in this county, Hamilton County, you don't see often.

THE COURT: I think that—yeah, the—that was actually a robbery. It wasn't an aggravated robbery.

MR. BROWN: Correct. It was a robbery. Charged as aggravated; pleaded to robbery. Yes, sir. I apologize.

Mr. Dorsey goes to prison, goes to the Tennessee Department of Corrections until May of 2019. And yes, he gets out, and he had some time of success, it appears. Roughly 18 months from May—his release in May to his offenses here on New Year's Eve of 2020 and New Year's Day 2021.

THE COURT: Talk to me about the—so this was essentially shooting a gun in the air celebrating New Year's Day?

MR. BROWN: New Year's—New Year's Eve at nighttime hours.

THE COURT: Yeah.

MR. BROWN: And it's a frequent occurrence in Chattanooga, specifically in East Chattanooga where this **[39]** incident occurred.

THE COURT: Which is, I think, why the police watch the—

MR. BROWN: Yes.

THE COURT:—the—

MR. BROWN: Yes.

THE COURT:—the—the cameras the way they do because it happens so frequently.

MR. BROWN: And—and—and an example of how it happens so frequently, Judge, is this New Year's, the Chattanooga Police Department posted on their Facebook page "Please do not fire guns in the air on New Year's. We know it's a common occurrence. It's dangerous. Don't do it."

The circumstances beyond his—the conduct, which is dangerous—a bullet goes up. It's got to come down.

THE COURT: Very, very dangerous. Very reckless.

MR. BROWN: But not only does—is he a felon in possession of a gun who is firing it into the air—we've established we all agree that's dangerous—he's in the company of another convicted felon, his separately indicted codefendant who pleaded guilty and was sentenced before this Court, who was also in **[40]** possession of a gun.

And Mr. Dorsey's guidelines are significantly higher than that individual, Charquel Applings, because Mr.—Mr. Dorsey was the individual actually captured on video observed by police firing a gun. Mr. Applings was convicted of having a gun. Mr. Dorsey took it a step further and fired it.

Judge, I don't need to belabor the—the circumstances that could have occurred post Mr. Dorsey firing the gun in the air. Individuals he was with and associating with, other—it's a heavily populated residential area. Other individuals at their homes, making ingress and egress from their homes, or when law enforcement arrived and there are individuals actively firing guns. The dangerous—the dangerousness of this offense and Mr.—

Mr. Dorsey's propensity to engage in dangerous conduct is what drives the guideline for this.

Yes, his convictions—majority of his criminal history are all—other than this offense, he was a 17-, 18-year-old man. Then he has an opportunity for rehabilitation. He has a punishment, a prison sentence aimed at deterrence. And what's he do? He gets out of prison, obtains a firearm illegally, and is in the middle of the street firing it up in the air with—while he's associating with another known felon **[41]** who's illegally in possession of a gun.

THE COURT: Can you speak to the information contained in paragraph 51 of the presentence report.

MR. BROWN: Yes. He's a validated member of the Rollin 60 Crips, as is his codefendant, Charquel Applings. Rollin 60 Crips are a prolific street gang in Chattanooga responsible for a majority—a lion's share of the violence in this city. He is a validated—I do not have—he was associated. There were other Crip gang members present at this incident.

I don't have information as to Mr.—any information as to Mr. Dorsey engaging in criminal activity at the behest of the gang since his release from prison. But he was certainly associated with other gang members and a validated gang member and was on the day that he was on Rawlings Street in Chattanooga in possession of a gun firing it in the air.

84 to 105 months is a significant sentence, and I think that the circumstances of this case warrant an 84-month sentence, which is at the bottom of that guideline range. That's what I ask the Court to impose.

THE COURT: Thank you.

Ms. Marsa, do you have anything more you want to add on the 3553(a) factors?

MS. MARSA: No, Your Honor.

[42] THE COURT: Okay. Could you all come around, please.

MS. MARSA: Sure.

THE COURT: All right. Court has spent a substantial amount of time reviewing the presentence report in this case and reviewing the history of Mr. Dorsey, and so I would like to make some statements for the record.

First of all, the Court believes that the nature and circumstances of this offense are very serious. I understand that it is—it is—it's become accepted and expected on New Year's in certain parts of this city that people are going to fire guns in the—in the air on New Year's Eve and at New Year's Day. But it is exceedingly dangerous, and it is—it is a very serious offense.

The Court also has spent some time looking at the history and characteristics of Mr. Dorsey, and—and I do agree with the United States on his criminal history. He has a history of violence. Aggravated robbery and facilitating aggravated robbery and robbery are very, very serious offenses.

However, there are some mitigating factors in his personal history and his personal characteristics. Now, his personal circumstances are not an excuse for **[43]** the crimes that he has committed and not an excuse for the crime that he has here. However, the Court does consider the circumstances of his upbringing in fashioning a sentence and the fact that he was in state custody early and considers that to be a strong factor in the

sentence the Court is going to pronounce in this particular case.

The Court feels that—the Court is going to fashion a sentence that's going to adequately deter Mr. Dorsey and adequately—adequately deter those similarly situated while taking into account his history and his characteristics and some sentencing disparities of similarly situated defendants this Court has seen come through over the last two years for this same type of crime.

I'm going to fashion a sentence that's going to protect the public from Mr. Dorsey; however, but it's not going to—it's—it's going to be adequate for this offense, but not greater than necessary.

Now, Mr. Dorsey, a defendant has a right to make a statement or to present any information to mitigate a sentence. Do you wish to make a statement now or to present any additional information?

THE DEFENDANT: I would like to make a statement, sir.

[44] THE COURT: Please.

THE DEFENDANT: All right. Well, I take full responsibility for everything that I do, like, within my whole life. But I feel like—how could I say this? The government or the United States is kind of missing a lot of my parts that I actually changed. I mean, you can go back to me when I was 17, 15. Yes, I was a juvenile. Yes, I made some mistakes. I did. I paid for it and everything.

But when I got out of prison, I changed my life. I didn't move to Chattanooga. I got married. I settled down. I wasn't toting no gun at all. I knew that was a reason for me to get locked up.

When I caught these charges, Your Honor, January the 1st, I was actually put on the GPS band. If I was such a—with all due respect, a menace to society, I mean, it would have been further than me still me being on that band. I stayed on that band. I didn't run. I kept it charged up. I made sure I called when I was supposed to and paid all my fines.

I'm also like—how can I say this? You say—what's the word, "rehabilitation"? I try my best to do it. Now, stuff don't happen overnight. So yeah, I was only out for a year and a half, but that's better than, like you said, you seen other people come in your **[45]** courtroom doing.

So when I got out of prison, my intentions wasn't to go rob nobody or go steal. My intentions was to take care of—of who I'm taking care of and just live a regular life. That's it.

So yeah, juvenile—my pattern was kind of messed up from theft to robbery. But when I got out of prison, I didn't show them same actions. So I—you know, with all due respect, again, I kind of do feel like that's a harsh sentence.

I just had a little girl. Even though don't nobody in this courtroom has to know her or, with all due respect, has to care, I do.

So when I just did coming from 10 years and just, you know, shooting in the air—yes, I wasn't supposed to shoot in the air. I wasn't supposed to even possess a gun. For sure I wasn't supposed to do that. But it was only four of us on the street. You can say it was a group of people. Your Honor, it wasn't. It was four people on the street. Actually, it was five. Three of us got

locked up that night. I was in front of my aunt house. I was in front of a family house.

On the street I was on, on Rawlings, there wasn't no big—how can I say? Popularity. Popularity. The whole street that I was on, it was like **[46]** six abandoned houses, so nobody, you know, called the police on me or called the police on us. They just heard shots, and they came and did they job.

So, like, you know, I take full responsibility for it, but I'm not no bad person. I'm not no menace to society, sir. I got great manners. I hold the door for people. I look out for people. I do all this. So by me just sitting up right here and actually have to look at 84 months and my child just turned one years old, I feel like that's excessive, Your Honor.

Yeah, I know I made a mistake. I'm paying for it. I've been locked up 18 months, and I'm still going to have to go and do longer. But it's like that's excessive time, Your Honor. I don't think I deserve that.

And, I mean, I don't know if I can ask a question while I'm in the courtroom, but I'm pretty sure it's a lot of people other than felons that fires they gun on New Year's. Even though I wasn't supposed to, just hearing the word "recklessness" and—you know, didn't no bullets come down. Didn't no bullets come down. You see what I'm saying?

So I'm just kind of looking at it like, yeah, I wasn't supposed to do that, but it's kind of tough when I'm looking at 84 months. And I actually was doing good **[47]** out there. Like, I—I didn't get out of prison and say I'm going to plot and go rob nobody or steal. I didn't actually repeat what I was locked up for when I was a juvenile.

I was a juvenile, Your Honor. Yeah, I—I do know right from wrong or whatever like that. And yes, I was in the gang. I was for sure in the gang. That probably was a big part about it. But I'm not no bad person, though. I'm not no bad person at all.

My momma got lupus. She sick. I look out for my momma. I make sure my daughter has what she has. I mean, I was—I was okay.

The only reason why I was in Chattanooga, Tennessee is because of—my aunt Brenda had a cookout that day. And she just passed away. It was all over the news. She just passed away like two weeks ago. And that was the only reason why I was in Chattanooga, Tennessee. I live in Knoxville. I was away from Chattanooga.

So with all due respect to the courtroom, again, when you say he's a validated this and he's a menace and he's a danger, yes, I—that probably was dangerous. But I don't drink, so I wasn't intoxicated. I knew what I was doing. But I'm not no bad person, Your Honor. I didn't get out not living the same life **[48]** that I had lived before I was in prison. And I feel like that's excessive time, Your Honor.

To be honest, I had support coming, but just because I didn't know what I was going to look at, I didn't even want them to come 'cause I didn't want my family to be looking at me like, dang, like, you was doing so good, and they just took you away. I don't want no pity.

Every time I go to jail, Your Honor, I do my time. I do my time, Your Honor, every time. And I'm respectful. I respect authority. I didn't try to run. I complied.

I just don't want the courtroom to look at my negative. You can look at my positive too. I started going to a Pentecostal church and everything. So I'm trying to rehabilitate myself, and it's like, okay, I slip up and now I'm really paying my rest—that's like—I mean, it's not the rest of my life, but that's—that's like my whole life.

I won't even get a chance to see my child turn three. Not nobody's fault but mine, but I just feel like that's excessive time, Your Honor. You see what I'm saying? And I—I just feel like—I feel like that's—that's a long haul away from my daughter.

Now, I know shooting in the air was wrong, and **[49]** I—I know it was. You know, I know it was. But I know a lot of people celebrate like that too. And with all due respect, again, to the court system, I know officers that shoot in the air. I know marines shoot in the air. I know people in the Army shoot in the air.

So I'm not trying to conclude my negativity on that case by you not supposed to having a gun, but I'm just looking at it also like I didn't go shoot nobody. I didn't go catch no petty charges while I was out.

If I was out and got out and was on probation for a couple of days and violated—I was fresh 18. I had just turned 18. So yeah, I shouldn't have did it, but it happened, sir. Around the wrong people at the wrong time. You can say that. You know, sometimes it's some things that people do actually do in society that's kind of unexplainable.

But that same time when I got out from that 17-year-old kid and went and caught that other charge, I didn't do that when I turned 26. I got out May the 28th and stayed on the street till January the 1st of 2021. So

if I was still a menace to society, I wouldn't be that same person. I would have been catching another charge as people look at me. But I'm not no bad person.

And I really do feel like 84 months is a long time. 84 months is a—is a long time for—actually, **[50]** you know, with all due respect again—I know I keep saying that, but I got to 'cause I really don't know how to talk in the courtroom, and I don't know how y'all take my words, you know, differently than—I don't know how to really say it.

But like, you know, not to go back to my old charges, but I was 17, you know. How can I say—I was under—I was a juvenile. I was under delinquency of being a juvenile. So even though I wasn't supposed to catch that charge, I still was young. So it was like I had all my screws, but I didn't have the tools to tighten up 'cause I was just young.

I got taken away from my momma. We all did. My momma had six kids. My brother passed away when he was a baby, so that left five of us. We was separated. It wasn't because I was a nuisance when I was young or I couldn't—all of us got separated because of a situation with my mother. So yes, the streets did kind of raise me. I had to pick up stuff on my own. I really did.

But I'm not no bad person, Your Honor. And I do feel like 84 months is a long time from a person just doing a 10-year bid and he got out doing good. I got out doing going. I didn't catch no other charges when I was on my GPS monitor. I didn't run. I didn't cut it. **[51]** I kept it charged up. I applied [sic] by the rules.

I know I made a mistake, and I stood there to face it. So whatever the courtroom give me, I'm going to take it on the chin. I'm going to just take it on the

chin. I woke up this morning, and hopefully I'll wake up the next morning and on and on until this time is over with.

But I don't want to be looked at like I'm no menace to society. I don't want to be looked at like you the same person that you was in 2011 'cause I'm not.

THE COURT: Thank you, Mr. Dorsey.

THE DEFENDANT: You're welcome, sir.

THE COURT: I'm sorry. Were you finished?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

THE DEFENDANT: Thank you.

THE COURT: Ms. Marsa, do you have anything you want to add on behalf of Mr. Dorsey?

MS. MARSA: No, Your Honor.

THE COURT: Mr. Brown, does the United States wish to make a final statement, or do you have anything more you want to add on an appropriate sentence?

MR. BROWN: No, thank you, Your Honor.

THE COURT: All right. Thank you.

The Court has considered the nature and **[52]** circumstances of the offense, the history and characteristics of the defendant, and the advisory guideline range, as well as the other factors listed in Title 18 United States Code Section 3553(a).

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court on Count 1 of the indictment that the defendant, Al Terik Dorsey, is hereby

committed to the custody of the Bureau of Prisons to be imprisoned for a term of 72 months.

I would like to note, for the record, that the Court would sentence Mr. Dorsey to a sentence of 72 months whether it had granted his objections to the PSR or not. Under the 3553(a) factors, the Court feels like that is the appropriate sentence in this particular case.

This sentence shall run concurrent with any sentence imposed in Hamilton County General Sessions Court Docket Numbers 1825382 and 1825383.

The Court will recommend the defendant receive 500 hours of substance abuse treatment from the Bureau of Prisons institution residential drug abuse treatment program.

The Court will further recommend that the defendant participate in vocational training while incarcerated.

[53] Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years.

While on supervised release, you shall not commit another federal, state, or local crime. You must not unlawfully possess and must refrain from the use of a controlled substance.

You must comply with the standard conditions that have been adopted by this Court in Local Rule 83.10. In particular, you must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon.

Defendant shall cooperate with the collection of DNA as directed.

In addition, the defendant shall comply with the following special conditions: Defendant shall participate in a program of testing and/or treatment for drug and/or alcohol abuse as directed by the probation officer until such time as the defendant is released from the program by the probation officer.

Defendant shall participate in a program of substance abuse treatment as directed by the probation officer until such time as the defendant is released from the program by the probation officer.

Defendant shall waive all rights to **[54]** confidentiality regarding substance abuse treatment in order to allow release of information to the supervising United States Probation Officer and to authorize open communication between the probation officer and the treatment providers.

Defendant shall submit his property, house, residence, vehicle, papers, computers, as defined in 18 United States Code Section 1030(e)(1), other electronic communications or data storage devices or media, or office to a search conducted by a United States Probation Officer or designee. Failure to submit to a search may be grounds for revocation of release.

Defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when a reasonable suspicion exists that the defendant has violated a condition of his supervision and the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

It is further ordered that the defendant pay to the United States a special assessment of $100 pursuant

to Title 18 United States Code Section 3013, which shall be due immediately.

[55] Court finds that the defendant does not have the ability to pay a fine. The Court will waive the fine in this case.

All documents sealed in defendant's case are now ordered to be unsealed with the exception of the presentence report, unless counsel has reasons why it should not be.

Defendant shall forfeit to the United States defendant's interest in property as specified in the agreed preliminary order of forfeiture as follows: A Taurus Millennium PT 111 nine-millimeter pistol, serial number TUC28802.

Does either party have any objections to the sentence just pronounced by the Court that have not been previously raised?

MR. BROWN: No, Your Honor.

MS. MARSA: No additional objections.

THE COURT: Mr. Dorsey, you have the right to appeal your conviction and the right to appeal your sentence. Any notice of appeal must be filed within 14 days of the entry of judgment or within 14 days of the filing of a notice of appeal by the government. If requested, the clerk will prepare and file a notice of appeal on your behalf.

If you cannot afford to pay the cost of an **[56]** appeal or for appellate counsel, you have the right to apply for leave to appeal in forma pauperis, which means you can apply to have the Court waive the filing fee. On appeal, you may also apply for court-appointed counsel.

Mr. Dorsey, I—I know it might not feel like it today, but the Court actually did cut you a break. We argued quite a bit in court today. Your counsel argued quite a bit today about whether or not, under the law, your—your criminal history—those were crimes of violence, whether or not the law determines them to be crimes of violence as the law is written.

I can assure you robbing from people is a violent crime and facilitating the robbery of people at gunpoint is a violent crime, and that is why your sentence is what it is here today.

I understand that the conduct involved in this, shooting a gun in the air, sadly is not the worst conduct that we see come into this court. However, you are an individual that is not supposed to possess a firearm, and it is reckless and dangerous conduct for you to have engaged in. And your criminal history and your history is why you are where you are today.

However, because of your personal circumstances and several factors in your personal history, the Court **[57]** has determined that a sentence below the guideline range is appropriate in this particular case.

I wish you luck in this case. I wish you luck, and I encourage you to avail yourself of what's available to you in the Bureau of Prisons. And you can get back and be with your girl that—your daughter you expressed interest in.

Are there any other matters to resolve in this case?

MS. MARSA: No, Your Honor.

MR. BROWN: None from the government, Your Honor.

THE COURT: All right. He's remanded to your custody, Mr. Marshal.

END OF PROCEEDINGS

I, Stephanie Fernandez, do hereby certify that I reported in machine shorthand the proceedings in the above-styled cause, and that this transcript is an accurate record of said proceedings.

s/ Stephanie Fernandez
Stephanie Fernandez,
Official Court Reporter

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-5082

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

AL DORSEY,
Defendant-Appellant.

Filed March 26, 2024

ORDER

BEFORE: McKEAGUE, LARSEN, and MURPHY, Circuit Judges.

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

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

[Signature]
Kelly L. Stephens, Clerk