No. __-_______

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL EDWARD MOORE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Taylor*'s definition of generic burglary requires proof that intent to commit a crime was present at the time of unlawful entry or initial unlawful remaining (as two circuits hold), or whether (as the court below and three other circuits hold) it is enough that the defendant formed the intent to commit a crime at any time while unlawfully "remaining in" the building or structure.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

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MICHAEL EDWARD MOORE,

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Edward Moore respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's order in this matter was unpublished, and appears at pages 1a to 4a of the appendix to this petition.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals' denial of Mr. Moore's application for a certificate of appealability was entered on December 14, 2017. This petition is timely filed pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall... be deprived of life, liberty, or property, without due process of law . . . .

18 U.S.C. § 924(e) provides, in relevant part,

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions... for a violent felony... shall be... imprisoned not less than fifteen years.
>
> (2) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year... that...
> ...
> (ii) is burglary, arson, or extortion, involves the use of explosives.

Tenn. Code Ann. § 39-14-402 provides, in relevant part,

> (a) A person commits burglary who, without the effective consent of the property owner;
>
>> (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;
>>
>> (2) Remains concealed, with intent to commit a felony, theft or assault, in a building;
>>
>> (3) Enters a building and commits or attempts to commit a felony, theft or assault;

INTRODUCTION

Burglary, for purposes of determining whether it qualifies as a predicate under the Armed Career Criminal Act ("ACCA"), is given its "generic" meaning, having the "basic elements of [1] unlawful or unprivileged entry into, or remaining in, [2] a building or structure, [3] with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 599 (1990). The Circuits are deeply divided regarding whether an intent to commit a crime must be present at the moment one unlawfully remains in a building. *Compare*, *e.g.*,

United States v. Herrera-Montes, 490 F.3d 390, 392 (5th Cir. 2007) (holding that Tenn. Code Ann. § 39-14-402(a)(3) is not "generic" burglary because it does not require intent to commit a crime upon unlawful entry or remaining in) *with United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015) (holding that Tenn. Code Ann. § 39-14-402(a)(3) *is* generic burglary) (citing *United States v. Moore*, 578 F. App'x 550, 555 (6th Cir. 2014) (holding that § 39-14-402(a)(3) is burglary under ACCA's residual clause)) (overruled on other grounds by *United States v. Stitt*, 808 F.3d 676 (6th Cir. 2017)).

The Fifth and Eighth Circuits have concluded that *Taylor*'s definition of generic burglary requires a showing that the defendant had criminal intent when she unlawfully entered or first unlawfully remained inside the building, often referred to as a showing of "contemporaneous intent." *Herrera-Montes*, 490 F.3d at 392; *United States v. McArthur*, 850 F.3d 925, 939, 939 n.* (8th Cir. 2017). The Fourth, Sixth, Ninth, and Tenth Circuits have reached the opposite conclusion, transforming any trespass into a burglary if the defendant decides at any point to commit a crime. This split is unlikely to resolve itself, with Circuits now firmly entrenched in their respective positions. *See McArthur*, 850 F.3d at 939 (collecting cases); *United States v. Herrold*, -- F.3d --, 2018 WL 948373 (5th Cir. Feb. 20, 2018) (*en banc*).[1]

This is a question of "extraordinary importance to the federal sentencing structure" because the "Circuit split gravely undermines the uniform application of the [ACCA]'s enhanced sentencing provisions," causing significant sentencing disparities for

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[1] Mr. Moore's petition here presents substantially the same issue as pending petitions for certiorari *Quarles v. United States*, No. 17-778 (in which the government has received three extensions to respond to Mr. Quarles' petition), and *Ferguson v. United States*, No. 17-7496.

burglary, "a frequently-used ACCA predicate." Gov't Pet. for Reh'g En Banc, *United States v. Morris*, 836 F.3d 931 (8th Cir. 2016) (No. 14-3336).

STATEMENT OF THE CASE

In 2012, Michael Moore was convicted by a jury of one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g), and one count of possessing a stolen firearm, in violation of 18 U.S.C. § 922(j). The Presentence Investigation Report ("PSR") determined Mr. Moore qualified for the enhanced penalties of the Armed Career Criminal Act based upon four predicate convictions, three of which were for violating Tennessee's burglary statute under Tenn. Code Ann. § 39-14-402 (2000). Mr. Moore objected to the burglary convictions being used as ACCA predicates, arguing, *inter alia*, that one of the subsections of the Tennessee burglary statute does not require intent to commit a crime upon unlawful entry. That subsection provides that a person commits burglary if, without consent, "[e]nters a building and commits or attempts to commit a felony, theft or assault." Tenn. Code Ann. § 39-14-402(a)(3). The district court overruled Mr. Moore's objection and sentenced him to serve 235 months of incarceration, significantly more time than the non-ACCA statutory maximum of 120 months. 18 U.S.C. § 924(a)(2).

Mr. Moore appealed. He argued, in part, that it was not clear under which subsection of § 39-14-402(a) he was convicted. The Sixth Circuit ruled it would decide his appeal as if he were convicted under § 39-14-402(a)(3), the subsection that lacks contemporaneous intent. *United States v. Moore*, 578 F. App'x 550, 554 (6th Cir. 2014) (unpublished). It then ruled that Mr. Moore's convictions under § 39-14-402(a)(3) qualified as predicate offenses under the ACCA's residual clause. *Id.* at 555. The Sixth Circuit specifically did not rule whether

subsection (a)(3) qualifies as a predicate offense under the ACCA's enumerated offense clause. *Id*. at 555 n.3.

In May 2016, Mr. Moore filed a petition pursuant to 28 U.S.C. § 2255, arguing he is entitled to sentencing relief under the Supreme Court's ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015). He argued that (a)(3) is broader than generic burglary because it does not require the intent to commit a crime upon entry. *See Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013) (citing *Taylor*, 495 U.S. at 591). Subsection (a)(3) is not a variant of the "remaining in" subclass of generic burglaries because it would render redundant subsection (a)(2) (unlawfully remaining in a building with the intent to commit a crime).

The district court denied and dismissed Mr. Moore's petition, and refused to issue a certificate of appealability. It relied on *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015), in which the Sixth Circuit held that burglary under subsection (a)(3) "is also a 'remaining-in' variant of generic burglary because someone who enters a building or structure and, while inside, commits or attempts to commit a felony will necessarily have remained inside the building or structure to do so." 808 F.3d at 685.

Mr. Moore filed a motion with the Sixth Circuit Court of Appeals asking it to grant a certificate of appealability on the issue of whether (a)(3) is a generic burglary. He noted the extent of *Priddy*'s analysis of (a)(3) was a *single sentence*. He also alerted the Sixth Circuit to the split among Circuits regarding unlawful remaining without contemporaneous criminal intent, citing *United States v. Bernel-Aveja*, 844 F.3d 206 (5th Cir. 2016), and *United States v. McArthur*, 850 F.3d 925 (8th Cir. 2017) ("The most natural reading of *Taylor* and the sources on which it relied show that a generic burglary requires intent to commit a crime at the time of the

unlawful or unprivileged entry or the initial 'remaining in' without consent."). He encouraged the Sixth Circuit to reexamine its conclusion in *Priddy*.

First, the defendant in *Priddy* had not briefed the issue of (a)(3) as a predicate offense, only addressing whether it qualified under the residual clause. Nor had the Sixth Circuit rigorously analyzed how (a)(3) might be a generic burglary. Second, Mr. Moore argued that (a)(3) could not be a "remaining in" type of burglary because by its terms, it proscribes unlawful *entry* into a building and the subsequent commission of a crime. The Sixth Circuit's interpretation of (a)(3) read otherwise nonexistent language into the statute. Furthermore, interpreting (a)(3) as a "remaining in" offense rendered subsections (a)(2) and (a)(3) duplicative. In contrast, interpreting (a)(3) as it is written, without a requirement that a defendant have a specific intent to commit another crime at the time of entry, retains its character as a different offense, encompassing activities that amount to basic theft, vandalism, and/or trespassing.

The Sixth Circuit denied Mr. Moore's motion, citing *Priddy* and rejecting the holdings of *Bernel-Aveja* and *McArthur* as non-binding. The Order denying the certificate of appealability was issued on December 14, 2017.

REASONS FOR GRANTING THE PETITION

I. This case presents an ideal vehicle for resolving an enduring conflict with significant impact on just and equitable sentencing.

Twenty-two states have felony burglary statutes that include—explicitly or by interpretation—unlawful entry or unlawful "remaining in" without contemporaneous intent to commit a crime inside.[2] Four Circuits – the Fourth, Sixth, Ninth, and Tenth – hold that a

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[2] Alabama – Ala. Code § 13A-7-5 (2008 & supp. 2012); Colorado – Colo. Rev. Stat. Ann. § 18-4-202 (West 2013); Delaware – Del. Code Ann. tit. 11 § 825(a)(2) (West 2004); Florida – Fla. State. Ann. § 810.02(1)(b)(2) (West 2007 & Supp. 2016); Georgia – Ga. Code Ann. § 16-7-1 (2011 & Supp. 2016); Hawaii – Haw. Rev. Stat. Ann. § 708-812.5 (West 2006); Illinois – Ill.

conviction under such a statute is a conviction for generic burglary and thus worthy of triggering the draconian sentencing enhancements of the ACCA. Two Circuits – the Fifth and the Eighth – have properly held that such statutes are outside *Taylor*'s definition of generic burglary.

The implications of the widespread disagreement on this frequently recurring issue are severe. As the government itself has urged, "the Circuit split gravely undermines the uniform application of [the ACCA]'s enhanced sentencing provisions," resulting in the uneven administration of justice. Gov't Stay Mot. at 6, *United States v. Morris*, 836 F.3d 931 (8th Cir. 2016) (No. 14-3336). Indeed, depending on the Circuit, district courts are imposing drastically different sentences based on identical Tennessee burglary convictions, *compare Priddy*, 808 F.3d at 681, *with Herrera-Montes*, 490 F.3d at 392, and based on identical Texas burglary convictions, *compare Herrold*, 2018 WL 948373, *with United States v. Bonilla*, 687 F.3d 188, 194 (4th Cir. 2012); *United States v. Dunn*, 96 F. App'x 600, 605 (10th Cir. 2004) (unpublished). Thus, whether a defendant incurs a 15-year mandatory minimum sentence (with life maximum) under the ACCA depends entirely on the jurisdiction in which he is federally prosecuted.

This result subverts the ACCA's purposes of providing a "uniform definition" of burglary, and ensuring that the same type of conduct receives similar treatment at the federal level. *Taylor*, 495 U.S. at 592. The Circuit split thus has produced the very arbitrariness that

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Comp. Stat. 5/19-1 (West 2003); Iowa – Iowa Code Ann. § 713.1 (West 2016); Kansas – Kan. Stat. Ann. § 21-5807 (2007 & supp. 2015); Kentucky – Ky. Rev. Stat. Ann. § 511.020 (LexisNexis 2014); Maine – Me. Rev. Stat. Ann. tit. 17-A, § 401 (2006 & Supp. 2015); Maryland – Md. Code Ann. Crim. Law § 6-205 (West 2002); Michigan – Mich. Comp. Laws Ann. § 750.110(a)(2) & (3) (2008); Minnesota – Minn. Stat. Ann. § 609.582 (2007); Montana – Mont. Code Ann. § 45-6-204(1)(b) (West 2009); Ohio – Ohio Rev. Code Ann. §§ 2911.12, 2911.21(A)(1) (West 2006 & Supp. 206); Rhode Island – 11 R.I. Gen. Laws Ann. § 11-8-2 (West 2017); South Dakota – S.D. Codified Laws § 22-32-1 (2006); Tennessee – Tenn. Code Ann. 39-14-402(a)(3) (West 1995); Texas – Tex. Penal Code Ann. § 30.02(a)(3) (Vernon's 2017); Utah – Utah Code Ann. § 76-6-202 (LexisNexis 2012); Washington – Wash. Rev. Code § 9A.52.020 (2015).

both Congress and this Court have long sought to avoid. Additionally, the significance of the ACCA's enhanced penalty for any individual defendant is profound, imposing "a mandatory minimum sentence of imprisonment for 15 years," and a maximum of life, rather than the statutory maximum of ten years. *Id*. at 581; 18 U.S.C. §§ 924(a)(2) & (e). In Mr. Moore's case, reversal would almost certainly result in a sentence reduction of over nine years.

This case presents an excellent vehicle for resolving the question presented. Mr. Moore's statute of conviction, Tenn. Code Ann. § 39-14-402(a)(3), has been held by the Sixth Circuit to be a generic burglary, while the Fifth Circuit has held the very same subsection not to be generic burglary. *Priddy*, 808 F.3d at 684, 685; *Herrera-Montes*, 490 F.3d at 392. Over the seven-year history of his case, Mr. Moore has at every turn preserved his argument that his prior burglary convictions do not qualify as "generic burglary" under the ACCA because they lacked the contemporaneous intent element required by generic burglary. *See* Pet. App. pp. 3a, 9a, 11a. The Sixth Circuit treated Mr. Moore's convictions as violations of § 39-14-402(a)(3), establishing the law of the case. *United States v. Moore*, 578 F. App'x 550, 554 (6th Cir. 2014); *Pepper v. United States*, 562 U.S. 476, 506 (2011) (citing *Arizona v. California*, 460 U.S. 605, 618 (1983)). The Sixth Circuit acknowledged the Circuit split, but found no reason to overrule its own precedent in *Priddy*. Pet. App. pp. 3a, 4a.

Mr. Moore's petition allows this Court to decide a critical issue of ACCA sentencing jurisprudence based on disparate interpretations of the same statute.

II. The decision below maintains a steadfast Circuit split.

In continuing to hold that a prior burglary conviction can serve as an ACCA predicate if the defendant developed the intent to commit a crime at any point "while 'remaining in'" a building, the Sixth Circuit has maintained a long-established split between Circuit Courts of

Appeals. While the Sixth Circuit's position is in accord with Fourth, Ninth, and Tenth Circuit rulings, it directly contradicts rulings in the Fifth and Eighth Circuits, which require criminal intent contemporaneous with the unlawful entry or decision to remain in the building.

In denying Mr. Moore a certificate of appealability, the Sixth Circuit acknowledged the disagreement among the circuits, but glibly noted it was bound by *Priddy*, which itself had dedicated a single sentence to its analysis of § 39-14-402(a)(3). Other circuits have, in greater depth, acknowledged the pervasive split, noting "two competing views" over "the meaning of the phrase 'remaining in.'" *Bernel-Aveja*, 844 F.3d at 215 (Higginbotham, J., concurring in the judgment); *see also id.* at 243 (Owen, J., concurring) (noting "division among the Circuit Courts... as to when the intent to commit a crime on the premises must be formed"). Two defendants convicted of the same crime will face significantly different sentences in different Circuits: a statutory maximum of ten years, versus a mandatory minimum of 15 years and maximum of life in prison. This Court should grant review in order to restore "fundamental fairness" by ensuring that "the same type of conduct is punishable on the Federal level in all cases." *Taylor*, 495 U.S. at 582 (quoting S. Rep. No. 190, 98th Cong., 1st Sess. 20 (1983)).

A. Two Circuits have held that *Taylor* requires contemporaneous intent.

The Fifth and Eighth Circuits have held that, to satisfy *Taylor*'s definition of generic burglary, a statute must require proof that the defendant intended to commit a crime at the time of unlawful entry or first unlawful remaining in a building. *United States v. Herrold*, -- F.3d --, 2018 WL 948373 (5th Cir. Feb. 20, 2018) (*en banc*); *McArthur*, 850 F.3d 925 (8th Cir. 2017).

In *Herrold*, the Fifth Circuit, sitting *en banc*, held that § 30.02(a)(3) of Texas' burglary statute, which prohibits "entry into a building or habitation followed by commission or attempted commission of a felony, theft, or assault" is broader than the generic definition of burglary. 2018

WL 948373 at *9 (summarizing Tex. Penal Code Ann. § 30.02(a)(3)). This is because generic burglary has a "contemporaneity requirement": a "defendant must have the intent to commit a crime *when* he enters or remains in the building or structure." *Id.* Like the Tennessee statute at issue in Mr. Moore's case, § 30.02(a)(3) "contains no textual requirement that a defendant's intent to commit a crime contemporaneously accompany a defendant's unauthorized entry," which makes it broader than generic burglary. *Herrold*, 2018 WL 948373 at *9.[3]

The Eighth Circuit likewise recognized in *McArthur* that generic burglary "requires intent to commit a crime at the time of the unlawful or unprivileged entry or the initial 'remaining in' without consent." 850 F.3d at 939. *McArthur* noted that the "act of 'remaining in' a building, for purposes of generic burglary, is not a continuous undertaking," but a "discrete event that occurs at the moment when a perpetrator, who at one point was lawfully present, exceeds his license and overstays his welcome." *Id.* "If the defendant does not have the requisite intent at the moment he 'remains,' then he has not committed the crime of generic burglary." *Id.* The Eighth Circuit thus determined that the defendant's conviction under Minnesota's third-degree burglary statute[4] did not support an ACCA sentencing enhancement because the statute did not "require that the defendant have formed the 'intent to commit a crime' at the time of the nonconsensual entry or remaining in." *Id.* at 940.

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[3] The Fifth Circuit has also ruled, in *United States v. Herrera-Montes*, 490 F.3d 390 (5th Cir. 2007), that the Tennessee burglary statute was not subject to the Sentencing Guideline' career offender enhancement for "crime[s] of violence," because *Taylor* requires that the defendant intend to commit a crime at the time of unlawful entry or remaining in and the Tennessee statute did not require contemporaneous intent. 490 F.3d at 392. The Fifth Circuit explained, to assume that "intent could be formed anytime" would be a radical expansion of the common meaning of burglary because "then every crime committed after an unlawful entry or remaining in would be burglary." *Id.* at 392 n.1.

[4] Minn. Stat. Ann. § 609.582, subd. 3 (2016) (whoever "enters a building without consent and steals or commits a felony or cross misdemeanor while in the building... commits burglary in the third degree").

B. Four other Circuits maintain that *Taylor* permits sentence enhancement even when contemporaneous intent is not required.

In sharp contrast, the Fourth, Sixth, Ninth, and Tenth Circuits have interpreted *Taylor*'s "remaining in" language broadly to apply to a defendant who forms the intent to commit a crime at any point when trespassing in a building.

As discussed *supra*, the Sixth Circuit held in *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015), that § 39-14-402(a) – the same provision at issue in *Herrera-Montes* – qualified as an ACCA predicate offense because it was a "'remaining-in' variant of generic burglary." 808 F.3d at 685. In the court's view, "someone who enters a building or structure and, while inside, commits or attempts to commit a felony will necessarily have remained inside the building or structure to do so." *Id.* The Sixth Circuit dedicated a single sentence to this analysis. *See id.* In denying Mr. Moore's petition for certificate of appealability, the Sixth Circuit cited *Priddy*, as well as *Priddy*'s recent affirmation in *United States v. Ferguson*, 868 F.3d 514, 515-516 (6th Cir. 2017); *petition for certiorari docketed*, No. 17-7496; Pet. App. pp. 3a, 4a.

The Fourth Circuit reached the same conclusion in *United States v. Bonilla*, 687 F.3d 188, 194 (4th Cir. 2012), in affirming the defendant's sentence enhancement under U.S.S.G. §2L1.2[5] based on his violation of the Texas burglary statute.[6] The Fourth Circuit rejected the Fifth Circuit's holding to the contrary, dismissing the Fifth Circuit's reading of *Taylor* as "too

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[5] The Fourth Circuit "rel[ies] on precedents evaluating whether an offense constitutes a 'crime of violence' under the Guidelines interchangeably with precedents evaluating whether an offense constitutes a 'violent felony' under the ACCA, because the two terms have been defined in a manner that is 'substantively identical'." *United States v. King*, 673 F.3d 274, 279 n.3 (4th Cir. 2012).

[6] This is the same statute the Fifth Circuit sitting *en banc* recently ruled to *not* be a generic burglary in *Herrold*.

rigid." *Id*. (citing *United States v. Constante*, 544 F.3d 584, 587 (5th Cir. 2008) (per curiam)). Since "proof of a completed or attempted felony *necessarily* requires proof that the defendant formulated the intent to commit a crime either prior to his unlawful entry or while unlawfully remaining in the building," the court determined that the statute "substantially correspond[s]" to *Taylor*'s generic definition – even though it does not contain an express intent element. *Id*. at 193. The dissent in *Bonilla* explained that *Taylor*'s "with-intent-to-commit phrasing" retains the "requirement of contemporaneous intent... [that] was the essence of burglary at common law, as it was the element that distinguished the offense from trespass." *Id*. at 196-197 (Traxler, J. dissenting).

The Ninth Circuit has likewise concluded that "*Taylor* allows for burglary convictions so long as the defendant formed the intent to commit a crime while unlawfully remaining on the premises, regardless of the legality of the entry." *United States v. Reina-Rodriguez*, 468 F.3d 1147, 1155 (9th Cir. 2006) (overruled on other grounds by *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007)). According to the Ninth Circuit, requiring intent solely at entry "would render *Taylor*'s 'remaining-in' language surplusage." *Id*. But the court concluded, without explanation, that "remaining in" must refer to a continuing course of conduct rather than a discrete point in time. As such, the court ruled that a conviction under Utah's second-degree burglary statute[7] was a crime of violence[8] under the Sentencing Guidelines.[9] *Id*. at 1157.

[7] Utah Code Ann. § 76-6-202(1) (West 2015) ("An actor is guilty of burglary who enters or remains unlawfully in a building or any portion of a building with intent to commit [a crime].").

[8] Because a "violent felony as defined in the ACCA is nearly identical to a 'crime of violence' as defined in the Sentencing Guidelines," the Ninth Circuit has "used [its] analysis of the [latter]... to guide [its] interpretation of [the former]." *United States v. Prince*, 772 F.3d 1173, 1176 (9th Cir. 2014).

[9] *Reina-Rodriguez* significantly curtailed the reach of the Ninth Circuit's earlier ruling in *United States v. Bonat*, 106 F.3d 1472 (9th Cir. 1997). *Bonat* held that the Arizona burglary statute

Finally, the Tenth Circuit has held that intent to commit a crime may be formed at any point while the defendant is unlawfully present in the building. In *United States v. Dunn*, 96 F. App'x 600, 605 (10th Cir. 2004) (unpublished), the court rejected the defendant's argument that the same Texas burglary statute at issue in *Constante* and *Bonilla* did not support an ACCA sentencing enhancement because it "lack[ed] the coincidence of unprivileged entry and intent to commit a crime." *Dunn* held that "this Court has squarely held that the elements of the Texas statute at issue 'substantially correspond to the generic elements of burglary contained in *Taylor*.'" *Id*. at 605 (citing *United States v. Spring*, 80 F.3d 1450, 1462 (10th Cir. 1996)). The court was thus "bound by circuit precedent" to conclude that criminal intent could be developed at any time while the defendant unlawfully remains on the premises. *Id*.

C. Review is necessary to resolve this enduring Circuit split

This split is unlikely to dissipate without the Court's intervention. It involves six Circuit Courts of Appeals. Rather than taking steps to reconcile the disagreement, circuit courts have stood fast by their precedents in recent rulings. *See*, *e.g.*, *United States v. Ferguson*, 868 F.3d 514, 516 (6th Cir. 2017); *Herrold*, 2018 WL 948373 at *13. Some Circuit courts have declined to grant rehearing *en banc* despite the urgings of judges and litigants, including the United States. *See*, *e.g.*, Order Denying Reh'g En Banc, *Ferguson*, 868 F.3d 514 (R. 49-1, 6th Cir. Oct. 19, 2017) (No. 15-6303); Order Denying Reh'g En Banc, *McArthur*, 850 F.3d 925 (8th Cir. Oct.

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failed to satisfy the definition of generic burglary because state courts had interpreted it "to allow a conviction even if the intent to commit the crime was formed after entering the structure." *Bonat*, 106 F.3d at 1475. But as the court clarified in *Reina-Rodriguez*, Arizona state courts had construed its burglary statute so broadly as to eliminate the requirement of unlawful presence in a building. 468 F.3d at 1155 (noting that, "under Arizona law, a person may be convicted of burglary merely by committing the crime of shoplifting"). In Utah, however, unlawful presence was still a necessary element of burglary. *Id*. at 1156 (citing *State v. Rudolph*, 970 F.2d 1221, 1229 (Utah 1998)).

19, 2016) (No. 14-3335); Order Denying Reh'g En Banc, *Dunn*, 96 F. App'x 600 (10th Cir. June 15, 2004) (No. 03-5011). Upon rehearing, the Eighth and Tenth Circuits have maintained positions that continue the circuit split. *See Herrold*, 2018 WL 948373 at *13 (*en banc*) (holding Texas burglary statute is indivisible and non-generic, in contravention of previous Fifth Circuit law and in conflict with the Tenth Circuit's interpretation of the same law in *United States v. Dunn*, 96 F. App'x 600 (10th Cir. 2004); *McArthur*, 850 F.3d at 840 (on panel rehearing, reaffirming the initial panel decision in *United States v. McArthur*, 836 F.3d 931, 944 (8th Cir. 2016)).

In light of such intractable disagreement, "[o]nly the Supreme Court can resolve the split among the Circuit Courts as to when formation of intent for purposes of generic burglary must occur." 844 F.3d at 245 (Owen, J., concurring).

III. The decision below is wrong.

To qualify as a "burglary" under the ACCA, a prior state felony conviction must have required proof of contemporaneous intent to commit a crime. That conclusion follows from this Court's precedent, the ACCA's text and purpose, and better-reasoned circuit court decisions. The Sixth Circuit's contrary position conflicts with *Taylor*, undermines Congress' purpose of deterring violent crime, and leads to illogical results.

In *Taylor*, this Court rejected the notion that the ACCA reaches any crime that happens to carry the title "burglary." Instead, *Taylor* concluded that Congress had adopted "the generic, contemporary meaning of burglary," with three elements: "[1] an unlawful or unprivileged entry into, or remaining in, [2] a building or other structure, [3] with intent to commit a crime." 495 U.S. at 598 (citing 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(a), (c), (e), at 466, 471, 474 (1986)). This definition is "practically identical" to the

ACCA's original statutory definition of "burglary," *id*., which covered "any felony consisting of entering or remaining surreptitiously within a building... *with intent to engage* in conduct constituting a Federal or State offense." 18 U.S.C. § 1202(c)(9) (1982 ed., Supp. III) (emphasis added); *accord* 495 U.S. at 590 (finding "nothing in the history to show that Congress intended in 1986 to replace the 1984 'generic' definition of burglary with something entirely different").

"The most natural reading of *Taylor* and the sources on which it relied show that a generic burglary requires intent to commit a crime at the time of the unlawful or unprivileged entry or the initial 'remaining in' without consent." *McArthur*, 850 F.3d at 939 (internal citations omitted). First, by using the word "with," this Court "can only be understood as requiring the intent to accompany the other elements" of generic burglary. *Bonilla*, 687 F.3d at 197 (Traxler, C.J., dissenting) (citing *Webster's Encyclopedic Unabridged Dictionary of the English Language* 2183 (2001) (defining "with" as "accompanied by; accompanying")); *see also McArthur*, 850 F.3d at 939 (emphasizing the *Taylor* definition's use of "with"). If this Court had intended the elements to be independent of one another, it could have used "and" instead of "with."

Second, requiring contemporaneous intent aligns with the historical and other sources on which *Taylor* relied in determining the "generally accepted contemporary meaning" of burglary at the time of the ACCA's enactment, including "the Model Penal Code." *Taylor*, 495 U.S. at 596-598 n.8. Those authorities support a contemporaneous intent requirement. *See McArthur*, 850 F.3d at 939. Looking to the same sources, the Eighth Circuit in *McArthur* concluded that intent must either "exist at the time the defendant unlawfully remained within," *id*. (quoting 2 LaFave & Scott § 813(b), (e), at 468, 473-474 & n.101), or "accompany" the "entry" or "intrusion," *id*. (quoting Model Penal Code § 221.1 cmt. 3 (Am. Law Inst. 1980)). *Accord Herrera-Montes*, 490 F.3d at 392 (reaching the same conclusion after analyzing Black's Law

Dictionary and the Model Penal Code). For instance, the Model Penal Code definition referenced in *Taylor* reads: "A person is guilty of burglary if he enters a building or occupied structure... *with* purpose to commit a crime therein." Model Penal Code § 221.1(1) (emphasis added). This understanding of intent is deeply rooted in the definition of burglary and distinguishes it from lesser property offenses, such as trespass. *See* 4 William Blackstone, *Commentaries on the Laws of England*, 227 (1769) ("As to the *intent*; it is clear, that such breaking and entry must be with a felonious intent, otherwise it is only a trespass."); *see also Bonilla*, 687 F.3d at 196-197 (Traxler, C.J., dissenting) (quoting Blackstone); *Bernel-Aveja*, 844 F.3d at 218 (maintaining that "the most fundamental character of burglary" is that "the perpetrator trespass[es] while already harboring intent to commit a further crime.").

This position is also the most faithful to the ACCA's purpose. "Congress singled out burglary... because of its inherent potential for harm to persons." *Taylor*, 495 U.S. at 588; *see also* H.R. Rep. No. 849, 99th Cong., 2d Sess. 3 (1986) ("The Subcommittee agreed to add the crimes... that involve conduct that presents a serious potential risk of physical injury to others... such as burglary."). This Court has recognized that contemporaneous intent is closely tied to the risk of violence because "[t]he fact that an offender enters a building *to commit a crime* often creates the possibility of a violent confrontation between the offender and an occupant." *Taylor*, 495 U.S. at 588 (emphasis added). Without such a requirement, the ACCA's severe sentencing enhancements could be applied to any trespass with a subsequent crime, no matter the context or risk of harm.

There is a clear difference between breaking into a home *with the intent* to steal, or surreptitiously concealing oneself in a jewelry store until the close of business *with the intent* to take merchandise, on the one hand, and a hiker who enters an unoccupied cabin for protection

from the cold and only later opportunistically decides to take food or supplies. The first two – each squarely within the generic meaning of burglary – can be said to pose a high risk of danger to persons; the latter does not. To the contrary, the entire rationale for defining burglary as a separate offense collapses if the crime sweeps so broadly. As the Model Penal Code aptly describes, "burglary is by hypothesis an attempt to commit some other crime" and was used at common law because of the difficulty of punishing inchoate offenses. Model Penal Code § 221.1 cmt. 1. Because modern criminal law has largely abandoned rigid limits on criminal attempt, burglary is only justifiable as an independent offense if it is limited to conduct that creates more danger than the underlying crime. The existence of criminal intent at the time of unlawful entry is a key factor that "creates the possibility of a violent confrontation." *See Taylor*, 495 U.S. at 588; cf. Model Penal Code § 221.1 cmt.1 ("entry into a home at night in order to commit a theft is surely a more aggravated offense than an attempted theft alone, because of the additional element of personal danger that attends such conduct").

"The ultimate absurdity," according to the authors of the Model Penal Code, would be "a provision... making it burglary to commit an offense 'in' a building, regardless of ... *the intent with which he entered*." Model Penal Code § 221.1 cmt. 1 (emphasis added). To avoid this, the Code deliberately "exclude[s] from burglary [those] situations" that involve "no element of aggravation of the crime the actor proposes to carry forward." *Id*. cmt. 3(a) (discussing the need for an unlawful entry requirement); *see also* 2 LaFave & Scott § 8.13(a), at 467 (citing this definition as a "sound approach"). Tennessee's statute allows for such an "ultimate absurdity" because it does not require that criminal intent accompany the unlawful occupation. By bringing this statute within generic burglary under the ACCA, the Sixth Circuit would make a "career criminal" out of a Tennessee hiker who seeks shelter and later commits a theft of opportunity,

while a hiker on the North Carolina side of the Great Smoky Mountains would face only misdemeanor charges. *See* N.C. Gen. Stat. § 14-54(c) (2013) (breaking and entering a building [without intent to commit a crime] is a Class 1 misdemeanor). This approach clearly undermines both of Congress' objectives: deterring violent crime and guarding against unfair or disproportionate sentencing enhancements. *See* S. Rep. No. 190, 98th Cong., 1st Sess. 20 (1983) ("[ACCA] should ensure... that the same type of conduct is punishable on the Federal level in all cases.").

Circuits adopting the Sixth Circuit's view have relied on *Taylor*'s "remaining in" language, reasoning that "proof of a completed or attempted felony *necessarily* requires proof that the defendant formulated the intent to commit a crime either prior to his unlawful entry or while unlawfully remaining in the building." *Bonilla*, 687 F.3d at 193. This argument, which sees "remaining in" as a continuous process, is inconsistent with *Taylor* and would lead to draconian results.

First, such a reading renders *Taylor*'s "unlawful entry" language superfluous. The definition of generic burglary refers separately to "unlawful entry" and "remaining in." If it were true that the commission of a crime during an unlawful occupation "necessarily" proves that the requisite intent formed while "remaining in" the premises, then "every unlawful entry with intent would become 'remaining in' with intent as soon as the perpetrator enters" and the "unlawful entry" prong would be meaningless. *McArthur*, 850 F.3d at 939 (internal citations omitted). To give full weight to the Court's definition, both "unlawful entry" and "remaining in" must be read as discrete moments when an unlawful occupation begins. Therefore, a crime is only generic burglary if this specific act is done "with intent to commit a crime."

Second, the decision below continues to push the ACCA beyond its logical limits, triggering a fifteen-year mandatory sentencing enhancement not only for the hypothetical hiker, but also for a homeless person who sleeps in a warehouse and steals a coat on his way out, or "teenagers who unlawfully enter a house only to party, and only later decide to commit a crime." *Herrera-Montes*, 490 F.3d at 392. These defendants may perhaps be fairly punished as thieves. These prior transgressions, however, would not be proof that they are the individuals targeted by the ACCA: "career offenders... who commit... serious crimes as their means of livelihood." *Taylor*, 495 U.S. at 587.

This Court has consistently imposed a demanding standard for ACCA enhancements, requiring that prior crimes be "the same as, or narrower than, those of the generic offense" to avoid "unfairness to defendants." *Mathis v. United States*, 136 S. Ct. 2243, 2247, 2253 (2016). This exacting analysis ensures that only convictions that clearly constitute generic burglary trigger the mandatory enhancements. A failure to require contemporaneous intent misreads *Taylor* and broadens generic burglary beyond the strict confines provided by Congress.

Once this Court corrects the Sixth Circuit's definitional error on contemporaneous intent, it is clear that the Tennessee statute at issue here sweeps beyond the definition of generic burglary. The statute applies to a defendant who unlawfully "enters a building and commits or attempts to commit a felony, theft or assault." Tenn. Code Ann. § 39-14-402(a)(3). This provision allows convictions for nothing more than committing a misdemeanor theft having entered a building without permission.

CONCLUSION

For the reasons set forth above, Michael Moore respectfully requests that the petition for certiorari be granted.

Respectfully submitted,

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