

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GLYNZO CLARK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

/s/ Taylor Wills Edwards "T.W." Brown
Taylor Wills Edwards "T.W." Brown
Assistant Federal Public Defender
Northern District of Texas
P.O. Box 17743
819 Taylor Street, Room 9A10
Fort Worth, TX 76102
(817) 978-2753
Taylor_W_Brown@fd.org
Texas Bar No. 24087225

INDEX TO APPENDICES

- Appendix A Opinion of the Fifth Circuit, *United States v. Clark*, No. 23-10664, 2024 WL 1375353 (5th Cir. Apr. 1, 2024) (unpublished)
- Appendix B Amended Judgment and Sentence of the United States District Court for the Northern District of Texas, entered June 21, 2023. *United States v. Clark*, Dist. Court No. 3:16-CR-109-L.
- Appendix C Opinion of the Fifth Circuit, CA No. 17-11079, *United States v. Clark*, 49 F.4th 889 (5th Cir. 2022)
- Appendix D Judgment and Sentence of the United States District Court for the Northern District of Texas, entered August 24, 2017. *United States v. Clark*, Dist. Court No. 3:16-CR-109-L.

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 23-10664
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

April 1, 2024

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

GLYNZO CLARK,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CR-109-1

Before SMITH, HIGGINSON, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:*

Glynzo Clark pleaded guilty of being a felon in possession of a firearm, and he was sentenced on remand from this court, *see United States v. Clark*, 49 F.4th 889, 891-92 (5th Cir. 2022), to a 180-month term of imprisonment and to a three-year period of supervised release. In this appeal, Clark asserts that his prior burglary conviction, under TEX. PENAL CODE § 30.02(a),

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

No. 23-10664

was not a violent felony under the Armed Career Criminal Act (ACCA). Clark concedes that this issue is foreclosed by *United States v. Herrold*, 941 F.3d 173, 182 (5th Cir. 2019) (en banc). He has raised the issue to preserve it for further review.

The Government has moved for summary affirmance based on *Herrold*, or for an extension of time in which to file a brief. Because Clark's argument is foreclosed, summary affirmance is proper. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

The Government's motion for summary affirmance is GRANTED, the alternative motion for an extension of time is DENIED, and the district court's judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA

***AMENDED**
JUDGMENT IN A CRIMINAL CASE

v.

GLYNZO CLARKCase Number: **3:16-CR-00109-L(1)**USM Number: **54045-177*****James Matthew Wright**

Defendant's Attorney

THE DEFENDANT:

<input type="checkbox"/>	pleaded guilty to count(s)	
<input checked="" type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	Count 1 of the Indictment filed March 23, 2016
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense

18:922(g)(1) and 924(e) Convicted Felon In Possession Of A Firearm

Offense Ended

08/11/2015

Count

1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
- ☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 16, 2023

Date of Imposition of Judgment



Signature of Judge

Sam A. Lindsay, United States District Judge

Name and Title of Judge

June 21, 2023

Date

***On October 6, 2022, the United States Court of Appeals for the Fifth Circuit found that three of Defendant's prior convictions qualify as predicate offenses under ACCA. Therefore, Defendant's sentence was vacated and remanded for resentencing. Accordingly, the court enters this Amended Judgment. See page 2 and the Statement of Reasons for amendments.**

23-10664.162

DEFENDANT: GLYNZO CLARK
CASE NUMBER: 3:16-CR-00109-L(1)

IMPRISONMENT

*Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **One hundred eighty (180) months as to Count 1. Pursuant to USSG § 5G1.3(d), the imposed sentence shall run partially concurrently with the undischarged terms of imprisonment in Dallas Criminal Court 4 Case Nos. F-1518268 (related), F-1560296 (unrelated), and F-1670315 (unrelated), to the extent that it does not exceed 2 years. Any remaining time on the undischarged terms shall run consecutively to the instant offense.**

- ☒ The court makes the following recommendations to the Bureau of Prisons:
The court recommends that Defendant be allowed to serve his sentence at FCI, Pollock, in Pollock, Louisiana, if he is eligible.
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at ☐ a.m. ☐ p.m. on
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: GLYNZO CLARK
CASE NUMBER: 3:16-CR-00109-L(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **Three (3) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: GLYNZO CLARK
CASE NUMBER: 3:16-CR-00109-L(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: GLYNZO CLARK
CASE NUMBER: 3:16-CR-00109-L(1)

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of *excessive* alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$10 per month.

The defendant shall participate in mental health treatment services as directed by the probation officer until successfully discharged. These services may include medications prescribed by a licensed physician. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$10 per month.

The defendant shall report in person at least once every week any time he is unemployed and furnish proof or evidence he is making a good-faith effort to secure a legitimate, verifiable, full-time job. Once the defendant secures employment, he shall furnish proof of earnings each month and report to his probation officer as directed.

DEFENDANT: GLYNZO CLARK
CASE NUMBER: 3:16-CR-00109-L(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$.00	\$.00	\$.00

- ☐ The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

- ☐ Restitution amount ordered pursuant to plea agreement \$
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- | | | |
|---|-------------------------------|--|
| <input type="checkbox"/> the interest requirement is waived for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution |
| <input type="checkbox"/> the interest requirement for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution is modified as follows: |

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: GLYNZO CLARK
CASE NUMBER: 3:16-CR-00109-L(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A** ☐ Lump sum payments of \$ _____ due immediately, balance due
☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B** ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C** ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D** ☐ Payment in equal 20 (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E** ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F** ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of \$100.00 for Count 1 which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- ☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

DEFENDANT: GLYNZO CLARK
CASE NUMBER: 3:16-CR-00109-L(1)

ADDITIONAL FORFEITED PROPERTY

Pursuant to 18 U.S.C. §924(d) and 28 U.S.C. §2461(c), the following property is forfeited to the United States of America:

any firearm involved in the commission of the offense, including a Colt, 38 caliber revolver, model Detective Special, bearing serial number M37031 and any ammunition recovered with the weapon (“the property”).

APPENDIX C

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

September 14, 2022

No. 17-11079

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellant,

versus

GLNYZO CLARK,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CR-109-1

Before JONES, HO, and WILSON, *Circuit Judges*.

PER CURIAM:

Glnyzo Clark pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). This offense typically carries a maximum penalty of ten years' incarceration. The presentence report (PSR), however, recommended sentencing Clark pursuant to the Armed Criminal Career Act (ACCA), which would increase Clark's penalty to a minimum of fifteen years' incarceration. The district court declined to do so—finding that Clark's prior convictions fail to satisfy the requirements of the ACCA. We disagree. We thus vacate Clark's sentence and remand for resentencing.

No. 17-11079

I.

A defendant may be sentenced under the ACCA if he or she has at least three prior convictions that each qualify as a “violent felony” or “serious drug offense.” 18 U.S.C. § 924(e)(1). In relevant part, a “serious drug offense” is one “involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law.” *Id.* § 924(e)(2)(A)(ii). And a “violent felony” is “any crime punishable by imprisonment for a term exceeding one year,” that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” *Id.* § 924(e)(2)(B)–(B)(i).

Four of Clark’s prior convictions are relevant on appeal: (1) aggravated assault by threat of bodily injury (case no. F-0720695); (2) aggravated assault by causing bodily injury (case no. F-0624885); (3) burglary of a habitation (case No. F-0673371); and (4) possession with intent to distribute a controlled substance (case no. F-0673218).

“This court reviews whether a prior conviction qualifies as an ACCA predicate de novo.” *United States v. Prentice*, 956 F.3d 295, 298 (5th Cir.), *cert. denied*, 141 S. Ct. 920 (2020).

We consider each prior conviction in turn.

II.

Aggravated Assault.

We consider two of Clark’s prior convictions for aggravated assault and find that one of them qualifies as a predicate under the ACCA.

Let’s begin with aggravated assault by threat of bodily injury. Under Texas Penal Code § 22.01(a)(2), this offense can only be committed intentionally or knowingly. We have held that intentionally or knowingly

No. 17-11079

threatening another with imminent bodily injury is a “crime of violence” under 18 U.S.C. § 16(a). *See, e.g., United States v. Torres*, 923 F.3d 420, 426 (5th Cir. 2019). And “we construe the elements clauses of section 16 and the ACCA congruently.” *United States v. Griffin*, 946 F.3d 759, 762 n.2 (5th Cir. 2020). Accordingly, Clark’s conviction for aggravated assault by threat of bodily injury necessarily constitutes a violent felony under the ACCA. *See United States v. Guzman*, 797 F.3d 346, 348 (5th Cir. 2015) (finding no plain error where the district court found the same).

But aggravated assault by bodily injury does not qualify. This offense can be committed with a mens rea of recklessness. *See* TEX. PENAL CODE § 22.01(a)(1). And as the Supreme Court held in *Borden v. United States*, “[o]ffenses with a *mens rea* of recklessness do not qualify as violent felonies under [the] ACCA.” 141 S. Ct. 1817, 1834 (2021).

So for Clark to be sentenced under the ACCA, his convictions for burglary and possession with intent to distribute must both qualify as predicates. 18 U.S.C. § 924(e)(1).

III.

Burglary of a Habitation.

The ACCA’s definition of “violent felony” explicitly includes generic burglary. 18 U.S.C. § 924(e)(2)(B)(ii). But Texas Penal Code § 30.02(a) contains three subsections by which a defendant can commit burglary in Texas. At the time of Clark’s sentencing, our court had held that only a violation of § 30.02(a)(1) constitutes generic burglary under the ACCA. *See United States v. Herrold (Herrold I)*, 813 F.3d 595, 598–99 (5th Cir.), *vacated*, 137 S. Ct. 310 (2016). Because Clark’s charging documents were ambiguous as to which provision he was convicted under, the government conceded, and the district court held, that his burglary conviction could not serve as an ACCA predicate.

No. 17-11079

Then several years later, during the pendency of this appeal, our court vacated *Herrold I*. We determined that § 30.02(a) constitutes generic burglary in its entirety, and thus any § 30.02(a) conviction qualifies as a predicate under the ACCA. *United States v. Herrold (Herrold II)*, 941 F.3d 173, 182 (5th Cir. 2019).

Clark nonetheless maintains that the government should be precluded from relying on *Herrold II*. He argues the government waived or invited any error in the district court related to his burglary conviction by conceding at the time of sentencing that the conviction did not qualify as a predicate offense. This argument fails.

Invited error is a variety of waiver that “generally evince[s] an intent by the speaker to convince the district court to do something that it would not otherwise have done.” *United States v. Lerma*, 877 F.3d 628, 632 (5th Cir. 2017) (cleaned up). The government’s statement amounted to no more than an acknowledgement of the state of the law as it existed at the time. It was neither designed to, nor had the effect of, “convinc[ing] the district court to do something” it would not have already been dutybound to do. *Id.*

And because we are not bound by the government’s concession, *see, e.g., United States v. Shelton*, 325 F.3d 553, 560 & n.10 (5th Cir. 2003), our holding in *Herrold II* resolves this issue: Clark’s prior conviction for burglary of a habitation qualifies as a predicate under the ACCA.

IV.

Possession with Intent to Distribute a Controlled Substance.

Clark was convicted under Texas Health and Safety Code § 481.112(a), which maintains that “a person commits an offense if [he] knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance.”

No. 17-11079

In *United States v. Vickers*, we held that the § 481.112 offense constitutes a “serious drug offense” under the ACCA. 540 F.3d 356, 366 (5th Cir. 2008). The district court claims that ruling was abrogated by our subsequent holding that a § 481.112 conviction “does not qualify as a controlled substance offense under the [Sentencing] Guidelines.” *United States v. Tanksley*, 848 F.3d 347, 352 (5th Cir.), *supplemented*, 854 F.3d 284 (5th Cir. 2017).

But that is not so. For one thing, absent an intervening change in the law, “one panel of our court may not overturn another panel’s decision.” *Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016). For another, the definition of a “controlled substance offense” under the Sentencing Guidelines—as addressed in *Tanksley*—differs from that of a “serious drug offense” under the ACCA—as addressed in *Vickers* and at issue here. Our court acknowledged this critical distinction in *Vickers* itself, explaining that “an offense could be found to satisfy the ACCA requirements, while the same offense would not be sufficient to trigger an enhancement under the Sentencing Guidelines.” *Vickers*, 540 F.3d at 366 n.3. And, what’s more, our court has expressly reaffirmed the holding in *Vickers* following the *Tanksley* decision. *See Prentice*, 956 F.3d at 299–300.

Clark also argues that, even if *Tanksley* did not effectively overrule *Vickers*, a recent Supreme Court decision did. In *Shular v. United States*, the Supreme Court defined “involving” in the ACCA to mean “necessarily requir[ing].” 140 S. Ct. 779, 785 (2020). *See also Prentice*, 956 F.3d at 299 (“We may assume that *Shular* defined ‘involving’ in the ACCA to mean ‘necessarily requiring.’”).

This is indeed a far narrower definition than the “exceedingly broad” one applied by our court in *Vickers*. 540 F.3d at 365 (defining “involving” to mean “related to or connected with”) (quotations omitted). But our court

No. 17-11079

has expressly rejected Clark’s argument that *Shular* consequently abrogated *Vickers*’s holding. See *Prentice*, 956 F.3d at 300. In *Prentice*, we described how *Shular* did more than narrow the definition of “involving”—it also “broadens the understanding of ‘a serious drug offense’ by focusing on the underlying *conduct*.” *Id.* So while “[t]he precise reasoning of *Vickers*, *i.e.*, its interpretation of ‘involving,’ differs from that of *Shular* and seems at odds with *Shular*’s focus on the underlying *conduct* charged in state offenses. . . . there is no doubt that the ACCA sentence upheld in *Vickers* would also be affirmed under *Shular*.” *Id.*

Clark attempts to distinguish *Prentice* on the ground that he challenges the delivery prong of the Texas statute, whereas the *Prentice* court analyzed the possession-with-intent prong. He claims that the least culpable way to violate the delivery prong is by making a *fraudulent* offer to sell a controlled substance. In support, he points to some of our reasoning in *Vickers*: “The intentional offer to sell a controlled substance is the crime; the accused need not have any drugs to sell or even intend ever to obtain the drugs he is purporting to sell.” *Vickers*, 540 F.3d at 365.

No. 17-11079

But our court recently considered, and rejected, Clark’s theory of delivery whereby § 481.112 could potentially be violated by a fraudulent offer to sell. *Ochoa-Salgado v. Garland*, 5 F.4th 615, 620–21 (5th Cir. 2021). “Although Texas courts have sometimes used inconsistent language about the *mens rea* necessary to violate § 481.112, Texas appellate courts consistently conclude that, if a person offers to sell, with no intent to sell narcotics, but instead the intent to defraud the buyer of his money, that conduct is not a delivery of controlled substance by offer to sell.” *Id.* (cleaned up). Instead, as we explained, “§ 481.112 requires an intent to sell, which mirrors the requisite *mens rea* under the [Controlled Substances Act], namely intent to distribute.” *Id.* at 621.

Applying our holdings in *Vickers* and *Ochoa-Salgado* to the present case, we find that Clark’s prior conviction for possession with intent to distribute also qualifies as a predicate offense under the ACCA.

* * *

Because we find that three of Clark’s prior convictions qualify as predicate offenses under the ACCA, we vacate Clark’s sentence and remand for resentencing.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

GLNYZO CLARKCase Number: **3:16-CR-00109-L(1)**USM Number: **54045-177****Mark R. Danielson**

Defendant's Attorney

THE DEFENDANT:

<input type="checkbox"/>	pleaded guilty to count(s)	
<input checked="" type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	Count 1 of the Indictment filed March 23, 2016
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense

18:922(g)(1) and 924(a)(2) Convicted Felon In Possession Of A Firearm

Offense Ended

08/11/2015

Count

1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
- ☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 24, 2017

Date of Imposition of Judgment


Sam A. Lindsay, United States District Judge

Name and Title of Judge

August 24, 2017

Date

DEFENDANT: GLNYZO CLARK
CASE NUMBER: 3:16-CR-00109-L(1)

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **One hundred twenty (120) months as to Count 1. This sentence shall run concurrently with any sentence imposed in Case No. F-1518268, pending in Dallas County Criminal Court 4 in Dallas, Texas. This sentence shall run consecutively to any sentences imposed in Case Nos. MB1461706, MB1559748, and MB1559747, pending in Dallas County Court of Criminal Appeals 2 in Dallas, Texas; and consecutively to any sentences imposed in Case Nos. F-1518267, F-1518268, MB1546255, F01560296, and F-1670315, pending in the Dallas County Criminal Court 4, in Dallas, Texas.**

☒ The court makes the following recommendations to the Bureau of Prisons:
The court recommends that Defendant be allowed to serve his sentence at FCI, Pollock, in Pollock, Louisiana, if he is eligible.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: GLNYZO CLARK
CASE NUMBER: 3:16-CR-00109-L(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **Three (3) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: GLNYZO CLARK
CASE NUMBER: 3:16-CR-00109-L(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: GLNYZO CLARK
CASE NUMBER: 3:16-CR-00109-L(1)

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$10 per month.

The defendant shall participate in mental health treatment services as directed by the probation officer until successfully discharged. These services may include medications prescribed by a licensed physician. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$10 per month.

The defendant shall report in person at least once every week any time he is unemployed and furnish proof or evidence he is making a good-faith effort to secure a legitimate, verifiable, full-time job. Once the defendant secures employment, he shall furnish proof of earnings each month and report to his probation officer as directed.

DEFENDANT: GLNYZO CLARK
CASE NUMBER: 3:16-CR-00109-L(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$0.00	\$0.00	\$0.00

- ☐ The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

- ☐ Restitution amount ordered pursuant to plea agreement \$
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- | | | |
|---|-------------------------------|--|
| <input type="checkbox"/> the interest requirement is waived for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution |
| <input type="checkbox"/> the interest requirement for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution is modified as follows: |

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: GLNYZO CLARK
CASE NUMBER: 3:16-CR-00109-L(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A** ☐ Lump sum payments of \$ _____ due immediately, balance due
☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B** ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C** ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D** ☐ Payment in equal 20 (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E** ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F** ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of \$100.00 for Count 1 which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- ☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

DEFENDANT: GLNYZO CLARK
CASE NUMBER: 3:16-CR-00109-L(1)

ADDITIONAL FORFEITED PROPERTY

Pursuant to 18 U.S.C. §924(d) and 28 U.S.C. §2461(c), the following property is forfeited to the United States of America:

any firearm involved in the commission of the offense, including a Colt, 38 caliber revolver, model Detective Special, bearing serial number M37031 and any ammunition recovered with the weapon (“the property”).