IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 2:22-cr-20072-MSN

ANDRE CAGE,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS ACCA ALLEGATIONS AND DENYING DEFENDANT'S MOTION TO CERTIFY QUESTIONS OF STATE LAW TO THE TENNESSEE SUPREME COURT

Before the Court are the following two motions: (1) Defendant's Motion to Dismiss ACCA Allegations (ECF No. 32, "Motion to Dismiss") filed October 24, 2022, to which the Government responded in opposition on November 14, 2022 (ECF No. 38); and (2) Defendant's Motion to Certify Questions of State Law to the Tennessee Supreme Court (ECF No. 39, "Motion to Certify") filed November 15, 2022, to which the Government responded in opposition on November 29, 2022 (ECF No. 42). For the reasons set forth below, Defendant's Motion to Dismiss is **DENIED**, and Defendant's Motion to Certify is **DENIED**.

BACKGROUND

At the heart of both motions before the Court is the Armed Career Criminal Act ("ACCA") and its potential application to Defendant if he is convicted of one or more charges in this matter. As many who toil away in federal court know, the ACCA mandates a minimum 15-year sentence for an individual convicted of a violation of 18 U.S.C. § 922(g) when that individual has three or

more prior convictions for "violent felony or . . . serious drug offense[s]" that were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1).

Over the years, disputes over the ACCA's meaning have often reached the Supreme Court, with the most recent one, *Wooden v. United States*, 142 S. Ct. 1063 (2022), decided on March 7, 2022. In *Wooden*, the Supreme Court held that Mr. Wooden's ten burglary offenses did not occur on different occasions for purposes of the ACCA. 142 S. Ct. at 1074. In his concurring opinion, Justice Gorsuch noted that "[t]he Fifth and Sixth Amendments generally require the government in criminal cases to prove every fact essential to an individual's punishment to a jury beyond a reasonable doubt," yet "only judges found the facts relevant to Mr. Wooden's punishment under the Occasions Clause, and they did so under only a preponderance of the evidence standard." *Id.* at 1087 n. 7 (Gorsuch, J., concurring). The Supreme Court, however, did "not consider the propriety of this practice" because Mr. Wooden "did not raise a constitutional challenge to his sentence." *Id.* But Justice Gorsuch opined that "there is little doubt" the Supreme Court would have to address the practice soon. *Id.*

This Court understands that, following the *Wooden* decision, the U.S. Department of Justice ("DOJ") directed all United States Attorneys to have a jury determine whether a defendant's prior felonies were "committed on occasions different from one another" for purposes of the ACCA. In this district, the DOJ's edict resulted in a wave of superseding indictments, including one in this case.

Defendant was initially indicted in this matter on April 28, 2022, in a three-count indictment: Counts 1 and 2 charged that Defendant, knowing he was a felon, knowingly possessed a firearm in violation of 18 U.S.C. § 922(g)(1); and Count 3 charged that Defendant, knowing he was a felon, knowingly possessed multiple rounds of two calibers of ammunition (.40 and 9mm),

in violation of 18 U.S.C. § 922(g)(1). (*See* ECF No. 1 (sealed); ECF No. 2.) The First Superseding Indictment was returned on September 29, 2022 and is identical to the original indictment but added the following allegation to each count (the "ACCA Allegations"): "Before **ANDRE CAGE** committed the offense charged in this Count, **ANDRE CAGE** had at least three prior convictions for either serious drug offenses or violent felonies, or both, committed on occasions different from one another, in violation of Title 18, United States Code, Section 924(e)." (ECF No. 22 at PageID 35–37.)

According to the Government's Notice of Bill of Particulars (ECF No. 31), the ACCA Allegations in the First Superseding Indictment are based on Defendant's convictions set forth in the following chart:

Conviction	Statute	Conviction Date	Jurisdiction
Aggravated Burglary	Tenn. Code Ann. § 39-14-403	7/8/05	Shelby County, TN
Aggravated Assault	Tenn. Code Ann. § 39-13-102	9/8/08	Shelby County, TN
Robbery	Tenn. Code Ann. § 39-13-401	3/11/14	Shelby County, TN
Robbery	Tenn. Code Ann. § 39-13-401	3/11/14	Shelby County, TN

(ECF No. 31 at PageID 47.)

In his Motion to Dismiss, Defendant argues that his aggravated assault and robbery convictions do not qualify as violent felonies under the ACCA, and he seeks dismissal of the ACCA Allegations in the First Superseding Indictment.[1] In his Motion to Certify, Defendant asks

[1] The procedural posture of Defendant's Motion to Dismiss is a bit unusual in that it requests a pretrial determination on an issue that will be relevant only if Defendant is convicted. Defendant argues that "[t]here is no need for a jury to deliberate on the secondary question of whether prior offenses occurred on separate occasions if the offense[s] do not constitute ACCA 'violent felonies' in the first instance." (ECF No. 32 at PageID 51 (citing *United States v. Culbert*, 453 F. Supp. 3d 595, 596, 601 (E.D.N.Y. 2020).) Yet, the Court questions whether a jury

this Court to certify two questions related to his robbery convictions to the Tennessee Supreme Court.

DISCUSSION

I. Defendant's Motion to Dismiss

Relevant here, the ACCA's definition of a "violent felony" includes "any crime punishable by imprisonment for a term exceeding one year" that either "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another," or "(ii) is burglary, arson, or extortion, [or] involves use of explosives . . . ." 18 U.S.C. § 924(e)(2)(B)(i) & (ii). The former part of the ACCA's violent felony definition has been dubbed the "elements clause"[2] and the latter portion the "enumerated offenses clause." *See United States v. Patterson*, 853 F.3d 298, 302 (6th Cir. 2017); *see also Wooden*, 142 S. Ct. at 1079 (Gorsuch, J., concurring). District courts use the "categorical approach" to determine whether a prior conviction falls within the ACCA's definition of "violent felony." *Descamps v. United States*, 570 U.S. 254, 260–61 (2013) (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990)). Under the categorial approach, the district court looks only at the statutory definition of the offense, not the facts underlying the conviction. *Patterson*, 853 F.3d at 302.

Applying the categorial approach is a two-step process. *See United States v. Covington*, 738 F.3d 759, 763 (6th Cir. 2014); *United States v. Mitchell*, 743 F.3d 1054, 1064 (6th Cir. 2014). Step one requires the court to decide whether the statute at issue is divisible. *Covington*, 738 F.3d

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determination on the "different occasions" issue would prevent Defendant, if convicted on one or more counts, from raising his argument about his prior felony convictions post-trial at sentencing. This is not intended to be a criticism; rather, the Court recognizes that all involved here are plowing new ground, and it seeks to explore options for resolving similar issues moving forward.

[2] Or the "use-of-force clause" or "use of physical force clause." *See, e.g.*, *Dunlap v. United States*, 784 F. App'x 379, 383 (6th Cir. 2019).

at 763 (citing *Descamps*, 570 U.S. at 277). A statute is divisible when it lists "potential offense elements in the alternative," which "renders opaque which element played a part in the defendant's conviction." *Descamps*, 570 U.S. at 260. If the statute is not divisible, the court proceeds directly to step two. However, if the statute is divisible, the court uses a "modified categorical approach" and "examine[s] a limited class of documents," referred to as *Shepard* documents, "to determine which of a statute's alternative elements formed the basis of the defendant's prior conviction." *Descamps*, 570 U.S. at 261–62. "Where the defendant has pled guilty, these so-called *Shepard* documents may include the 'charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.'" *United States v. Denson*, 728 F.3d 603, 608 (6th Cir. 2013) (quoting *Shepard v. United States*, 544 U.S. 13, 16 (2005)).

At step two, "the court must ask whether the offense the statute describes, as a category, is a crime of violence." *Covington*, 738 F.3d at 763. This determination turns "on which clauses of the definition[] of violent felony" are at issue. *Id.* If the elements clause is at issue, the court asks whether the statute of conviction (or a divisible statute's alternative elements that formed the basis of the defendant's prior conviction) "requires proving that someone used, attempted, or threatened to use physical force against another . . . ." *Patterson*, 853 F.3d at 302. If so, then the offense falls within "the elements clause even if the statute does not match the elements clause word for word." *Patterson*, 853 F.3d at 302 (citing *United States v. Gloss*, 661 F.3d 317, 319 (6th Cir. 2011)). If the enumerated offenses clause is at issue, the court compares the elements of the statute of conviction (or a divisible statute's alternative elements that formed the basis of the defendant's prior conviction) with "the elements of the 'generic' crime—*i.e.*, the offense as commonly understood." *Descamps*, 570 U.S. at 257. If the statute of conviction's "elements are the same, or

narrower than, those of the generic offense," then it falls within the enumerated offenses clause. *Id.*

The Court applies the categorial approach to each of Defendant's convictions in turn below.

A. Aggravated Burglary—Tenn. Code Ann. § 39-14-403

Defendant's Motion to Dismiss does not assert that his conviction for aggravated burglary is not a violent felony under the ACCA, so, arguably, the Court need not address it. Out of an abundance of caution, however, the Court will briefly do so.

First, Tenn. Code Ann. § 39-14-403 is not divisible. Second, Defendant's aggravated burglary conviction implicates the ACCA's enumerated offenses clause. Whether the elements of Tennessee's aggravated burglary statute are the same as, or narrower than, those of the generic offense of burglary was the subject of the Supreme Court's decision in *United States v. Stitt*, 139 S. Ct. 399 (2018). *Stitt* held that the Tennessee statute was within the scope of the generic definition of burglary, 139 S. Ct. at 406, and the Sixth Circuit has since reaffirmed that conclusion. *See Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019). Accordingly, Defendant's conviction for aggravated burglary is a "violent felony" under the ACCA.

B. Aggravated Assault—Tenn. Code Ann. § 39-13-102

At the time of Defendant's conviction in 2008, Tennessee's aggravated assault statute provided, in relevant part, as follows:

(a) A person commits aggravated assault who:

(1) Intentionally or knowingly commits an assault as defined in § 39-13-101 and:

(A) Causes serious bodily injury to another; or

(B) Uses or displays a deadly weapon; or

(2) Recklessly commits an assault as defined in § 39-13-101(a)(1), and:

(A) Causes serious bodily injury to another; or

> (B) Uses or displays a deadly weapon.
>
> (b) A person commits aggravated assault who, being the parent or custodian of a child or the custodian of an adult, intentionally or knowingly fails or refuses to protect the child or adult from an aggravated assault as defined in subdivision (a)(1) or aggravated child abuse as defined in § 39-15-402.
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> (c) A person commits aggravated assault who, after having been enjoined or restrained by an order, diversion or probation agreement of a court of competent jurisdiction from in any way causing or attempting to cause bodily injury or in any way committing or attempting to commit an assault against an individual or individuals, intentionally or knowingly attempts to cause or causes bodily injury or commits or attempts to commit an assault against the individual or individuals.
>
> (d)(1) Aggravated assault under subdivision (a)(1) or subsection (b) or (c) is a Class C felony. Aggravated assault under subdivision (a)(2) is a Class D felony.
>
> . . . .

Tenn. Code Ann. § 39-13-102 (effective to June 8, 2009).

Assault does not fall within the enumerated offenses clause, and therefore, Defendant's conviction for aggravated assault is a violent felony under the ACCA only if it falls within the elements clause. To make this determination, the Court looks first at whether the statute is divisible—it is. *See Dunlap*, 784 F. App'x at 388 ("The Tennessee aggravated assault statute is divisible; it contains six separate sections setting out different types of aggravated assault."). The Court thus applies the modified categorial approach and reviews *Shepard* documents to see if it can ascertain the specific section under which Defendant was convicted.

Here, the Court has the following *Shepard* documents for Defendant's aggravated assault conviction: (1) the indictment (*see* ECF No. 38-4 at PageID 101–02); (2) the plea colloquy transcript (*see* ECF No. 38-3); and (3) the judgment sheet[3] (*see* ECF No. 38-4 at PageID 103).

[3] In the Sixth Circuit, the district court may examine state-court judgments since they fall within *Shepard*'s category of "some comparable judicial record." *United States v. Armstead*, 467 F.3d 943, 948 (6th Cir. 2006), *abrogated on other grounds by Descamps*, 570 U.S. 254; *see also United States v. Sosa*, 448 F. App'x 605, 609 (6th Cir. 2012) (describing a judgment as "the sort[] of document[] reviewable under *Shepard*).

These documents reveal that Defendant's aggravated assault conviction was under subsection (a)(1).

First, the plea colloquy and judgment sheet both reflect that Defendant was convicted of a Class C felony. (*See* ECF No. 38-3 at PageID 97; ECF No. 38-4 at PageID 103.) Because a conviction under subsection (a)(2) was a Class D felony, Defendant could not have been convicted under that subsection.

Second, the indictment reflects that Defendant was initially indicted for attempted second-degree murder under Tenn. Code Ann. § 39-13-210 and alleges "that he did unlawfully and knowingly attempt to kill [redacted] . . . ." (ECF No. 38-4 at PageID 101–02). Importantly, the plea colloquy reflects Defendant stipulated that the State would have sought to prove the following facts had the matter gone to trial:

> [On] November 28, 2007 . . . Ronald Cox was at . . . the Tulane Apartments, where he and the defendant Mr. Cage had an argument over who had fathered a young woman's child. After the words were exchanged, the defendant left the apartment complex and returned with a chrome-plated semiautomatic handgun. He walked into the kitchen and fired two shots at Mr. Cox, both striking him, one in his arm and leg, the other in the other leg. Mr. Cox identified the defendant Mr. Cage from a photo lineup and identified him as the person responsible for shooting him.

(ECF No. 38-3 at PageID 93.)

Additionally, in reviewing the plea agreement with Defendant, the following exchange occurred:

> THE COURT: All right. Now you were charged with criminal attempt murder in the second degree. That carries between 15 and 60 years and up to a $50,000 fine. Is that your understanding?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Now that's gonna be broken down or reduced to a lesser offense aggravated assault. Aggravated assaults are what we call C felonies in this state and they carry jail time between three and 15 years and up to a $10,000 fine. Is that your understanding?

THE DEFENDANT: Yes, sir.

(ECF No. 38-3 at PageID 97.)

The facts recited above do not include allegations that Defendant (1) was a parent or custodian of a child or adult and failed to protect that child or adult from an aggravated assault or aggravated child abuse, as required under subsection (b); or (2) had previously been enjoined or restrained by an order, diversion, or probation agreement from causing or attempting to cause bodily injury or commit an assault against an individual or individuals, as required under subsection (c). Thus, Defendant was convicted under subsection (a)(1), as it is the only subsection for which a factual basis was established during the plea colloquy.[4]

Having identified the specific subsection under which Defendant was convicted, the Court moves to step two and asks whether that subsection "requires proving that someone used, attempted, or threatened to use physical force against another . . . ." *Patterson*, 853 F.3d at 302. The Court concludes that it does.

In *United States v. Cooper*, the Sixth Circuit considered whether aggravated assault under Tenn. Code Ann. § 39-13-102 constituted a "crime of violence" for purposes of the Career Offender sentencing guideline. 739 F.3d 873, 880 (6th Cir. 2014). The court applied the modified categorial approach, and after analyzing various *Shepard* documents, it found that the defendant was convicted under the portion of Tenn. Code Ann. § 39-13-102 for intentionally assaulting someone by using or displaying a deadly weapon. *Id.* at 880–82. The court then concluded that, because the subsection of the aggravated assault statute under which the defendant pled guilty

[4] Defendant entered a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), (*see* ECF No. 38-3 at PageID 93), and thus a factual basis for the plea had to be established on the record before the trial court could accept it. *See In re Treylynn T.*, No. W2019-01585-COA-R3-JV, 2020 WL 5416649, at *5 (Tenn. Ct. App. Sept. 9, 2020) (quoting *State v. Albright*, 564 S.W.3d 809, 817 n.5 (Tenn. 2018)).

matched the generic definition of aggravated assault listed in the enumerated offenses clause, the defendant's conviction constituted a crime of violence. *Id.* at 882–83. Having reached that conclusion, the court found it unnecessary to analyze whether the defendant's conviction satisfied the elements clause. *Id.* at 882 n.5.

Since *Cooper*, the Sixth Circuit has applied the modified categorial approach to aggravated assault convictions under Tenn. Code Ann. § 39-13-102(a)(1)(A) and (a)(1)(B) and concluded that convictions under both subsections are violent felonies under the ACCA's elements clause. *See Braden v. United States*, 817 F.3d 926, 933 (6th Cir. 2016); *United States v. Joy*, 658 F. App'x 233, 236 (6th Cir. 2016); *Neely v. United States*, No. 20-5985, 2021 WL 3878715, at *3 (6th Cir. Feb. 24, 2021); *Campbell v. United States*, No. 16-5288, 2017 WL 4046379, at *2 (6th Cir. Mar. 22, 2017); *Crowell v. United States*, No. 18-5203, 2018 WL 4190839, at *1 (6th Cir. May 3, 2018).

Accordingly, Defendant's aggravated assault conviction is a "violent felony" as defined in the ACCA.

C. Robbery—Tenn. Code Ann. § 39-13-401

As with aggravated assault, robbery is not included in the enumerated offenses clause, which leaves only the elements clause as a potential path for Defendant's robbery convictions to be violent felonies under the ACCA.

The Court looks first at Tennessee's robbery statute, Tenn. Code Ann. § 39-13-401. The statute provides that "[r]obbery is 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 statute is not divisible, so the Court proceeds directly to step two.

At step two, the Court asks whether the statute "requires proving that someone used, attempted, or threatened to use physical force against another . . . ." *Patterson*, 853 F.3d at 302.

Defendant argues that it does not because "the element of 'fear' for common law robbery may be satisfied by *threatening to accuse* a person of having committed sodomy or a crime against nature referred to in 19th century terms as *crimen innominatum*." (ECF No. 32 at PageID 61.) At first blush, Defendant's argument sounds like something from a law school exam, but, in fact, it was the conclusion of the Fourth Circuit in *United States v. White*, 24 F.4th 378, 381–82 (4th Cir. 2022). In *White*, the Fourth Circuit certified the following question to the Supreme Court of Virginia: "Under Virginia common law, can an individual be convicted of robbery by means of threatening to accuse the victim of having committed sodomy?" 24 F.4th at 379. The Supreme Court of Virginia responded, "yes if the accusation of 'sodomy' involves a crime against nature under extant criminal law." *Id.* at 379–80.

The Fourth Circuit similarly certified the following question to the Supreme Court of Maryland[5]: "Under Maryland law, can an individual be convicted of robbery by means of threatening force against property or threatening to accuse the victim of having committed sodomy?" *Dickson v. United States*, 274 A.3d 366, 367 (Md. Ct. App. 2022). The court concluded that, under Maryland law, an individual could not be convicted of robbery by means of threatening to accuse the victim of having committed sodomy. *Id.* at 380. The decision in *Dickson* rests on two alternative bases. First, the court found that the theory of robbery by a threat to accuse the victim of sodomy was not an accepted tenet of English common law until the 1779 case of *Rex v.*

[5] The court was previously the Court of Appeals of Maryland, but the name was changed to the Supreme Court of Maryland via a constitutional amendment that became effective in December 2022. *See* Md. Const. art. IV, § 14; Md. Code Ann., Cts. & Jud. Proc. § 1-301. This Court uses the current name, Supreme Court of Maryland, even though the name change had not occurred at the time of the Fourth Circuit's certification or when the court issued its opinion in *Dickson*.

Donnally.[6] *Id.* at 375 (citing *Rex v. Donnally*, 168 Eng. Rep. 199 (1779); 1 Leach 193). That date was important because "July 4, 1776[7] was a fork in the road" and "English common law established on or before that date became part of Maryland's common law." *Id.* at 375. Second, the court explained that when the Maryland General Assembly codified Maryland's robbery statute in 2000,[8] it directed that Maryland robbery "retain[ed] its judicially determined meaning." *Id.* at 377. The court thus sought to determine what the "judicially determined meaning" of robbery was at that time. *Id.* The court concluded that in 2000, the General Assembly understood the judicially determined meaning of robbery to be limited to takings committed through the actual or threatened use of force against the person. *Id.* at 379–80. The robbery-by-accusation-of-sodomy exception was therefore not part of the common law incorporated into Maryland's robbery statute. *Id.*

As to Tennessee law, the debate in this case centers around a case "of old vintage from the 19th century," (ECF No. 32 at PageID 62), *Britt v. State*, 26 Tenn. 45 (1846). In *Britt*, the

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[6] The Supreme Court of Maryland rejected that the robbery-by-accusation-of-sodomy exception was established by the time of the earlier case of *Rex v. Jones*, 168 Eng. Rep. 171 (1776); 1 Leach 139. *Dickson*, 274 A.3d at 374–75, 375 n.6. The court acknowledged that the Supreme Court of Virginia had reached a different conclusion regarding the *Jones* case, but it noted the Supreme Court of Virginia stated that "its interpretation of *Jones* was not 'incontestable.'" *Id.* 375 n.6 (citing *White*, 863 S.E.2d at 492). The Supreme Court of Maryland also noted that the holding in *White* was ultimately based on four earlier opinions of the Supreme Court of Virginia that recognized the robbery-by-accusation-of-sodomy exception. *Id.* (citing *White*, 863 S.E.2d at 492). Similarly, in *United States v. Hubbard*, the Sixth Circuit noted that *White* involved "numerous Virginia decisions [that] had recognized the so-called 'sodomy exception,'" and the same could not be said for Tennessee. No. 21-6219, 2023 WL 319604, at *3 n.3 (6th Cir. Jan. 19, 2023).

[7] *White* explained that it was unclear whether Virginia adopted English common law as of 1776 or 1792, but the Supreme Court of Virginia found it unnecessary to resolve that issue based on its holding. 863 S.E.2d at 486 n.5. However, in a brief concurrence, Justice Mims, joined by Justice Powell, noted that he believed (1) the correct date for adoption of English common law was 1776, and (2) that the "sodomy exception" was first applied in England after that date. *Id.* at 492–93.

[8] In Virginia, robbery remains a common law crime, and "Virginia's robbery statute prescribes the degrees of punishment for robbery, but not its elements." *White*, 863 S.E.2d at 484.

Tennessee Supreme Court noted that "threatening to prosecute an innocent man for any crime whatever, except only the *crimen innominatum*, and by the fear arising from such threat to compel the surrender of money or property, does not amount to robbery." 26 Tenn. at 46. Continuing, the court explained that "it is not the fear, except in the single instance indicated, which connects itself with the legal idea of robbery." *Id.* The court recognized "that the courts of England felt that even this exception looked extremely anomalous, and they strive, while permitting it to stand, to place it on ground unapproachable, by any other case of fear of prosecution, as if determined, hereafter, it should have no associate in the offence of robbery." *Id.* at 47. In conclusion, the court stated that Tennessee's "statutes create no change in this respect," but noted that the definition of the offense was made "with a view to exclude the idea of any apprehension than that of bodily danger or impending peril to the person" without further reference to the *crimen innominatum* exception. *Id.* The parties disagree on the effect of *Britt*: Defendant argues it incorporated the *crimen innominatum* exception into "Tennessee common law robbery and by extension § 39-13-401," (ECF No. 32 at PageID 62),[9] while the Government contends that *Britt* not only did not incorporate

[9] Defendant correctly notes that courts "are required by the General Assembly to construe the statute by reference to the common law." (ECF No. 32 at PageID 61 (citing *State v. Owens*, 20 S.W.3d 634, 640 (Tenn. 2000).) However, as *White* and *Dickson* demonstrate, the first step is to determine what specific common law should be referenced. One option is English common law as of 1776 because Tennessee "adopted the common law of England 'as it stood at (1776) and before the separation of the colonies . . . (it) being derived from North Carolina, out of which state the State of Tennessee was carved.'" *State v. Alley*, 594 S.W.2d 381, 382 (Tenn. 1980) (quoting *Dunn v. Palerma*, 522 S.W.2d 679, 682 (Tenn. 1975)). The court would then need to determine whether the robbery-by-accusation-of-sodomy exception was part of the English common law by that date—a topic on which the Supreme Court of Virginia and the Supreme Court of Maryland split. *See supra* note 6. Another option, as seen in *Dickson*, is a later year, such as 1989—*i.e.*, the year Tennessee's current robbery statute under which Defendant was convicted, Tenn. Code Ann. § 39-13-401, was enacted. Tennessee's current robbery statute was enacted in 1989 as part of a larger modernization of Tennessee's criminal code, which also included enactment of Tenn. Code Ann. § 39-11-104, which provides that Title 39 "shall be construed according to the fair import of its terms, including reference to the judicial decisions and common law interpretations, to promote justice, and effect the objectives of the criminal code." *Owens*, cited by Defendant, cites Tenn.

the *crimen innominatum* exception, but it "appears to have rejected it . . . ." (ECF No. 38 at PageID 82.)

Yet, it is a more recent case, *United States v. Mitchell*, 743 F.3d 1054 (6th Cir. 2014), that looms large for this Court. In *Mitchell*, the Sixth Circuit held that robbery under Tenn. Code Ann. § 39-13-401 is categorically a "violent felony" for purposes of the ACCA. 743 F.3d at 1060. The Sixth Circuit has repeatedly reaffirmed the holding of *Mitchell* in a variety of contexts. *See United States v. Kemmerling*, 612 F. App'x 373, 376 (6th Cir. 2015) (rejecting argument that *Mitchell*'s use-of-force clause analysis was undermined by *Johnson v. United States*, 576 U.S. 591 (2015)); *United States v. Southers*, 866 F.3d 364, 367–69 (6th Cir. 2017) (rejecting argument that *Mitchell* misinterpreted Tennessee law and was undermined by *Moncrieffe v. Holder*, 569 U.S. 184 (2013)); *United States v. Lester*, 719 F. App'x 455, 458–59 (6th Cir. 2017) (rejecting argument that *Mitchell* was undermined by *Mathis v. United States*, 579 U.S. 500 (2016)); *United States v. Frazier*, 742 F. App'x 81, 83 (6th Cir. 2018) (rejecting argument that *Mitchell* misinterpreted Tennessee law); *United States v. Porter*, 765 F. App'x 128, 130 (6th Cir. 2019) (rejecting argument that *Mitchell* was undermined by *Stokeling v. United States*, 139 S. Ct. 544 (2019) and that it failed to consider Tennessee law); *United States v. White*, 768 F. App'x 428, 432 & n.1 (6th Cir. 2019) (rejecting argument that *Mitchell* was undermined by *Mathis* or *Stokeling*); *United States v. Belcher*, 40 F.4th 430, 431 (6th Cir. 2022) (rejecting argument that *Mitchell* was undermined by *Elonis v. United States*, 575 U.S. 723 (2015) and *Borden v. United States*, 141 S. Ct. 1817 (2021)).

In addition, less than a week ago, the Sixth Circuit expressly rejected the same argument Defendant advances here. *United States v. Hubbard*, No. 21-6219, 2023 WL 319604, at *3 (6th

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Code Ann. § 39-11-104 for the proposition that courts must construe a statute by reference to the common law. *Owens*, 20 S.W. 3d at 640.

Cir. Jan. 19, 2023). *Hubbard* appears to adopt the Government's interpretation of *Britt*, opining that its "actual holding is that '[t]he fear constituting an element of the crime is a fear of present personal peril from violence offered or impending.'" 2023 WL 319604, at *3. *Hubbard* also points out that cases citing *Britt* do so "for the proposition that robbery-by-fear requires 'fear of bodily danger or impending peril to the person,'" which is why the Sixth Circuit has repeatedly "held that robbery under Tennessee law satisfies the elements clause of the ACCA . . . ." *Hubbard*, 2023 WL 319604, at *3 (first citing *State v. Bowles*, 52 S.W.3d 69, 80 (Tenn. 2001), then citing *Mitchell*, 743 F.3d at 1059 and *Belcher*, 40 F.4th at 432). Finally, *Hubbard* notes that *Britt*'s reasoning about the sodomy exception may have been abrogated by *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996), which found Tennessee's Homosexual Practices Act unconstitutional. *Id.* at *3 n.2.

Mitchell did not address the specific argument regarding *crimen innominatum* that Defendant makes here, yet its holding implicitly rejects Defendant's argument.[10] Further, although *Hubbard* is an unpublished decision, it is directly on point. Defendant recognizes his argument presents this Court with a precedential quandary and "acknowledges that [his] argument may be foreclosed at the district court level by precedent." (ECF No. 32 at PageID 59.) Indeed, the Court concludes that the better part of valor is to defer to the Sixth Circuit in the first instance. Thus, the Court finds Defendant's robbery convictions are violent felonies under the ACCA's elements clause as set forth in *Mitchell*, 743 F.3d at 1060, and *Hubbard*, 2023 WL 319604, at *3.

[10] The Government asserts that Defendant's argument was raised before the Sixth Circuit in *Belcher*, 40 F.4th 430 (2022), *reh'g en banc denied*, No. 21-5414, 2022 WL 10219852 (6th Cir. Sept. 23, 2022), *cert. denied*, No. 22-6072, 2023 WL 124246 (Jan. 9, 2023). The argument, however, was raised for the first time in the appellant's reply brief, (*see Belcher*, No. 21-5414, Doc. No 42 at PageID 27–33), and it was not specifically addressed by the Sixth Circuit in *Belcher*.

Accordingly, Defendant's robbery convictions are "violent felony" offenses under the ACCA.

For the reasons explained above, as alleged in the First Superseding Indictment, Defendant has three or more prior convictions for violent felonies under the ACCA, and therefore, Defendant's Motion to Dismiss ACCA Allegations (ECF No. 32) is **DENIED**.

II. Defendant's Motion to Certify

As set forth in his Motion to Dismiss, Defendant argues Tennessee's robbery statute is overbroad, and thus his robbery convictions are not for "violent felonies" under the ACCA. In connection with his Motion to Dismiss, Defendant also filed his Motion to Certify, which asks this Court to certify the following questions to the Tennessee Supreme Court:

> 1. Under Tennessee common law, can an individual commit the offense of robbery by threatening to accuse the victim of having committed sodomy or a crime against nature referred to in 19th century terms as *crimen innominatum*?
>
> 2. If so, can an individual be convicted of statutory robbery under Tenn. Code Ann. § 39-13-401 by threatening to accuse the victim of having committed sodomy or a crime against nature?
>
> (ECF No. 39 at PageID 121.)
>
> Rule 23 of the Tennessee Supreme Court provides, in part, as follows:
>
> The Supreme Court may, at its discretion, answer questions of law certified to it by . . . a District Court of the United States in Tennessee . . . . This rule may be invoked when the certifying court determines that, in a proceeding before it, there are questions of law of this state which will be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of Tennessee.

Tenn. Sup. Ct. R. 23 § 1.

Whether to certify a question to the Tennessee Supreme Court "'is a matter within the discretion of the court' and is 'most appropriate when the question is new and state law is unsettled.'" *Devereux v. Knox Cnty.*, 15 F.4th 388, 397–98 (6th Cir. 2021) (quoting *State Auto*

Prop. & Cas. Ins. Co. v. Hargis, 785 F.3d 189, 194 (6th Cir. 2015)). "[C]ertification of novel or unsettled questions of state law for authoritative answers by a State's highest court . . . may save time, energy, and resources and help build a cooperative judicial federalism." *Am. Booksellers Found. for Free Expression v. Strickland*, 560 F.3d 443, 446 (6th Cir. 2009) (quoting *Arizonans for Official Eng. v. Arizona*, 520 U.S. 43, 77 (1997)). However, "[t]he state court need not have addressed the exact question, so long as well-established principles exists to govern a decision." *Devereux*, 15 F.4th at 398 (quoting *Pennington v. State Farm Mut. Auto. Ins. Co.*, 553 F.3d 447, 450 (6th Cir. 2009)). The Sixth Circuit has expressed that it "prefer[s] when litigants ask the district court to certify a question before it rules, rather than waiting to receive 'an unfavorable ruling.'" *Stewart v. Knox Cnty.*, No. 21-5301, 2022 WL 2526666, at *5 (6th Cir. July 7, 2022) (citing *Town of Smyrna v. Mun. Gas Auth. of Ga.*, 723 F.3d 640, 649 (6th Cir. 2013)).

The questions Defendant presents for certification are certainly novel in the modern era, or at least, there is no published decision[11] in Tennessee addressing them. There are, however, multiple Tennessee Supreme Court decisions defining the "fear" element of robbery as requiring fear of physical injury. *See, e.g.*, *State v. Dotson*, 254 S.W.3d 378, 395 (Tenn. 2008); *State v. Bowles*, 52 S.W.3d 69, 80 (Tenn. 2001); *State v. Taylor*, 771 S.W.2d 387, 398 (Tenn. 1989). *Taylor* and *Bowles* have been cited numerous times by the Sixth Circuit when analyzing Tennessee robbery under the categorial approach. *See Mitchell*, 743 F.3d at 1059 (citing *Taylor*, 771 S.W.2d at 398); *Kemmerling*, 612 F. App'x at 375 (same); *Southers*, 866 F.3d at 367 (same); *Frazier*, 742 F. App'x at 83 (same); *Belcher*, 40 F.4th at 431 (same); *Hubbard*, 2023 WL 319604, at *3 (citing *Bowles*, 52 S.W.3d at 80). Moreover, the *Britt* decision, which Defendant's argument centers on, is not a new decision and does not announce a change in state law. Finally, the Court is bound by

[11] Or unpublished, as far as this Court can tell.

Sixth Circuit precedent, and it questions whether granting the Motion to Certify would be an indirect departure from that precedent.[12]

For these reasons, Defendant's Motion to Certify Questions of State Law to the Tennessee Supreme Court (ECF No. 39) is **DENIED**.

CONCLUSION

For the reasons set forth above, (1) Defendant's Motion to Dismiss ACCA Allegations (ECF No. 32) is **DENIED**, and (2) Defendant's Motion to Certify Questions of State Law to the Tennessee Supreme Court (ECF No. 39) is **DENIED**.

IT IS SO ORDERED, this 24th day of January, 2023.

s/ Mark S. Norris
MARK S. NORRIS
UNITED STATES DISTRICT JUDGE

[12] The appellant in *Hubbard* did not request the district court or the Sixth Circuit to certify the question regarding the existence of the robbery-by-accusation-of-sodomy exception to the Tennessee Supreme Court. 2023 WL 319604, at *3 n.3.