No. __-_____

IN THE
SUPREME COURT OF THE UNITED STATES

MATTHEW RICHARDSON,

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

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PETITION FOR WRIT OF CERTIORARI

ELIZABETH B. FORD
Federal Community Defender

Laura E. Davis
Assistant Federal Defender
Counsel of Record
Federal Defender Services of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, Tennessee 37929
Laura_Davis@fd.org
(865) 637-7979

QUESTIONS PRESENTED

1. Whether the "*Mathis* peek" used by the court below to guess if a fact is an element or a means of committing an offense violates the Sixth Amendment by increasing a defendant's mandatory sentence based on facts that may not have needed to be found beyond a reasonable doubt.

2. 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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PETITION FOR WRIT OF CERTIORARI

Petitioner Matthew Richardson 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 opinion in this matter is published, and appears at pages 2a to 17a of the appendix to this petition. Its Order denying rehearing appears at page 1a of the appendix.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals' denial of Mr. Richardson's petition for rehearing was entered on June 4, 2018. 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...

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury... and to be informed of the nature and cause of the accusation...

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

Ga. Code Ann. § 16-7-1 (1999 & 2003) provides:

> **(a)** A person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof. A person convicted of the offense of burglary, for the first such offense, shall be punished by imprisonment for not less than one nor more than 20 years. For the purposes of this Code section, the term "railroad car" shall also include trailers on flatcars, containers on flatcars, trailers on railroad property, or containers on railroad property.
>
> **(b)** Upon a second conviction for a crime of burglary occurring after the first conviction, a person shall be punished by imprisonment for not less than two nor more than 20 years. Upon a third conviction for the crime of burglary occurring after the first conviction, a person shall be punished by imprisonment for not less than five nor more than 20 years. Adjudication of guilt or imposition of sentence shall not be suspended, probated, deferred, or withheld for any offense punishable under this subsection.

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*, 883 F.3d 517 (5th Cir. 2018) (*en banc*) *petition for cert. filed*, No. 17-1445 (April 19, 2018).[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 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).

Petitions for certiorari regarding contemporaneous intent are pending before this Court, including: *Quarles v. United States*, No. 17-778 (4/27/18 conference, no relist date yet); *Ferguson v. United States*, No. 17-7496 (5/17/18 conference, no relist date yet); *Moore v. United States*, No. 17-8153 (9/24/18 conference); *United States v. Herrold*, No. 17-1445 (9/24/18 conference). Mr. Richardson also anticipates the government will file a petition for certiorari in *United States v. Juarez-Martinez*, No. 16-40007, -- F. App'x --, 2018 WL 3097134 (5th Cir. 2018) (holding Georgia burglary not divisible and not generic because the statute can be violated without contemporaneous intent), given its reliance on *Herrold*.

Three different Circuits have three different approaches to interpreting the Georgia burglary statute, with the Eleventh and Fifth Circuits coming to opposite conclusions and the Sixth's judgment dependent on the constitutionally fraught "*Mathis* peek."

[1] Mr. Richardson's petition here presents substantially the same issue as pending petitions for certiorari in *Quarles v. United States*, No. 17-778, *Ferguson v. United States*, No. 17-7496, and *Moore v. United States*, No. 17-8153.

STATEMENT OF THE CASE

In 2014, Matthew Richardson pled guilty to violating 18 U.S.C. § 922(g). His presentence report averred he qualified for enhanced sentencing under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), based on three Georgia burglary convictions from 1999 and 2003. Mr. Richardson was sentenced to serve 180 months in prison.

In June 2016, Mr. Richardson filed a petition pursuant to 28 U.S.C. § 2255 and based on *Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding residual clause of the ACCA to be unconstitutionally vague). He argued his burglary convictions could only have qualified as predicate offenses under the ACCA's residual clause. Mr. Richardson argued that the Georgia statute (Ga. Code Ann. § 16-7-1) is overbroad, in part because it includes structures such as vehicles, aircraft, and railroad cars. Even if the statute were divisible, the *Shepard*[2] documents in Mr. Richardson's case do not make clear what sort of structure he was convicted of burgling.

The district court denied and dismissed Mr. Richardson's petition. It found that the Georgia burglary statute is divisible, dividing its list of structures into three groups: (1) the dwelling house of another, (2) any other building, vehicle, railroad car, watercraft, aircraft, or other structure designed for use as the dwelling of another; or (3) any other building railroad car, aircraft. The district court relied on *United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016), which had similarly divided Georgia's burglary statute (though with a strong dissent, 842 F.3d at 1170-79). The district court eventually granted a certificate of appealability as to the status of the Georgia burglary statute.

Mr. Richardson filed his opening brief in the Sixth Circuit on September 20, 2017. He argued Georgia's burglary statute is overbroad because it included moving vehicles and railroad

[2] *Shepard v. United States*, 544 U.S. 13 (2005)

cars. The list of structures is a list of means by which someone might commit burglary, rather than elements, because the particular structure does not need to be proved beyond a reasonable doubt, and the same penalty applied to all structures. Furthermore, the Georgia model jury instructions do not treat the type of structure as an element. Mr. Richardson cited cases that held a person may be convicted of burglary involving a structure other than that charged, provided it was another structure covered by the list in the statute. *Weeks v. State*, 616 S.E.2d 852 (Ga. Ct. App. 2005) ("dwelling house" in indictment, proof of home under construction); *Sanders v. State*, 667 S.E.2d 396 (Ga. Ct. App. 2008) ("dwelling house" charged, no proof at trial structure was a dwelling).

The government argued that the structures listed are elements because Georgia's notice pleading rules required the *location* burgled to be specified in the charging document. *Morris v. State*, 303 S.E.2d 492 (Ga. Ct. App. 1983); *State v. Ramos*, 243 S.E.2d 693 (Ga. Ct. App. 1978). The government also endorsed employing a "*Mathis* peek" at Mr. Richardson's conviction records to determine whether the statute was divisible. It argued that because Mr. Richardson's charging documents allege he twice burglarized "the dwelling house of another" and once "a building, to wit: Rick's Cafe," then the statute was divisible and the type of structure was an element.

Mr. Richardson argued against using the "*Mathis* peek" because such an analysis "invites the very collapse of the distinction between the categorical and modified categorical approach." Moreover, indictments can and often do contain many facts that are not elements.

The Sixth Circuit rejected the reasoning of the Eleventh Circuit in *Gundy*, as well as arguments of counsel. *Richardson v. United States*, 890 F.3d 616 (6th Cir. 2018). It noted *Gundy*'s "conclusion that the statute's structure supports finding that the locations are elements

is problematic," because the three structure subsets asserted by *Gundy* are "not based on any Georgia authority." 890 F.3d at 623. Also, the statute's punishment structure did not hinge on the type of structure entered. *Id*. While the Sixth Circuit at times embraced the logic of *Gundy*'s dissent, *id.* at 624, 626, it ultimately rejected its overall logic as well.

The Sixth Circuit reasoned that "[a]lthough the parties' arguments do not definitively answer the threshold elements/means inquiry, they do establish that Georgia's burglary statute and the law interpreting it are ambiguous as to whether the different types of listed locations are elements or means of committing the offense." *Id*. at 627. It disagreed "with the *Gundy* majority that the burglary statute's text and structure support the conclusion that the locations listed in the statute are elements rather than means." *Id*. at 628. However, it also disagreed "with the *Gundy* dissent that Georgia 'case law *unambiguously* defines the elements of the crime of burglary, and the different types of locations that can be burglarized are not separate elements'." *Id*. (quoting *Gundy*, 842 F.3d at 1171). Having concluded that "Georgia law fails to provide a clear answer," the Sixth Circuit employed the "*Mathis* peek."

In *Mathis,* the Supreme Court endorsed peeking at record documents if state law "fails to provide clear answers" regarding the elements of an offense. *Mathis v. United States,* 136 S. Ct. 2243, 2256 (2016). The Sixth Circuit acknowledged that the "peek" "is for the sole and limited purpose of determining whether the listed items are elements of the offense. *Id*. at 628. According to the court, the language in the indictments – each charging just one of the structures listed in Georgia's burglary statute – satisfied "*Taylor*'s demand for certainty when determining whether a defendant was convicted of a generic offense." *Id*. at 628-29. The language "supports the government's argument (and *Gundy*'s holding) that the alternative locations are elements and the statute is divisible as to the locations that can be burglarized." *Id*. at 629. The Sixth Circuit

stated it understood "the practical reality" of Mr. Richardson's argument that the "*Mathis* peek invites unlawful judicial factfinding" and "invites the very collapse of the distinction between the categorical and modified categorical approach cautioned against in *Descamps*." *Id*. at 629 n.10. However, *Mathis* is the governing law. *Id*. The Sixth Circuit affirmed the finding of the district court that Mr. Richardson's Georgia burglary convictions were generic burglaries and thus predicate offenses under the ACCA. *Id*.

Mr. Richardson filed a petition for rehearing. He argued the "*Mathis* peek" allows courts to rely on information that Georgia might not need to prove to a jury (thus not an element) when deciding whether to increase a federal defendant's statutory minimum and maximum sentence, in violation of the Sixth Amendment's protections. He also suggested that the Sixth Circuit certify the following question to the Supreme Court of Georgia, since the Court has repeatedly recognized the primacy of a state court's interpretation of state criminal law:

> In order to find a defendant guilty of violated Ga. Code Ann. § 16-7-1 (1980-June 30, 2012), must a jury unanimously agree on the particular type of structure the defendant entered? Or can the jury merely agree that the defendant entered some sort of structure that is included in the statute's list of "swelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another" or "building railroad car, aircraft, or any room or any part thereof?"

The Sixth Circuit denied Mr. Richardson's motion for rehearing on June 4, 2018.

On June 22, 2018, the Fifth Circuit issued its opinion in *United States v. Juarez-Martinez*, No. 16-40007, -- F. App'x --, 2018 WL 3097134 (5th Cir. 2018). It held that because Georgia's burglary statute could be violated by unlawfully entering or remaining and then later committing a crime, it was broader than generic burglary. *Id*. at *1, *2. This ruling was pursuant to (and consistent with) that Circuit's holding in *United States v. Herrold*, that intent to commit a crime

must exist at the moment a defendant initially exceeds their license to enter or remain. 883 F.3d 517 (5th Cir. 2018) (*en banc*), *petition for cert. filed*, No. 17-1445 (April 19, 2018).

REASONS FOR GRANTING THE PETITION

I. The "*Mathis* peek" – as employed by the Sixth Circuit in *Richardson* – amounts to judicial factfinding and guesswork, in violation of Mr. Richardson's Fifth and Sixth Amendment rights.

If a statute and state law interpreting the statute do not make clear what are the elements of a statute, the court may "peek at the [record] documents," to see if it can glean or infer the based on the documents. *Mathis v. United States*, 136 S. Ct. 2243, 2256-57 (2016). This step beyond the categorical and modified categorical approaches has come to be known as the "*Mathis* peek." This approach violates defendant's Fifth and Sixth Amendment rights and should be abandoned.

In 1999, the Supreme Court ruled that, when construing a federal statute, "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999); *accord*, *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). When a sentencing court finds a prior conviction qualifies as a predicate offense under the ACCA, that finding "indisputably increases the maximum penalty." *Descamps v. United States*, 570 U.S. 254, 269 (2013). Therefore, "that finding would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction." *Id*.

Georgia requires an indictment to state the location burglarized, to give adequate notice to the defendant. *Richardson*, 890 F.3d at 626 (quoting *Gundy*, 842 F.3d at 1176 (Jill Pryor, J., dissenting)). However, the proof of the *type* of structure need not match that which is alleged, provided it is a structure included in the burglary statute's definition or, at very least, the

difference is not a "fatal variance" from the indictment. *Id*. at 625 (citing *Weeks v. State*, 616 S.E.2d 852 (Ga. Ct. App. 2005); *Sanders v. State*, 667 S.E.2d 396 (Ga. Ct. App. 2008). Georgia's pattern jury instructions can be read to hold the specific structure is not an element of the offense, and they can be read as having "placeholder" language, to be filled in at the close of trial with the appropriate structure. *Id*. at 626. Georgia law "fails to provide a clear answer" to the means/element question. *Id*. at 628.

Because of that failure, the Sixth Circuit did a "*Mathis* peek" at the indictments in Mr. Richardson's burglary cases. *Id*. Two stated "dwelling house" and one "a building, to wit: [a cafe]." *Id*. at 629. The Sixth Circuit found this language to be consistent with the government's and *Gundy*'s argument that the type of structure was an element of Georgia burglary, and therefore Mr. Richardson's burglaries were generic burglaries. *Id*. However, we cannot be certain because the law is not clear, and the Sixth Circuit rejected the suggestion that it ask the Georgia Supreme Court to clarify. We do not know that the Sixth Circuit's analysis did not violate Mr. Richardson's Sixth Amendment jury trial rights. The language in his burglary indictments could have as much to do with the idiosyncratic charging habits of particular county prosecutor's offices as it would with the actual elements that must be proven beyond a reasonable doubt.

Taylor[3] demands certainty "when determining whether a defendant was convicted of a generic offense." *United States v. Richey*, 840 F.3d 310, 318 (6th Cir. 2016) (quoting *Mathis v United States*, 136 S. Ct. 2243 (2016) (quoting *Shepard*, 544 U.S. at 21)) (internal quotation marks omitted). This demand is founded on the bedrock protections of the Constitution. When a court looks to increase a defendant's potential sentence from a statutory maximum of 10 years to

[3] *Taylor v. United States*, 495 U.S. 575 (1990).

a mandatory minimum of 15 years with a maximum of life in prison, it must do so in a way that protects the defendant's Fifth Amendment due process rights and Sixth Amendment right to a jury trial.

The Sixth Circuit's "*Mathis* peek" was no more than a guess or supposition of what might be an element of Georgia burglary has none of the certainty *Taylor* requires. The "*Mathis* peek" invites such a constitutionally infirm analysis and should therefore be clarified or abandoned.

II. This case presents an issue over which there is an enduring Circuit 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.[4] Four Circuits – the Fourth, Sixth, Ninth, and Tenth – hold that a 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.

[4] 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. 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).

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 Georgia burglary convictions, compare *Gundy*, 842 F.3d 1156, 1159 (11th Cir. 2016), *with Juarez-Martinez*, 2018 WL 3097134 at *2, identical Tennessee burglary convictions, *compare Priddy*, 808 F.3d at 681, *with Herrera-Montes*, 490 F.3d at 392, and identical Texas burglary convictions, *compare Herrold*, 883 F.3d 517, *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 regarding intent thus has produced the very arbitrariness that 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. Richardson's case, reversal would almost certainly result in a sentence reduction of over nine years.

Mr. Richardson's argument here is also before this Court in *Quarles v. United States*, No. 17-778 (April 27, 2018, conference, no relist date); *Ferguson v. United States*, No. 17-7496 (May 17, 2018, conference, no relist date); *Moore v. United States*, No. 17-8153 (September 24, 2018, conference); *United States v. Herrold*, No. 17-1445 (September 24, 2018, conference) (government petition for certiorari). Given the government petition in *Herrold*, it is anticipated they will file a petition for certiorari in *Juarez-Martinez*. This Court may wish to hold Mr. Richardson's petition pending its decision whether to hear any of these other cases.

A. The decision below reflects a steadfast Circuit split.

Even if *Richardson* had been decided after the Fifth Circuit ruled in *Juarez-Martinez*, relief would have been foreclosed by Sixth Circuit precedent. *See United States v. Priddy*, 808 F.3d 676, 685 (6th Cir. 2015). The Sixth Circuit holds 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, maintaining 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.

1. 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*, 883 F.3d 517 (5th Cir. 2018) (*en banc*), *petition for cert. filed*, No. 17-1445 (April 19, 2018); *United States v. 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. 883 F.3d at 523 (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 Georgia statute at issue in Mr. Richardson's case, § 16-7-1 has no "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*, 883 F.3d at 531.[5]

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

[5] 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. The Fifth Circuit maintained this interpretation when it examined Georgia's burglary statute in *Juarez-Martinez*. 2018 WL 3097134, *2.

burglary statute[6] 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.

2. 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.

Sixth Circuit held in *Priddy* that Tennessee burglary 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*.

The Fourth Circuit reached the same conclusion in *Bonilla,* 687 F.3d at 194, in affirming the defendant's sentence enhancement under U.S.S.G. §2L1.2[7] based on his violation of the Texas burglary statute.[8] The Fourth Circuit rejected the Fifth Circuit's holding to the contrary, dismissing the Fifth Circuit's reading of *Taylor* as "too rigid." *Id*. (citing *United States v.*

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[6] 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").

[7] 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).

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

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 corresponds 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[9] was a crime of violence[10] under the Sentencing Guidelines.[11] *Id*. at 1157.

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[9] 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].").

[10] 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).

[11] *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 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

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*.

B. 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*, 883 F.3d at 536. 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. 19, 2016) (No. 14-3335); Order Denying Reh'g En Banc, *Dunn*, 96 F. App'x 600 (10th Cir. June 15, 2004)

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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)).

(No. 03-5011). Upon rehearing, the Eighth and Tenth Circuits have maintained positions that continue the circuit split. *See Herrold*, 883 F.3d at 536 (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." *Bernel-Aveja*, 844 F.3d 206, 245 (5th Cir. 2016) (Owen, J., concurring).

C. Generic burglary requires contemporaneous intent.

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 Taylor*, 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); *United States v. Bernel-Aveja*, 844 F.3d 206, 218 (5th Cir. 2016) (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"). Georgia'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 Georgia hiker who seeks shelter and later commits a theft of opportunity,

while a hiker in neighboring North Carolina 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*, 136 S. Ct. at 2247, 2253. 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.

CONCLUSION

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

Respectfully submitted,

ELIZABETH B. FORD
Federal Community Defender

Laura E. Davis
Assistant Federal Defender
Counsel of Record
Federal Defender Services of Eastern Tennessee, Inc.

800 South Gay Street, Suite 2400
Knoxville, Tennessee 37929
(865) 637-7979

Counsel for Matthew Richardson