No. 17-1362

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOSHUA E. SHEPHERD,
Petitioner,

v.

STEPHEN JULIAN,
Warden, FCI Terre Haute,
Respondent.

On Appeal from the United States District Court
For the Southern District of Indiana, Terre Haute Division
The Honorable Larry J. McKinney
Case No. 2:17-cv-00026-LJM-MJD

REPLY BRIEF FOR PETITIONER

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Despite the ever-changing landscape of ACCA law, one fact remains constant: denying Shepherd's habeas petition now and under these circumstances would be a miscarriage of justice. Just six months ago, the government asked this Court to reverse Shepherd's sentence because it was unlawful, *see* Stipulated Mot. to Reverse and Remand at 3–4, Dec. 15, 2017, ECF No. 17 (hereinafter "Stipulated Mot."), and even more recently, the government reaffirmed that position, *see* Resp't's Mem. at 7–8, Jan. 22, 2018, ECF No. 20. However, the government "now believes" that the Kentucky second-degree burglary statute's text "compels" a different view. Br. of the Resp't at 18, May 30, 2018, ECF No. 32. What is more, the government now contends it was apparently "mistaken" about Shepherd's ability to challenge his sentence all along. *Id.* at 11.

The reality is that Shepherd has been challenging his ACCA sentence for over a decade—longer than the ten-year statutory minimum sentence he would have received absent his ACCA enhancement. And had his case been resolved just over thirty days ago, both the government and the law would have been on his side. Yet, through no fault of his own—but rather constant litigation delays, a poorly drafted plea agreement, and confusing guidance regarding the availability of collateral review—Shepherd remains incarcerated through the government's flip-flops and the law's incessant churning.

I. This Court should not enforce the waiver contained in the plea agreement.

Until May 30, 2018, everyone in this case seemingly agreed that the appeal waiver in Shepherd's plea was not a bar to his § 2241 petition. *See* 28 U.S.C. § 2241. The government and Shepherd agreed that the circumstances surrounding his plea and, in particular, statements by the sentencing court were confusing and that, therefore, Shepherd's appeal waiver was not made knowingly and voluntarily. Stipulated Mot. at 1. The parties also agreed that Shepherd likely relied on comments during the proceedings to reasonably conclude that he retained the right to appeal his sentence. *Id.* At a minimum, the parties recognized that the patent ambiguities in the record should be construed in Shepherd's favor and meant that applying law of the case would not be appropriate here. *Id.* at 2.

This Court did not mention waiver—a potentially case-ending issue—when requesting the parties to file supplemental memoranda on § 2241-related issues. Given the government's prior express disavowal that waiver and law-of-the-case doctrine applied, this Court should simply set aside the government's about-face arguments on these topics and move directly to the merits of the legal questions underlying Shepherd's habeas petition. *See Wood v. Milyard*, 566 U.S. 463, 474 (2012); *United States v. Ryan*, 688 F.3d 845, 848 (7th Cir. 2012) ("[A] prosecutor's considered decision to refrain from raising a known procedural issue is waiver."); *compare* Stipulated Mot. at 1–2 (government arguing that this is an inappropriate case to press the law of the case doctrine and the Court should not enforce the

waiver), *with* Br. of the Resp't at 12 (government now arguing that "the Court should enforce Shepherd's collateral waiver under the law of the case doctrine").

If this Court chooses to examine the law-of-the-case doctrine, it should find that it need not apply it here. As a threshold matter, the "doctrine is a matter of practice and discretion, not a limit on power." 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4478 (2d ed. 1987); *see Redfield v. Cont'l Cas. Corp.*, 818 F.2d 596, 605 (7th Cir. 1987) ("[L]aw of the case is a discretionary doctrine."). Thus, the doctrine "will not be enforced where it is clearly erroneous or where doing so would produce an injustice." *Redfield*, 818 F.2d at 605. Against this backdrop, applying the doctrine in Shepherd's case would be misguided for four reasons.

First, the magistrate judge who initially applied the waiver doctrine to Shepherd clearly erred by crediting above all else the fact that Shepherd "attested" that his plea was entered knowingly and voluntarily when the totality of the circumstances in the change of plea and sentencing hearings (the latter of which the magistrate never even considered)[1] demonstrated otherwise. Am. Br. of Pet'r Joshua E. Shepherd at B.7, May 20, 2018, ECF No. 24 (hereinafter "Am. Br. of Pet'r"). The attestation on which the magistrate judge relied was merely Shepherd's signature on the guilty plea. *Id.* If a defendant's signature were the trump card, this Court

[1] In his amended brief, Shepherd asserted that the magistrate judge did not consider the transcript of the plea colloquy. Am. Br. of Pet'r Joshua E. Shepherd at 7, May 20, 2018, ECF No. 24. That was mistaken—the magistrate judge *did* review the plea colloquy and the written plea agreement. *Id.* at B.8. Crucially, however, the magistrate judge did not discuss the conflicting statements made during the sentencing hearing. *See id.*

would have no need for the totality test that it uses. *See United States v. Chapa*, 602 F.3d 865, 868 (7th Cir. 2010). In truth, the countless conflicting statements made to Shepherd during the change of plea and sentencing hearings—statements that the parties even now agree created confusion, *see* Br. of the Resp't at 7—directly affected Shepherd's ability to knowingly and voluntarily enter his plea. The magistrate judge sidestepped these issues, which is why both parties initially agreed that "neither that court nor the Sixth Circuit passed on the voluntariness question." Stipulated Mot. at 2. Even under its revised position, the government does not try to dispute the insufficiency of the magistrate's analysis. Moreover, by conceding that the colloquy proceedings "likely created real confusion," the government essentially endorses Shepherd's view that contradictory statements impeded the voluntariness of the plea. Br. of the Resp't at 7.

Second, "law of the case" has not been consistently applied by the other courts considering Shepherd's claims. Courts in both relevant circuits have seen fit to address Shepherd's claims on their merits. In Shepherd's 2016 motion under § 2255, for instance, *see* 28 U.S.C. § 2255, the Sixth Circuit never mentioned waiver and proceeded to evaluate whether Shepherd could show that he was entitled to relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015). Am. Br. of Pet'r at B.35. Similarly, when Shepherd filed a petition under § 2241, the district court was silent on the issue of waiver. In fact, the court stated that the "*dispositive question here* is whether Shepherd's habeas claim permits him to traverse the portal created by

§ 2255(e)." *Id.* at A.42 (emphasis added). To the extent that law of the case seeks to support judicial efficiency and consistency, those goals have already been eroded by prior courts. There is no need for this Court to resurrect the doctrine here to reach a supposed waiver that other courts have overlooked.

Third, it is not clear that "law of the case" should apply to a wholly separate § 2241 petition. Indeed, courts are split on the threshold question whether collateral proceedings qualify as the "same case" for law-of-the-case purposes. *Compare Peoples v. United States*, 403 F.3d 844, 847 (7th Cir. 2005) (finding that law of the case "applies equally when the same issue is raised on direct appeal and again on an initial round of collateral review"), *with Stoufflet v. United States*, 757 F.3d 1236, 1240 (11th Cir. 2014) (refusing to apply the law of the case because, *inter alia*, "the collateral attack is distinct from the original prosecution that ended in a final judgment against the prisoner").

This question is even more entrenched on the question of successive petitions. *Compare Rosales–Garcia v. Holland*, 322 F.3d 386, 398 n.11 (6th Cir. 2003) (en banc) ("Whether successive habeas petitions constitute stages in a single, continuing lawsuit is a question that should be carefully considered . . . . [We] think it likely that each habeas petition is a separate and distinct case."), *and Lacy v. Gardino*, 791 F.2d 980, 984 (1st Cir. 1986) ("It is by no means clear . . . that these two [successive] habeas petitions are part of the same case."), *with Shore v. Warden, Stateville Prison*, 942 F.2d 1117, 1123 (7th Cir. 1991) (applying the law of the case doctrine to successive habeas petitions), *and Raulerson v. Wainwright*, 753 F.2d 869, 875 (11th

Cir. 1985) (same). This case does not involve an initial or even a successive § 2255 motion; this is Shepherd's appeal of his first (and only) petition under § 2241, a provision that only comes into play when § 2255 is no longer adequate or available. *See In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998). Although it is true that this Court has applied "law of the case" to collateral attacks following direct appeals—mostly for inadequately supported ineffective assistance of counsel claims brought on direct appeal, *see Peoples*, 403 F.3d 844—this Court has never expanded its limited application of the doctrine to § 2241 and it should not do so now.

Fourth, for all these reasons, it would work an injustice to bar Shepherd's claim based on the law of the case. An injustice can be found for any number of reasons, and many are present here. As both parties initially agreed, no court has properly evaluated the totality of the circumstances surrounding Shepherd's waiver. *See* Stipulated Mot. at 2. Moreover, it is clear from a review of the entire record that Shepherd was not made "aware of the direct consequences of the plea" because of the confusion created by the district court and the failure of anyone to explain the difference between direct review and collateral attack. *See United States v. Jordan*, 870 F.2d 1310 (7th Cir. 1989) (discussing the requirements for a voluntary plea). The government, even under its revised position, still concedes those essential facts: the "colloquy with the district judge likely created real confusion" and "they did not discuss his waiver of collateral challenges." Br. of the Resp't at 5, 7. The waiver has not been consistently applied by other courts who have considered Shepherd's claims, and this Court would have to explicitly expand the doctrine to

§ 2241 petitions in order to apply it here.

The government discusses none of this. Its sole rationale for why applying law of the case would not amount to a "miscarriage of justice"[2] is because, in its opinion, "Shepherd is not entitled to any relief." Br. of the Resp't at 12. Putting aside the question-begging nature of this assertion, it also makes no sense; waiver is a threshold question. If it controls, this Court does not even dive into the merits of the claims. *See, e.g.*, *United States v. Arroyo-Blas*, 783 F.3d 361, 365 (1st Cir. 2015) (discussing that a "Plea Agreement's waiver of appeal . . . may bar [the] appeal in its entirety" so the court "must first conduct a 'threshold inquiry' to determine" the waiver issue). Certainly, the injustice question cannot be dictated by a substantive merits question not yet even on the table. This Court should reject the government's new arguments and recognize that an unknowing and involuntary waiver exists, and that using the waiver against Shepherd would not vindicate the interests of justice.

II. Shepherd's claim is cognizable under § 2241, and although this Court should credit the circuit of conviction in the mine run of cases, it need not do so if it would effectuate a serious injustice.

The government concedes that Shepherd's ACCA claim is cognizable under

[2] The operative term in this inquiry is "injustice," not "miscarriage of justice." *See Redfield*, 818 F.2d at 605; *see also Peoples*, 403 F.3d at 847 (referring to the "ends of justice" not a "miscarriage of justice"). The latter has developed into a term of art in the habeas context involving constitutional violations that have resulted in the incarceration of the actually innocent. *See Schlup v. Delo*, 513 U.S. 298, 327 (1995). Unlike "miscarriage of justice," an "injustice" is simply an "unfairness" that can arise in any number of ways, as demonstrated above. *See Unfairness*, Merriam-Webster Online Dictionary, http://www.merriam-webster.com (last visited June 12, 2018).

§ 2241. Br. of the Resp't at 12–16. Binding precedent so says. *See Light v. Caraway*, 761 F.3d 809, 813 (7th Cir. 2014). It is curious, then, that the government devotes five pages of its brief to articulate its newfound position, one directly contrary to this Court's cases. *See* Br. of the Resp't at 16–20 (government claiming that it reconsidered its position on § 2241 after hearing arguments in favor of a limited savings clause for the first time in *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 502 (U.S. Dec. 4, 2017) (No. 17-85)).[3]

After spending pages explaining to this Court its preferred interpretation of § 2241, the government devotes just one page to the question of "which law applies" in determining whether Shepherd is entitled to relief. And though the government advocates for the circuit of confinement, it offers no authority to support its rationale: That the key players in the lawsuit are located in this circuit and expect its law to apply. *See* Br. of the Resp't at 20–21. This contention flies in the face of federal practice and procedure for at least three reasons. First, courts and litigants are accustomed to this Court applying other courts' law when appropriate. *See, e.g.*, *Alper v. Altheimer & Gray*, 257 F.3d 680, 688 (7th Cir. 2001) (applying state substantive law and considering decisions from other jurisdictions). Second, the parties' actions are compelled by this Court's decision, not the method by which it

[3] This view of § 2241 did not newly emerge with *McCarthan*. In fact, the Tenth Circuit articulated the same approach over six years ago. *See Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011) (Gorsuch, J.). Yet the government did not adopt it then. *See United States v. Wheeler*, 886 F.3d 415, 434 & n.12 (4th Cir. 2018) (observing that, at oral argument, the government finally "attributed this change of position to new leadership in the Justice Department").

arrived at it. And third, in the § 2241 context, parties do not have any reliance interests or need to conform future conduct. Instead, the litigation centers on whether they will get relief for prior acts.

Unlike the government's flip-flopping, Shepherd remains consistent. That the circuit-of-conviction approach is still most faithful to doctrinal underpinnings, however, does not mean that this Court is obligated to apply this prudential doctrine. The "choice of law" question is a guiding hand that may be used at the court's discretion; it is not an unconditional mandate. *See, e.g.*, *Van Cannon v. United States*, 890 F.3d 656, 664 (7th Cir. 2018) (looking to the law of the circuit of conviction but intimating that it could "disagree" with that circuit's law, though ultimately opting not to).

This Court always retains the ability and flexibility to fashion habeas relief that vindicates its purpose: to avoid injustice, especially violations of due process rights. *See Fay v. Noia*, 372 U.S. 391, 402 (1963), *overruled in part by Wainwright v. Sykes*, 433 U.S. 72, 97 (1977), *and abrogated on other grounds by Coleman v. Thompson*, 501 U.S. 722 (1991). After all, due process was one of two reasons why this Court surmised that Congress retained the safety hatch in enacting AEDPA. *See Davenport*, 147 F.3d at 609, 611 (determining that the essential function of habeas corpus is to give "a reasonable opportunity to obtain a reliable judicial determination" and that an inadequate procedure is one that "is so configured as to deny a convicted defendant *any* opportunity for judicial rectification") (emphasis in original). So, even if this Court refers to circuit-of-conviction law and finds it would

deny Shepherd relief, this Court retains the power to remedy the error in Shepherd's case if it believes that the error would warrant a different outcome.

III. It would be a miscarriage of justice to deny Shepherd relief at this time.

Not only does this Court possess the power to flexibly effectuate a just remedy under the umbrella of habeas corpus, it should do so in this case. Shepherd will be the first one to concede that the timing of *United States v. Malone*, 889 F.3d 310 (6th Cir. 2018), *petition for en banc rehearing denied*, June 12, 2018, ECF No. 31, could not have been worse for him. As noted above, Shepherd has always advocated for the general rule that the law of the circuit of conviction should guide this Court in the § 2241 context. Shepherd does not retreat from that position now, even though the caselaw has shifted in a way that arguably hurts him. The doctrinal and prudential reasons for applying the law of the circuit of conviction do not change simply because the circuit's law (or the Administration) changes.

But as also noted above, the "choice of law" decision is a prudential one, and this Court's deference to a sister circuit's ruling is not required if it believes the ruling to be in error or if it believes doing so would work a patent unfairness. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1175–76 (D.C. Cir. 1987) (Ginsburg, J.), *aff'd sub nom.*, *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989) (recognizing that "[t]he federal courts spread across the country owe respect to each other's efforts and should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis"); *see also* Am. Br. of Pet'r at 39–46

(contending that this Court should exercise its inherent flexibility and vast discretion under habeas to correct this miscarriage of justice).

Both rationales are at play in Shepherd's case. Specifically, as discussed below, Shepherd's case deserves different treatment for two reasons: (1) ACCA law is in flux across the country, but in particular in the Supreme Court and the Sixth and Seventh Circuits, *see infra* Section III.A; and (2) *Malone* is likely wrongly decided, which means that simply crediting the latest iteration in the ongoing ACCA saga or waiting until the dust settles would effect a serious injustice on Shepherd: it would either deny him relief altogether or afford him relief after he has served all or nearly all of his enhanced sentence. *See infra* Section III.B. Additionally, as discussed below, *see infra* Section III.C, if this Court applies Seventh Circuit law, Shepherd would be entitled to relief. Finally, this combination of circumstances is exceptional and unlikely to arise again; it warrants both a departure from the general circuit-of-conviction approach and a grant of habeas relief. *See infra* Section III.D.

A. The ACCA is in a state of confusion.

The "legendary ambiguity" of the ACCA has left the law surrounding the issue in Shepherd's case unsettled, rapidly evolving, arbitrary, and in disarray: in fact, "there are now more Armed Career Criminal Act appeals than there are armed career criminals." John Elwood, *Relist Watch: Quantity has a Quality All its Own*, SCOTUSblog (Mar. 22, 2018, 11:11 AM), http://www.scotusblog.com/2018/03/relist-

watch-quantity-quality/. This past March, the ACCA's ambiguity led the Supreme Court to relist twenty ACCA cases in just one week. *Id.*

Given the ACCA's ambiguity, the Supreme Court is presently set to hear argument in no less than three ACCA cases next term (two of which are consolidated). *See United States v. Sims*, 854 F.3d 1037 (8th Cir. 2017), *cert. granted*, 138 S. Ct. 1592 (U.S. Apr. 23, 2018) (No. 17-766) (certifying the following question presented: "Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as 'burglary' under the [ACCA]"); *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017) (en banc), *cert. granted*, 138 S. Ct. 1592 (U.S. Apr. 23, 2018) (No. 17-765) (same); *United States v. Stokeling*, 684 Fed. App'x 870 (11th Cir. 2017) (per curiam), *cert. granted*, 138 S. Ct. 1438 (U.S. Apr. 2, 2018) (No. 17-5554) (certifying the following question presented: whether a robbery offense that includes as an element overcoming victim resistance is an ACCA predicate when state courts interpreting that language have required only slight force). The Supreme Court only recently granted these petitions, so the issues upon which the circuits are split will remain unsettled for many months. And there are likely more cases to come.[4] *See United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (en banc); *United States v. Naylor*, 887 F.3d 397 (8th Cir. 2018) (en banc).

[4] The ACCA jurisprudence is in disarray on other grounds as well. *See, e.g.*, Petition for Writ of Certiorari, *United States v. Quarles*, 850 F.3d 836 (6th Cir. 2017), *petition for cert. docketed*, No. 17-778 (U.S. Nov. 28, 2017) (noting confusion over the intent requirements for generic burglary; three circuits require proof of intent when the defendant enters the building, while two others allow conviction if there is proof the defendant developed the intent once inside). Notably, if the Court were to accept the *Quarles* petition and hold that generic burglary requires proof of intent contemporaneous with entry, Shepherd's second-degree burglary convictions would not be ACCA predicates because the Kentucky statute

Thus, the question of whether a conviction under a state burglary statute can be considered an ACCA predicate offense for purposes of a sentence enhancement depends entirely on circuit—not on settled law. What is more, the Supreme Court's resolution of these splits would likely impact Shepherd's case directly. If the Supreme Court decides that state statutes including burglary of nonpermanent or mobile structures adapted or used for overnight accommodation are broader than generic burglary, then Shepherd's Kentucky second-degree burglary convictions may not be ACCA predicate offenses as there are conflicting views over the Kentucky statute's inclusion of mobile structures. *Compare Stitt*, 860 F.3d at 874 (White, J., concurring) (finding the Kentucky statute includes burglary of "vehicles, watercraft, and aircraft"), *with Malone*, 889 F.3d at 312–13 (finding the Kentucky statute does not include these structures).

Not only is ACCA burglary law currently confused across various circuits, but it is recently unsettled in both Shepherd's circuit of conviction and circuit of confinement—the two circuits potentially relevant for resolving his case's merits. Although in prior memoranda both Shepherd and the government agreed that Shepherd's Kentucky second-degree burglary convictions were not ACCA predicates in the Seventh Circuit under *Smith v. United States*, 877 F.3d 720 (7th Cir. 2017), *petition for cert. docketed*, No. 17-7517 (U.S. Jan. 23, 2018), *see* Mem. for Pet'r at 2, 5 n.3, Jan. 25, 2018, ECF No. 21, a petition for a writ of certiorari remains pending

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does not require contemporaneous intent. *See* Ky. Rev. Stat. Ann. § 511.030(1) (stating Kentucky statute requires criminal intent either when a person "knowingly enters *or* remains unlawfully in a dwelling") (emphasis added).

in that case. *Smith*, 877 F.3d 720 (No. 17-7517). Additionally, this Court's recent opinion in *Van Cannon*, 890 F.3d 656, might also be upended. Even though *Van Cannon* supports a finding that convictions under state statutes like the one in Shepherd's case are not ACCA predicates, this Court entered a circuit split on another issue. *Id.* at 665 n.2. Because *Van Cannon* held that generic burglary requires contemporaneous intent, *see id.* at 665, if the *Quarles* petition is granted yet another aspect of Shepherd's prior conviction will be open to debate. *See* Petition for Writ of Certiorari at (I), *Quarles*, 850 F.3d 836 (No. 17-778).

Likewise, ACCA burglary law has taken a complete U-turn in the Sixth Circuit since Shepherd filed his March 20, 2018, amended brief. As of May 8, Shepherd's conviction for Kentucky second-degree burglary is suddenly an ACCA predicate offense under Sixth Circuit law. *See Malone*, 889 F.3d at 313; *but see Stitt*, 860 F.3d at 874 (White, J., concurring) (showing before *Malone*, the Sixth Circuit did not consider Kentucky second-degree burglary an ACCA predicate offense). But whether *Malone* becomes settled ACCA burglary law within the Sixth Circuit remains to be seen; the Sixth Circuit denied Malone's a petition for rehearing just yesterday, but has not issued the mandate. *See* Order Den. Pet. for En Banc Reh'g at 1, *United States v. Malone*, June 12, 2018, ECF No. 31; *see also* Fed. R. App. P. 41(c) advisory committee's note to 1998 amendment ("A court of appeals' judgment or order is not final until issuance of the mandate.").

The unsettled nature of the law can serve as a ground for this Court to grant relief. While the ACCA continues to change, Shepherd's case has not. He has

unwaveringly pointed out these errors in his sentence to no less than eight separate decisionmakers on four different courts in two different circuits. But for delays, new and shifting precedent, and some courts' failures to thoroughly and accurately assess his case, Shepherd would walk today a free man; instead, he remains incarcerated in Terre Haute. At this point, it is anyone's guess which direction the ACCA will go.

B. *Malone* is likely mistaken because it employs an errant statutory analysis, all the while ballooning the definition of building beyond the bounds of *Taylor*.

The other, related reason this Court should not blindly apply the nascent *Malone* decision is because its reasoning is incomplete and very likely incorrect. First, the *Malone* panel's statutory interpretation—which the government adopts unblinkingly, *see* Br. of the Resp't at 23–24—rests entirely on the idea that the definition of "dwelling" does not expressly incorporate the definition of "building" set forth in the Kentucky statute, while the definition of "premises" does. *See Malone*, 889 F.3d at 312–13. But that inference defies logic and ordinary rules of statutory interpretation: Normally, one takes a legislature at its word and reads words defined in a statute *the way they are defined*. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (explaining that "the normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning") (internal quotation and citation omitted).

Additionally, if the "as defined herein" proviso is what triggers the specialized statutory definition of "building," then it can only mean that the subsequent uses of

the term "building"—alone and without the proviso—must accord with the panel's "building in its ordinary sense" limitation. If that is true, the specialized definition of building does virtually no work in the statute, a result that those construing a statute try to avoid. *See Malone*, 889 F.3d at 312 (recognizing the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant") (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)). Both first-degree burglary, *see* Ky. Rev. Stat. Ann. § 511.020, and third-degree burglary, *see id.* § 511.040, like their second-degree burglary analogue, *see id.* § 511.030, criminalize entering or remaining unlawfully in a "building," and not a "building *as defined herein*." If the panel's logic follows, "building" should not be interpreted in *any* of the three degrees of burglary to be defined the same as "building" in the definitions section, *see id.* § 511.010. This leaves a *de minimis* role for the statutory definition of building to play in the "Burglary and Related Offenses" chapter: All that is left for the statutory definition of building to do is be incorporated by reference into the definition of "premises,"[5] which itself is only pertinent to criminal trespass in the second and third degrees. *See id.* §§ 511.070, 511.080.

[5] The statutory definition of building cannot even do that nominal work because the Supreme Court of Kentucky explained nearly two decades ago that even though "premises" is defined to be either a "building" or "any real property," *see* Ky. Rev. Stat. Ann. § 511.010(3), all the term "premises" *actually* refers to in the context of second- and third-degree criminal trespass is land, *not buildings*. *Colwell v. Commonwealth*, 37 S.Wd.3d 721, 726 (Ky. 2000) (reasoning that to hold otherwise would render second- and third-degree criminal trespass redundant). On the state Supreme Court's understanding, "the dual definition of 'premises'" applies only when that word is used in the "general provisions" section that describes privileges and licenses. *See id.* That leaves exactly *no* role for the

The government's construction is at odds not only with the Kentucky Legislature's intent, but also the state Supreme Court's corresponding exposition of the burglary statutes. Starting with the statute, the general commentary that follows the definition of first-degree burglary notes that third-degree burglary is the basic burglary crime. The legislative commission then further specifies that it "must be committed in a 'building,' *defined in KRS 511.010(1)* in such a way as to include all structures in which people lodge, work, or otherwise conduct business." Ky. Rev. Stat. Ann. § 511.020 cmt. (Ky. Crime Commission 1974) (emphasis added). But, as stated above, third-degree burglary (just like second-degree) proscribes entering or remaining unlawfully in a "building," and not a "building *as defined herein*," deflating the government's definition.

Perhaps taking its cue, the Supreme Court of Kentucky also interprets the use of just the word "building" in the chapter of crimes to mean building the way it is expressly defined in the statute, not solely in its ordinary sense. *See Conyers v. Commonwealth*, 530 S.W.3d 413, 419 (Ky. 2017) ("A 'building,' for the purposes of the burglary *statutes*, is a building in its ordinary sense *plus* 'any structure, vehicle, watercraft or aircraft: (a) Where any person lives, or (b) Where people assemble for [various] purposes . . . .'") (citing Ky. Rev. Stat. Ann § 511.010(1)) (emphasis added); *Funk v. Commonwealth*, 842 S.W.2d 476, 482 (Ky. 1992) ("The word 'building' in KRS 511.020 *is defined in KRS 511.010* . . . .") (emphasis added); *see also Spears v.*

government's definition of "building" to play in any element of any of the related burglary offenses.

Commonwealth, 78 S.W.3d 755, 758 n.7 (Ky. Ct. App. 2002) ("The word 'building', as it is used in KRS 511.040, is defined by KRS 511.010(1).").

Even putting aside the flawed statutory interpretation, there is another wholly independent problem with *Malone*'s holding that Kentucky's second-degree burglary is an ACCA predicate: "[U]sually occupied by a person lodging therein" is more inclusive than "designed or adapted for overnight human accommodation." *See* Am. Br. of Pet'r at 36–39. As demonstrated more fully in the next section, a burglary statute's focus on a building's use rather than its inherent nature (those designed or adapted for human accommodation) is overbroad. *See Smith*, 877 F.3d at 724 ("agree[ing] with the Tenth Circuit in *Patterson* and *Spring* and with Judge Sutton's dissenting opinion . . . in *Stitt*."). The *Malone* panel did not even consider this and thus its holding wrongly rests on an incomplete and inaccurate statutory construction, *see, e.g.*, *United States v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485, 496 (5th Cir. 2014) (reasoning that having blinders on one isolated clause of a statute can distort its overall meaning), which further supports why this Court should use its inherent powers within habeas to grant Shepherd relief.

Finally, *Malone* is proving difficult to reconcile with the full court's decision in *Stitt*, another hint that *Malone* may not ultimately withstand review. For one, although the *Malone* panel did not necessarily need to credit Judge White's concurrence in *Stitt*, it should not have flatly ignored it given that Judge White interpreted the Kentucky statute differently and concluded that it was categorically overbroad. *See Stitt*, 860 F.3d at 874–75 (White, J., concurring). Additionally, as

evidenced by other opinions that predate *Malone*, Judge White is not alone: the *Stitt* reasoning—and its application to the Kentucky statute—is compelling. Even Judge Sutton, in dissent, recognized that *Stitt* "jeopardized" the Kentucky statute. *See id.* at 878–79 (Sutton, J., dissenting). Judge White also persuaded a district court in this circuit. *See Jahns v. Julian*, No. 2:16-CV-0239-JMS-DLP, 2018 WL 1566808, at *4–5 (S.D. Ind. Mar. 30, 2018); *but see Chaney v. Shartle*, No. CV-16-00647-TUC-RCC, 2018 WL 2365713, at *2–3 (D. Ariz. May 24, 2018). It is true that the *Jahns* opinion pre-dates *Malone*, but the fact that Chief Judge Magnus-Stinson adopted the en banc court's rationale in *Stitt*, shows that reasonable jurists can diverge on this statutory interpretation. *See Jahns*, 2018 WL 1566808, at *4–5.[6]

C. If this Court resorts to Seventh Circuit precedent, Shepherd would be entitled to relief.

The government is wrong that the result is the same in both the Sixth and Seventh Circuits. *See* Br. of the Resp't at 20–21. It is true that Shepherd's position in his opening brief was that he was entitled to relief under either circuit's law. But the legal landscape has now changed; *Malone* has unequivocally placed Kentucky second-degree burglary within the reach of the ACCA. If this Court adopts the government's rule that circuit-of-confinement precedent governs, it can and should consider the arguments that the *Malone* panel never did and can freely disagree with its reasoning on the ones the panel reached. *See, e.g.*, *United States v.*

[6] Ironically enough, at sentencing in this case, defense counsel, the government, and the district court all agreed that the Kentucky statute was categorically overbroad because "building"—*as defined in the statute*—included vehicles, boats, and planes. *See* Am. Br. of Pet'r at 5 (citing A.23–27).

Franklin, 884 F.3d 331, 333 (7th Cir. 2018) (stating that a state burglary statute is broader than generic burglary if it applies "for example, to unlawful entries into vehicles as well as buildings or structures[.]").

For purposes of determining whether a certain structure is a "building" under a state burglary statute, the Supreme Court dispensed with analysis of the *use* of a structure, and instead, charted a course based on analysis of the *nature* of a structure.[7] *See, e.g.*, *United States v. Grisel*, 488 F.3d 844, 851 n.5 (9th Cir. 2007) (en banc). So, a statute that applies to *all* vehicles and boats is flawed for the same reason that a statute that applies to *all* buildings is flawed: not *all* of these structures are designed or adapted for human accommodation. Only those narrowly tailored statutes that extend to structures developed for human inhabitation may survive scrutiny under the ACCA. *See id.*

Even the *Stitt* dissent acknowledges this principle, though it couches it as a structure's "function" instead of its "nature." *Stitt*, 860 F.3d at 879 (Sutton, J., dissenting). The government would not with a straight face argue that "gazebos" and "doll houses" (to borrow a couple of Judge Sutton's hypotheticals) are not "buildings." But if a person sleeps there overnight, and someone steals something from that place, then under the government's interpretation, that constitutes second-degree burglary in Kentucky. By not spending any time scrutinizing what it

[7] The Supreme Court of Kentucky has embraced the "use" definition in a way seemingly at odds with *Taylor v. United States*, 495 U.S. 575 (1990), and its progeny. *See Cochran v. Commonwealth*, 114 S.W.3d 837, 839 (Ky. 2003) (concluding that whether a building satisfies the usually-occupied proviso of second-degree burglary "turns on [a building's] capacity, at the time of unlawful entry, of being occupied overnight and the intent of lawful or authorized persons to *use* it as such") (emphasis added).

means to be "usually occupied by a person lodging therein," the government skirts the critical analysis.

To illustrate this point, consider Shepherd's church hypothetical from his opening brief, which does not go out an "exit," as the government argues. Br. of the Resp't at 24. A church (an ordinary building) that welcomes the homeless to sleep on its pews each night would be a Kentucky dwelling because it would be a "building which is usually occupied by a person lodging therein." Ky. Rev. Stat. Ann. § 511.010(2). But someone can live in a church as such without the building necessarily being designed or adapted for human accommodation. Even under Judge Sutton's view—the broadest interpretation of generic burglary—such a building is on the outside looking in. So, too, with a hospital room full of worried family members,[8] or a 24-hour McDonald's that generally allows sleeping in the store, or overworked employees in their offices. Despite how people might use these buildings, it is not in the buildings' nature for people to live there.

This approach is consistent with *Taylor*'s interaction with the Model Penal Code's burglary provision. *See Taylor*, 495 U.S. at 598 n.8. Although the Court looked to the MPC in its formulation of federal generic burglary, the Court was clear that its "usage [of the generic crime of burglary] *approximates* that adopted by the drafters of the Model Penal Code"; it does not replicate it. *Id.* (emphasis added). So although the MPC utilizes the phrase "occupied structure," the Court chose to omit from its definition the word "occupied." *Compare* Model Penal Code § 221.1(1) (Am.

[8] *See Colson v. Commonwealth*, 27 S.W.3d 481, 483 (Ky. Ct. App. 2000) (holding that a hospital room constitutes a dwelling).

Law Inst. 2017) (defining burglary of "a building or occupied structure"), *with Taylor*, 495 U.S. at 598 (defining burglary of "a building or other structure"). Kentucky puts itself at odds with federal generic burglary because a building can be usually occupied by a lodger (Kentucky's use-focus) without it necessarily being designed or adapted for human accommodation (federal law's nature-focus).

Kentucky's use of the term "dwelling" is also at odds with the approaches of many other states. *Taylor* recognized that even though the common law restricted burglary to dwellings, many state burglary statutes broadened "dwelling" beyond its meaning at common law. *Taylor*, 495 U.S. at 592–93. Some states, in fact, had altogether discarded the element of dwelling. *Id.* Yet *Taylor*'s aim was to align its definition to the mine run of state definitions and so it ultimately declined to incorporate dwelling as an element in generic burglary. *Id.* Kentucky has every right to incorporate the term dwelling into its statute but in order to pass muster under the ACCA, it must define that legal term (one that the Court chose not to use) in a way that satisfactorily tracks the Court's meaning of "building or other structure." In short, because the Kentucky statute includes buildings that are not designed or adapted for human accommodation, it runs afoul of *Smith*.

D. This Court has the ability to remedy Shepherd's injustice now.

Whether this Court looks to Sixth Circuit or Seventh Circuit law, it has the discretion and ability to grant Shepherd relief. This Court's existing ACCA precedent is capacious enough to allow it to fully and properly interpret the Kentucky statute such that it would fall outside of generic burglary. Even if this

Court looks to the Sixth Circuit, habeas law provides the flexibility to depart from its law in rare circumstances. Am. Br. of Pet'r at 39 (quoting *Harris v. Nelson*, 394 U.S. 286, 291 (1969)). Such circumstances exist here. As evidenced by the various developments in ACCA law not only since Shepherd's opening brief in November but since his more recent amended brief in March, every day in a world with the ACCA is different. By the time the ACCA's application clears up, Shepherd will likely have served all of his enhanced sentence. This Court recently explained that it has "no doubt that an extended prison term—which was imposed on [a man] as a result of [his] designation as [a] career offender[]—constitutes prejudice." *Cross v. United States*, No. 17-2282, 2018 WL 2730774, at *4 (7th Cir. June 7, 2018) (citing *Glover v. United States*, 531 U.S. 198, 203 (2001)). Thus, all Shepherd asks is that this Court disposes of his petition consistent with the command of the habeas statute: "as law and justice require[s]." 28 U.S.C. § 2243.

CONCLUSION

For the aforementioned reasons, this Court should reverse the judgment of the district court and remand the case with instructions to grant Shepherd's petition for a writ of habeas corpus under 28 U.S.C. § 2241.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)

1. This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,655, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a) and the type style requirements of Fed. R. App. P. 32(a) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 365 in 12-point Century Schoolbook font with footnotes in 11-point Century Schoolbook font.

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Dated: June 13, 2018

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Petitioner, Joshua E. Shepherd, hereby certify that I electronically field this reply brief with the clerk of the Seventh Circuit Court of Appeals on June 13, 2018, which will send notice of the filing to counsel of record in the case.

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