NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DALTON CRUTCHFIELD,

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

CORRECTED JOINT PETITION FOR WRIT OF CERTIORARI[1]

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[1] Pursuant to Supreme Court Rule 12.4, Petitioners Patrick Jackson, Joseph Kemmerling, DeMarcus Rogers, Owen Lewis Finch, Teddy Norris, Marcus Mann, Jermel Franklin Williams, Kevous McKinney, Larry Ammons, Michael Lemons, Michael Roberts, Darryl Merriweather, Richard Hughes, Azavius Justice, Keith Keglar Timothy Bohannon, Leo Bearden, Michael Cox, Wilson Jones, and Dereck Dawson are joining this Petition seeking review of their Sixth Circuit judgments. The cases involve an identical issue.

QUESTION PRESENTED FOR REVIEW

Whether Tennessee's burglary statutes are generic where the State can obtain a conviction by proving only attempted burglary because the element of "entry" is satisfied by a mere showing of the use of an instrument in an attempt to make entry.

LIST OF PARTIES

Pursuant to Supreme Court Rule 12.4, Petitioners are filing a single petition seeking review of their Sixth Circuit judgments that involve the same issue. The parties to each proceeding include the United States, and the following Petitioners:

Dalton Crutchfield

Patrick Jackson

Joseph Kemmerling

Demarcus Rogers

Owen Lewis Finch

Teddy Norris

Marcus Mann

Jermel Franklin Williams

Kevous McKinney

Larry Ammons

Michael Lemons

Michael Roberts

Darryl Merriweather

Richard Hughes

Azavius Justice

Keith Keglar

Timothy Bohannon

Leo Bearden

Michael Cox

Wilson Jones

Dereck Dawson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutory Authority

Other Authority

IN THE

SUPREME COURT OF THE UNITED STATES

JOINT PETITION FOR WRIT OF CERTIORARI

Petitioner, Dalton Crutchfield,[2] respectfully prays that a writ of certiorari issue to review the judgment below.

[2] Petitioners Patrick Jackson, Joseph Kemmerling, DeMarcus Rogers, Owen Lewis Finch, Teddy Norris, Marcus Mann, Jermel Franklin Williams, Kevous McKinney, Larry Ammons, Michael Lemons, Michael Roberts, Darryl Merriweather, Richard Hughes, Azavius Justice, Keith Keglar, Timothy Bohannon, Leo Bearden, Michael Cox, Wilson Jones, and Dereck Dawson join this Petition pursuant to Supreme Court Rule 12.4.

OPINIONS BELOW

Pursuant to this Court's Rule 12.4, Petitioners are filing a single petition seeking review of their Sixth Circuit judgments that involve the same issue. The Sixth Circuit opinions are available as follows, submitted collectively as Appendix A, filed electronically herewith, in the order of issuance. Additionally, in Appendix B, the corresponding district court orders are submitted for all Petitioners who initiated their cases under 28 U.S.C. § 2255.

1. United States v. Crutchfield, Nos. 17-6358/17-6360, 2019 U.S. App. LEXIS 25527 (6th Cir. April 26, 2019), rehr'g en banc denied, United States v. Crutchfield, Nos. 17-6358/17-6360, 2019 U.S. App. LEXIS 27782 (6th Cir. Sept. 13, 2019);

2. Jackson v. United States, Nos. 17-6080/6081, 2019 U.S. App. LEXIS 27959 (6th Cir. Sept. 17, 2019);

3. United States v. Kemmerling, Nos. 17-6515/17-6516, 2019 U.S. App. LEXIS 27960 (6th Cir. Sept. 17, 2019);

4. United States v. Rogers, Nos. 17-5914/17-5917/17-6489, 2019 U.S. App. LEXIS 27956 (6th Cir. Sept. 17, 2019);

5. Finch v. United States, No. 17-5965, 2019 U.S. App. LEXIS 28335 (6th Cir. Sept. 18, 2019);

6. Norris v. United States, Nos. 17-5983/17-5985, 2019 U.S. App. LEXIS 28491 (6th Cir. Sept. 19, 2019);

7. Mann v. United States, Nos. 17-6486/17-6487, 773 F. App'x 308 (6th Cir. 2019), rehr'g en banc denied, Mann v. United States, Nos. 17-6486/17-6487, 2019 U.S. App. LEXIS 29062 (6th Cir. Sept. 25, 2019);

8. Williams v. United States, Nos. 17-5921/17-5923, 2019 U.S. App. LEXIS 29209 (6th Cir. Sept. 26, 2019);

9. McKinney v. United States, No. 5956, 2019 U.S. App. LEXIS 29208 (6th Cir. Sept. 26, 2019);

10. United States v. Ammons, Nos. 17-5920/17-5922, 2019 U.S. App. LEXIS 32243 (6th Cir. Oct. 25, 2019);

11. Lemons v. United States, Nos.17-5945/17-5847, 2019 U.S. App. LEXIS 32244 (6th Cir. Oct. 25, 2019);

12. United States v. Roberts, No. 17-6412, 2019 U.S. App. LEXIS 25500 (6th Cir. Aug. 23, 2019), rehr'g en banc denied, 2019 U.S. App. LEXIS 32240 (6th Cir. Oct. 25, 2019);

13. United States v. Merriweather, No. 18-5567, 2019 U.S. App. LEXIS 32520 (6th Cir. Oct. 29, 2019);

14. Hughes v. United States, No. 17-5913, 2019 U.S. App. LEXIS 32585 (6th Cir. Oct. 30, 2019);

15. United States v. Justice, No. 17-6465, 2019 U.S. App. LEXIS 24497 (6th Cir. Aug. 15, 2019), rehr'g en banc denied, United States v. Justice, No. 17-6465, 2019 U.S. App. LEXIS 32752 (6th Cir. Oct. 31, 2019);

16. United States v. Keglar, Nos. 17-6021/17-6113, 2019 U.S. App. LEXIS 24498 (6th Cir. Aug. 15, 2019), rehr'g en banc denied, United States v. Keglar, Nos. 17-6021/17-6113, 2019 U.S. App. LEXIS 32751 (6th Cir. Oct. 31, 2019);

17. Bohannon v. United States, No. 17-5962, 2019 U.S. App. LEXIS 33019 (6th Cir. Nov. 4, 2019);

18. Bearden v. United States, No. 17-5927, 2019 U.S. App. LEXIS 33528 (6th Cir. Nov. 6, 2019);

19. Cox v. United States, No. 17-5953, 2019 U.S. App. LEXIS 33934 (6th Cir. Nov. 13, 2019);

20. Jones v. United States, Nos. 18-5844/18-5845, 2019 U.S. App. LEXIS 34085 (6th Cir. Nov. 14, 2019);

21. Dawson v. United States, Nos. 17-5930/17-5931, 2019 U.S. App. LEXIS 34627 (6th Cir. Nov. 20, 2019).

JURISDICTION

On April 26, 2019, a three-judge panel of the Sixth Circuit Court of Appeals entered its opinion in United States v. Crutchfield, Nos. 17-6358/17-6360, 2019 U.S. App. LEXIS 25527 (6th Cir. April 26, 2019). A petition for en banc rehearing was filed and it was denied on September 13, 2019. See United States v. Crutchfield, Nos. 17-6358/17-6360, 2019 U.S. App. LEXIS 27782 (6th Cir. Sept. 13, 2019). All of the joined Petitioners' opinions were entered by varying panels of the Sixth Circuit Court of Appeals subsequent to September 13, 2019. This Court has jurisdiction over all of these cases pursuant to 28 U.S.C. § 1254(1).

STATUTES, ORDINANCES AND REGULATIONS INVOLVED

1. The Armed Career Criminal Act

> [T]the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

18 U.S.C. § 924(e)(2)(B).

2. Tennessee's burglary statute

> (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 the 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; or
>
> (4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.
>
> (b) As used in this section, "enter" means:
>
> (1) Intrusion of any part of the body; or
>
> (2) Intrusion of any object in physical contact with the body or any object controlled by remote control, electronic or otherwise.

Tenn. Code Ann. § 39-14-402(a), (b).

3. Tennessee's aggravated burglary statute

Aggravated burglary is burglary of a habitation as defined in §§ 39-14-401 and 39-14-402. Tenn. Code Ann. § 403.

STATEMENT OF THE CASES

In all of the cases presented to the Court, the Petitioners were originally convicted of being felons in possession of firearms, in violation of 18 U.S.C. § 922(g)(1). They were all sentenced under the enhanced punishment provisions of the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), mandating at least a sentence of 180 months imprisonment. Subsequent to this Court's ground breaking decision in Johnson v. United States, 135 S. Ct. 2551 (2015), which invalidated the "residual clause" definition of "violent felony." All but one filed motions to vacate, set aside or correct their sentences pursuant to 28 U.S.C. § 2255. In Mr. Justice's case, the government took a direct appeal. All of the Petitioners had convictions for Tennessee aggravated burglary, which they argued should not count as a violent felony for ACCA purposes. This was because during this time, the Sixth Circuit determined to revisit en banc the question of whether Tennessee aggravated burglary constituted a "violent felony" for ACCA purposes. See United States v. Stitt, 637 F. App'x 927 (6th Cir.), rehr'g en banc granted, United States v. Stitt, 646 F. App'x 454 (6th Cir. 2016). The en banc court held that Tennessee aggravated burglary could not constitute a "violent felony" for ACCA purposes due to the overbreadth of the definition of "habitation," which included vehicles adapted for overnight accommodation. See United States v. Stitt, 860 F.3d 854 (6th Cir. 2017) (en banc) ("Stitt I"). When the court in Stitt I concluded that Tennessee's aggravated burglary statute swept more broadly than generic burglary, it also noted that the decision conflicted with its prior decision in United States v. Nance, 481 F.3d 882 (6th Cir. 2007) (holding that Tennessee aggravated burglary is generic), so the court overruled Nance. See Stitt I, 860 F.3d at 806-61.

After the Sixth Circuit's en banc decision in Stitt I, the government conceded that the Petitioners' convictions for Tennessee aggravated burglary did not count as violent felonies. The

government, however, preserved its argument that Stitt I was wrongly decided and might be overturned by this Court. All of the Petitioners' sentences were remanded, and the Petitioners either received lower sentences, or their cases were held in abeyance pending the outcome of the petition for certiorari filed by the government challenging Stitt I. Many of the Petitioners have been out of prison since that time, working toward successfully completing their terms of supervised release.

In late 2018, this Court held that burglary of a structure or vehicle that had been adapted for overnight use qualified as the enumerated violent felony of burglary for ACCA purposes. United States v. Stitt, 139 S. Ct. 399, 403-04 (2018) ("Stitt II"). In light of the Stitt II decision, the government argued that all of the § 2255 motions that had been granted under Stitt I should be reversed, and the cases remanded to the district courts to reinstate the original sentences. In response, all of the Petitioners presented an alternative argument that Tennessee aggravated burglary still did not qualify as a violent felony for ACCA purposes because Tennessee's interpretation of the "entry" element was overly broad when compared to generic burglary. For some Petitioners, who also had prior Tennessee burglary convictions, this argument applied equally well.

This issue was raised by § 2255 Petitioners across the State of Tennessee and throughout the Sixth Circuit. The first panel to rule upon the issue was the panel in Brumbach v. United States, 929 F.3d 791 (6th Cir. 2019). The Brumbach panel held that by overruling Stitt I, this Court reversed the rationale by which the Sixth Circuit had overruled Nance. Brumbach, 929 F.3d at 794. The Brumbach panel reasoned that it would therefore necessarily follow that Nance's holding was once again the law of the circuit. Id.

The Brumbach panel went on to also note that Tennessee's aggravated burglary statute directly references Tennessee's simple burglary statute. Id. (citing Tenn. Code Ann. § 39-14-402 ("Aggravated burglary is a burglary of a habitation as defined in §§ 39-14-401 and 39-14-402."). The panel observed that after Stitt II, courts in the Sixth Circuit had cited United States v. Ferguson, 868 F.3d 514, 515 (6th Cir. 2017) (relying on United States v. Priddy, 808 F.3d 676, 684 (6th Cir. 2015)), which held, broadly, that "convictions under subsections (a)(1), (a)(2), or (a)(3) of the Tennessee burglary statute [Tenn. Code Ann. § 39-14-402] fit within the generic definition of burglary and are therefore violent felonies for purposes of the ACCA.") Id. The panel found that Ferguson was binding precedent, and any concerns about the relationship between Ferguson, Priddy and Nance had been resolved by Stitt II. Id. at 795.

With regard to the argument about the meaning of "entry," the Brumbach panel found that it was bound by Nance because the Sixth Circuit holds that one panel cannot overrule the published decision of another panel. Id. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or the Circuit Court sitting en banc overrules the prior decision. Id. (citing Salmi v. Sec'y of Health & Human Servs., 774 F.2d 685, 689 (6th Cir. 1985)).

Thus, in every case in this Petition, the respective panels found that they were bound by the holding in Brumbach. The Sixth Circuit has denied en banc review of the issue in Brumbach, and in several of the Petitioners' cases herein. See Brumbach v. United States, No. 18-5703/18-5705, 2019 U.S. App. LEXIS 28017 (6th Cir. Sept. 16, 2019). Hence, for this issue to be considered at all, this Court's help is required.

REASONS FOR GRANTING THE PETITION

Over a decade ago, this Court declared that attempted burglary is a not a "violent felony" under the ACCA's enumerated clause because it does not meet the generic definition of burglary set forth by the Court in Taylor v. United States, 495 U.S. 575, 598 (1990): "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." James v. United States, 550 U.S. 192, 198 (2007). Tennessee's reading of the word "entry" in its burglary statutes permits convictions based merely upon attempted burglary. For federal courts to allow use of such convictions to establish a requisite violent felony for ACCA purposes is in direct conflict with James.

Moreover, this Court has recently reiterated that, "[W]e made clear in Taylor that Congress intended the definition of burglary to reflect the generic sense in which the term was used in the criminal codes of most States at the time the Act was passed." See Stitt II, 139 S. Ct at 406 (internal quotations and citation omitted). The Brumbach panel's decision, the decision that controls Petitioners' fate herein, conflicts with the decisions from this Court that have repeatedly held that proper application of the categorical approach entails evaluating how, in 1986, the year the ACCA was amended to its current form, a majority of the States defined "entry" in their burglary statutes. See, e.g., Stokeling v. United States, 139 S. Ct. 544, 552 (2019) ("In 1986, a significant majority of the States defined nonaggravated robbery as requiring force that overcomes a victim's resistance."); United States v. Castleman, 572 U. S. 157, 167 (2014) (reading "physical force" to include common-law force, in part because a different reading would render 18 U. S. C. §922(g)(9) "ineffectual in at least 10 States"); United States v. Voisine, 136 S. Ct. 2272, 2280-81 (2016) (declining to interpret §921(a)(33)(A) in a way that would "risk rendering §922(g)(9) broadly inoperative" in 34 States and the District of Columbia). Because the Sixth Circuit is deciding this

important federal question in a way that conflicts with relevant decisions from this Court, Petitioners desperately need this Court's intervention. The Petitioners present the following for this Court's consideration in support of their urgent request.

A. Generic burglary requires an entry by the person or by an instrument being used to commit the intended felony.

The issue is whether a prior conviction for a Tennessee aggravated burglary offense (and in some of Petitioners' cases, a simple burglary offense) qualifies as an ACCA predicate under the "categorical approach," which requires the Court to compare the statutory elements of the Tennessee offense with the elements of "generic" burglary. Descamps v. United States, 570 U.S. 254, 257 (2013). "The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense." Id. Tennessee's burglary offenses do not qualify as ACCA predicates because the "entry" element is broader than those of the generic offense.

That mismatch is due to Tennessee's unusual definition of "entry." Because generic burglary requires an entry, a mere attempted burglary – e.g., when someone merely tries unsuccessfully to make entry – does not qualify as generic burglary. James, 550 U.S. at 198. Even though the traditional and modern majority rule on "entry" requires the making of an actual entry by a person or instrument to commit the intended crime therein, Tennessee's unusual rule does not. Tennessee treats some attempted burglaries as if they were completed burglaries, and for that reason the Tennessee burglary offense does not qualify as a generic burglary or, hence, as an ACCA predicate.

With respect to the crime of burglary, what counts as making "entry"? Common law and a majority of jurisdictions make it clear that an entry is made when, for example, any part of the

person, such as a hand, crosses the threshold of the structure as that person is trying to commit the felony. Commonwealth v. Cotto, 752 N.E.2d 768, 771 (Mass. App. 2001).

How does the law address a situation where only an instrument – such as a coat hanger or a screwdriver – crosses the threshold of the structure? For purposes of defining an "entry," the law on burglary has long made a distinction based on the defendant's purpose in using the threshold-crossing instrument. As discussed below, if that instrument is used in an effort to commit the intended felony inside the structure (e.g. a coat hanger used to snag an item), then an "entry" is made when the instrument crosses the threshold and thus a burglary is committed, assuming the other elements are established. However, if that instrument is used only in an effort to make entry (e.g., a screwdriver used to pry at the door), then no "entry" is made even when the instrument crosses the threshold, and a mere attempted burglary is committed. In short, the controlling distinction is between an instrument used in an effort to commit the intended felony ("instrument-for-crime rule"), versus an instrument used only in an attempt to make entry (the "any-instrument rule").

This distinction started with the common law. The common law adopted the instrument-for-crime rule. Cotto, 752 N.E.2d. at 771 (summarizing common law sources); see Commonwealth v. Burke, 467 N.E.2d 846, 849 (Mass. 1984) (quoting Rex v. Hughes, 1 Leach 406, 407 (1785)); Russell v. State, 255 S.W.2d 881, 884 (Tex. Crim. App. 1953) (adhering to common-law rule as stated in Hughes); Walker v. State, 63 Ala. 49, 51 (1879) (citing 1 Matthew Hale, The History of the Pleas of the Crown, 555 (1736)).

As of 1986, when Congress enacted the ACCA, the vast majority of states defined burglary in their respective codes as requiring an entry, without any statutory definition of "entry." Because a court should presume that an undefined statutory term comports with the common law,

Morissette v. United States, 342 U.S. 246, 263 (1952), it would naturally follow that the vast majority of states were following the instrument-for-crime rule as of 1986. Indeed, almost every single court that had interpreted "entry" by 1986 had endorsed the common law's instrument-for-crime rule, typically citing either the common law or one of the many treatises stating that the blackletter rule is the instrument-for-crime rule. See, e.g., State v. Hodges, 575 S.W.2d 769, 772 (Mo. Ct. App. 1978); People v Davis, 279 N.E.2d 179, 180 (Ill. Ct. App. 1972); State v. Liberty, 280 A.2d 805, 808 (Me. 1971); State v. O'Leary, 107 A.2d 13, 15-16 (N.J. 1954); Foster v. State, 220 So.2d 406, 407 (Fla. Dist. Ct. App. 1969); Mattox v. State, 100 N.E. 1009 (Ind. 1913); State v. Crawford, 80 N.W. 193, 194 (N.D. 1899); Walker, 63 Ala. at 51; People v. Tragani, 449 N.Y.S.2d 923, 925-28 (N.Y. Sup. Ct. 1982) ("it must be assumed that the drafters . . . really envisioned . . . an adoption by the courts of common-law, common-usage, and common-sense definitions of both bodily and instrumental entry"); see also Nev. Rev. Stat. § 193.0145 (1985); Wash. Rev. Code § 9A.52.010(2) (1985).[3]

Accordingly, the leading modern treatise on the subject – Wayne R. LaFave, Substantive Criminal Law – reports that the instrument-for-crime rule is the blackletter rule on burglary "entry." Id. § 21.1(b) (2 ed. 2003); see also Taylor, 495 U.S. at 580, 593, 598 & nn.3-4 (placing significant reliance on LaFave's treatise to define generic burglary).[4]

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[3] Prior to 1986, three additional states also indicated they would follow the instrument-for-crime rule: State v. Sneed, 247 S.E.2d 658, 659 (N.C. App. 1978); Stamps v. Commonwealth, 602 S.W.2d 172, 173 (Ky. 1980); Sears v. State, 713 P.2d 1218 (Alaska Ct. App. 1986). After 1986, three additional states clearly followed that rule, giving no reason to think that they were adopting a rule that was new: State v. Williams, 873 P.2d 471, 473-74 (Ore. App. 1994); Iowa J.I. Crim. § 1300.12; and OUJI-CR § 5-18 (Oklahoma). And, after 1986, two additional states indicated they would follow that rule, with no hint they were adopting a rule that was new: State v. Faria, 60 P.3d 333, 339 (2002) and People v. Rhodus, 303 P.3d 109, 113 (Colo. App. 2012).

[4] Professor LaFave explains: "If the actor . . . used some instrument which protruded into the structure, no entry occurred unless he was simultaneously using the instrument to achieve his

As of 1986, states deviating from that rule were few. By statute, four states had defined "entry" to include entry by any instrument, thereby adopting, against the grain, the any-instrument rule. See 11 Del. Code § 829(c)[5]; Ariz. Rev. Stat. Ann. § 13-1501(3); Tex. Penal Code Ann. § 30.02(b); Utah Code Ann. § 76-6-201(4). Plus, just two courts had authoritatively interpreted "entry" – when it was undefined by statute – to mean any instrument, rather than an instrument in use for the intended felony. One was an intermediate court of appeals in New Mexico that, after acknowledging the common-law and majority rule, simply announced that in its "opinion" an any-instrument rule was better. State v. Tixier, 551 P.2d 987, 989 (N.M. Ct. App. 1976). The other was the Tennessee Supreme Court, which issued binding language endorsing the any-instrument rule without explaining why it was doing so.[6] State v. Crow, 517 S.W.2d 753, 755 (Tenn. 1974). So, as of 1986, just six jurisdictions had deviated from the long-standing and traditional instrument-for-crime rule.

In sum, as of 1986, the common law, the clear majority of jurisdictions, and the LaFave treatise and others all took the very same approach to burglary's entry requirement: they all followed the instrument-for-crime rule. Accordingly, a "generic" burglary requires an entry by the person or by an instrument in use to commit the felony.

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felonious purpose. Thus there was no entry where an instrument was used to pry open the building, even though it protruded into the structure; but if the actor was also using the instrument to reach some property therein, then it constituted an entry." Id. § 21.1(b).

[5] In Bailey v. State, 231 A.2d 469 (Del. 1967), the Delaware Supreme Court interpreted a materially-equivalent precursor to 11 Del. Code § 829(c). Id. at 469. The court acknowledged that the common law followed the instrument-for-crime rule. Id. at 470. Nevertheless, in light of the statute's broader language, it adopted the any-instrument rule.

[6] An intermediate California court had so interpreted "entry" but did so by misreading the holding of a previous California precedent. Compare People v. Osegueda, 210 Cal. Rptr. 182, 185-86 (Cal. App. Dep't Super. Ct. 1984), with People v. Walters, 249 Cal. App. 2d 547, 551 (Cal. App. 2nd App. Dist. 1967).

B. Tennessee adopted the broader, any-instrument rule.

Under Tennessee precedent, it was not necessary that the defendant actually "enter" a structure at all; crossing the threshold with an instrument in an effort to make entry would suffice. The best proof of this fact is the Tennessee Supreme Court's decision in State v. Crow, 517 S.W.2d 753 (Tenn. 1974). In Crow, the proof at trial showed that a police officer had found a building's door had been damaged. Id. at 754. The door's glass window had been broken and there were "pry marks" around the lock. Id. The officer then found Crow hiding in nearby bushes with a tire tool, screwdriver, and knife. Id. On further inspection, it was ascertained that two layers of burlap, which the owner had attached to the inside of the door frame, had been cut about ten inches in the area of the lock. Id.

Based on this proof, Crow was convicted at trial of burglary. Crow, 517 S.W.2d at 754-55. The intermediate appellate court reversed finding proof of an "entry" lacking. Id. at 753. The Tennessee Supreme Court acknowledged both the majority and minority rules. Id. at 754 (citing Wharton's for majority rule and, for the minority rule, stating that some cases hold "entry of the hand or an instrument to be sufficient to supply the element of entry"). Ultimately, the Crow court held that the proof sufficed to show an entry because the jury could find as follows:

> that the defendant broke the glass and split the burlap with the knife, tire tool or screw driver, and thus entered the business house with an instrument, and/or that he reached his gloved hand through the burlap in an effort to find a flip lock that would admit him to the premises; that being unable to open the door, without a key, he had retreated to the bush[.]

Id. at 755 (emphasis added). Although the jury instruction issued by the trial court in Crow stated as much, the Tennessee Supreme Court also observed that cases existed "holding entry of the hand or an instrument to be sufficient to supply the element of entry," and, ultimately, it held that it sufficed that Crow may have simply broken the window and cut the burlap inside the door frame

using a tool in an attempt to make entry.[7] Id. at 754-55. Thus, according to the Tennessee Supreme Court, it could suffice that the defendant stuck an instrument through a door frame trying, but failing, to make entry. Id. In other words, an attempted, but failed burglary, involved enough of an "entry" to make it a full-fledged "burglary" under Tennessee law.

In Crow's wake followed Ferguson v. State, 530 S.W.2d 100 (Tenn. Crim. App. 1975), where the defendant was convicted on facts sufficient to show only a violation of the minority rule on "entry." In Ferguson, the state's evidence showed that the defendant and another man "knocked a padlock off the front door to the [restaurant] and went back beneath the bridge and returned with some large object which they used to break the glass on an inner door." Id. at 101. At that moment, the men noticed the police coming, and they ran, eluding immediate arrest. Id. These facts sustained a conviction at a jury trial of third-degree burglary, which, like all Tennessee burglary, required an "entry." Id. at 102. Citing Crow, the Tennessee Court of Criminal Appeals sustained the conviction. Id.

Indeed, Crow's guidance is reflected in a later published decisions of the state's courts because its considered dicta commands deference from lower courts. Holder v. Tennessee Judicial Selection Comm'n, 937 S.W.2d 877, 882 (Tenn. 1996) ("inferior courts are not free to disregard, on the basis that the statement is obiter dictum, the pronouncement of a superior court when it

[7] The Tennessee Pattern Jury Instructions prior to 1989 reflect that juries were routinely instructed on the entry-only view: "The entering requires only the slightest penetration of the space within the dwelling place by a person with his hand or any instrument held in his hand." T.P.I. Crim. § 11.02(1)(b) (1988). The instructions continue to be ambiguous with regard to the scope of "entry," providing: "'Enter' means an intrusion of any part of the body; or an intrusion of any object in physical contact with the body or any object controlled by remote control, electronic or otherwise." T.P.I. Crim. 14.01 (2019). Hence, there was and remains a realistic probability that the State could obtain a conviction for all types of burglary where there was only a mere attempted burglary.

speaks directly on the matter before it"). Not surprisingly, after Crow, Tennessee appellate courts have often summarized Crow's guidance by stating that simply crossing the threshold with an instrument constitutes an "entry" (i.e, the minority rule). See, e.g., State v. Moore, C.C.A. No. 1, 1990 Tenn. Crim. App. LEXIS 96, at *4 (Tenn. Crim. App. Feb. 7, 1990) ("The 'entry' element [of pre-1989 third-degree burglary] can be accomplished by the penetration of the space within the premises by the hand or an instrument held in the hand."); State v. Summers, C.C.A. No. 65, 1990 Tenn. Crim. App. LEXIS 681, at *3-4 (Tenn. Crim. App. Oct. 10, 1990) ("The 'entry' element of [pre-1989 second-degree] burglary can be accomplished by penetration of the space within the premises by the hand or an instrument held by the hand."); Hall v. State, 584 S.W.2d 819, 821 (Tenn. Crim. App. 1979) ("The 'entry' element of burglary can be accomplished without the accompaniment of any force, such as penetration of the space within the premises by the hand or an instrument held in the hand.").

In 1989, the Tennessee enacted a new burglary statute that, although bringing many changes to classifications and nomenclature (replacing, e.g., "second-degree" with "aggravated"), served to solidify the endorsement of the minority entry-only rule. The aggravated burglary statute provides that "[a]ggravated burglary is burglary of a habitation as defined in §§ 39-14-401 and 39-14-402." See Tenn. Code Ann. § 39-14-403(a). Subsection 401 contains the definition of "habitation" addressed in Stitt II. Section 402 is the entire Tennessee burglary statute. Section 402(a) defines "burglary" as follows:

> 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 the 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; or

(4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.

Tenn. Code Ann. § 39-14-402(a)(1)-(4).

The legislature defined "entry" in terms indistinguishable from those of the codes in Delaware, Arizona, Texas and Utah, cited above: "'enter' means: (1) Intrusion of any part of the body; or (2) Intrusion of any object in physical contact with the body or any object controlled by remote control, electronic or otherwise." Tenn. Code Ann. § 39-14-402(b). Accordingly, by using the "any" instrument language, the Tennessee code makes it clear that, when adopting its new criminal code, Tennessee kept the any-instrument rule.

C. **Tennessee's appellate courts have accepted the minority rule and treat mere attempts as burglary.**

Case law confirms that Tennessee courts understand this definition of entry to be as expansive as the Tennessee Supreme Court's explanation of the concept in Crow. In a more recent aggravated-burglary case, the Tennessee Court of Criminal Appeals cited Crow as support for its point that "entry of a hand or an instrument is sufficient" to constitute an "entry." State v. Johnson, No. M2010-02664-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 293, at *11-12 (Tenn. Crim. App. May 20, 2012); see also State v. House, No. W2012-01272-CCA-R3-CD, 2013 Tenn. Crim. App. LEXIS 567, at *14 (Tenn. Crim. App. June 21, 2013) (ordinary burglary; parenthetically stating that "entry of a hand or an instrument is sufficient"). With respect to the "entry" requirement, the law in Tennessee has been the same ever since Crow issued in 1974: a conviction can be sustained based on the minority rule.

The cases thus make clear that, when Petitioners were convicted of their aggravated burglary (and in some instances simple burglary) crimes, they could have been convicted on the theory that they made "entry" by merely sticking an instrument into a door-frame in an effort to open the door. See United States v. Burris, 912 F.3d 386, 406 (6th Cir. 2019) (en banc) ("sentencing courts must 'presume that the conviction rested upon nothing more than the least of the acts criminalized'" (quoting Moncrieffe v. Holder, 569 U.S. 184, 190-91 (2013)).

On this point, all that Petitioners must show is that there is a "realistic probability" that someone could be convicted of burglary in Tennessee when they merely crossed the threshold with an instrument used only in the effort to make entry. See Gonzales v. Duenas-Alverez, 549 U.S. 183, 193 (2007). That can be established by showing, for example: (1) a previous case where someone in Tennessee was convicted of burglary on such evidence, see id.; United States v. McGrattan, 504 F.3d 608, 615 (6th Cir. 2007) (relying on nonprecedential case law to infer certain conduct would support a certain type of conviction under Ohio law); or, (2) that the properly interpreted state law would support such a conviction. United States v. Lara, 590 F. App'x 574, 584 (6th Cir. 2014) (finding a "realistic probability" of a conviction under a certain theory even though there was no reported example of such a conviction).

As the foregoing discussion indicates, Petitioners can make the showing both ways. First, in Crow and Ferguson, burglary convictions were sustained on a record that showed with certainty only that the defendant had crossed the threshold with an instrument used to make entry, not to commit the felony therein. That fact suffices to satisfy the Duenas standard.

Second, the correctly-interpreted law would sustain an entry-only view for use of any instrument. Crow defined the entry requirement using "any instrument" language. Following Crow, Tennessee appellate courts and the pre-1989 pattern jury instructions likewise used such

"any instrument" language. And, after 1989, that "any instrument" language was codified. There is thus, a reasonable probability that someone has been convicted in Tennessee on the entry-only view of burglary because Tennessee has repeatedly used the "any instrument" language to define "entry." Because Petitioners could have been convicted for what were really just attempted burglaries, their convictions cannot qualify as generic "burglary" convictions.

D. Any counterargument conflicts with James.

Generic burglary incorporates the instrument-for-crime rule, yet Tennessee follows the broader any-instrument rule. Thus, a prior conviction for Tennessee burglary – whether aggravated or not – does not constitute generic burglary and does not count as an ACCA predicate. Descamps, 570 U.S. at 257.

Both Congress and this Court have recognized that a completed burglary and an attempted burglary are two different crimes. Congress rejected an amendment to define the ACCA's "violent felony" to include attempted burglary, thereby restricting the ACCA to completed burglary. See James, 550 U.S. at 200. Accordingly, the James Court held that Florida attempted burglary does not qualify as a generic burglary. Id. at 197.

Moreover, James made it clear that the degree of dangerousness could not be of controlling significance. The Florida attempt offense required the defendant to fail in a burglary after having made an "'overt act directed towards entering or remaining in a structure[.]'" Id. at 202 (quoting Florida law). Due to this required overt act, the James Court presumed the offense was at least as dangerous, if not more dangerous, than a completed generic burglary. Id. at 203-04. But, that degree of danger did not render the Florida attempt offense (which could be sticking a screwdriver through a doorframe) a generic burglary since a federal sentencing court's task is to define "burglary" as understood by Congress in 1986, not to classify as "burglary" any dangerous crime

that is similar to burglary. See id. at 197. In sum, James establishes that generic burglary does not include attempted burglary, and that attempts that are as dangerous as burglary are covered by the residual clause. Id. at 197, 202-04; see also Taylor, 495 U.S. at 600 n.9 (explaining the residual clause might cover break-in crimes falling beyond scope of "burglary"). Any counter-argument thus implicitly invites the Court to compensate for the loss of the residual clause by ignoring an age-old distinction between burglary and attempted burglary and by, consequently, lumping the two crimes together. The Court should decline this invitation.

E. The concerns about Sixth Circuit precedent holding that Tennessee's burglary statutes are generic were not resolved by this Court in Stitt II.

The Brumbach panel stated that any concerns about dated Sixth Circuit precedent holding that Tennessee aggravated burglary was generic were resolved by this Court in Stitt II. To come to this finding, the Brumbach panel simply ignored this Court's intervening precedent by holding that Sixth Circuit law simply returned to the status quo after this Court reversed Stitt I. When this Court reversed Stitt I, however, it did not hold that Tennessee aggravated burglary is a generic burglary; it simply held that the fact that Tennessee's definition of "habitation" includes "coverage of vehicles designed or adapted for overnight use [does not] take[] the statute outside the generic burglary definition." Stitt II, 139 S. Ct. at 407. This Court actually made no analysis and reached no conclusion regarding Tennessee's "entry" requirement; nor did it make any determination as to how, in general, a Tennessee aggravated burglary conviction must be classified.

Even prior to Stitt I, the Sixth Circuit recognized that there was some uncertainty in its case law as to whether Tennessee aggravated burglary necessarily counted as a generic burglary, despite Nance's broad statement that it did. See United States v. Brown, 516 F. App'x 461, 465 n.1 (6th Cir. 2013) (doubting that breadth and soundness of that statement). Then, in Stitt I the en banc Court expressly "overrule[d]" Nance, removing its precedential force. Stitt I, 860 F.3d at

861. Meanwhile, this Court did not hold that Nance was correct to say all Tennessee aggravated burglary convictions count as generic burglaries; it held only that Tennessee's definition of "habitation" was not fatally overbroad. Stitt, 139 S. Ct. at 407. The question is an open one going forward – and so it was open for the Sixth Circuit panels to find in Petitioners' favor. The panels herein erred in finding they were bound by Brumbach because the Brumbach panel erred in finding it was bound by Nance.

To understand Nance, one must understand United States v. Sawyers, 409 F.3d 732 (6th Cir. 2005). Sawyers held that Tennessee facilitation of aggravated burglary does not qualify as a generic burglary. Id. at 738. While doing so, it said that Tennessee aggravated burglary would so qualify. Id. To explain this dicta, the Sawyers panel summarily described what constituted an aggravated burglary under Tennessee law: "Aggravated burglary occurs when an individual enters a habitation 'without the effective consent of the property owner' and, . . . intends to commit a felony . . .'" State v. Langford, 994 S.W. 2d 126, 127 (Tenn. 1999) (citing Tenn. Code Ann. §§ 39-14-402 and 39-14-403)." Sawyers, 409 F.3d at 737 (emphasis added). As the emphasized phrase reflects, the Sawyers panel seems to have assumed that Tennessee law requires proof of entry by a person (entry by "an individual"), without even considering an entry-by-instrument scenario. Sawyers cited no other Tennessee law on the subject. Nor did it consider what the Tennessee statute means when it says entry can be made by an "object." Tenn. Code Ann. § 39-14-402(b). It did not examine the "entry" issue whatsoever.

The Nance panel then simply adopted Sawyers' dictum. Nance, 481 F.3d at 888. In a five-sentence passage, Nance quoted Sawyers' description of Tennessee law, repeating that aggravated burglary "occurs when an individual enters a habitation," and then Nance concluded that the Tennessee offense "clearly comports with [the] definition of generic burglary 'as committed in a

building or enclosed space.'" Id. (emphasis added). Nance's focus was strictly on the locational element, and it left the entry element unexamined. As the panel recognized in Brown, 516 F. App'x at 465, n.1, it seems that Nance does not legitimately serve as a comprehensive holding that all Tennessee aggravated burglary convictions qualify as generic burglary.

In Priddy, the panel cribbed the same incomplete summary of Tennessee law on aggravated burglary, simply saying it occurs "'when an individual enters a habitation.'" Priddy, 808 F.3d at 684 (quoting Langford, supra). Then, without analysis, it repeated Nance's broad statement that Tennessee's aggravated burglary statutes generally "'represent[] a generic burglary.'" Id. (quoting Nance).

Next, in Ferguson, the panel said Priddy "compels th[e] holding" that Tennessee non-aggravated burglary qualifies as a generic burglary, without any discussion of Tennessee law on "entry" or the satisfaction of the generic element of "entry." Rather it simply mentioned, and rejected, an argument about the timing of the mens rea. Ferguson, 868 F.3d at 515. Again, the court's focus was limited to an issue other than the entry element.

This Court has previously held that appellate courts are free to address previously unchallenged and unexamined assumptions and revise their views without having to abrogate precedent. Will v. Mich. Dep't of State Police, 491 U.S. 58, 63 n.4 (1989) ("'this Court has never considered itself bound [by prior sub silentio holdings] when a subsequent case finally brings the jurisdictional issue before us'" (internal citation omitted; brackets in original)); see also Staley v. Jones, 239 F.3d 769, 776 (6th Cir. 2001) (citing Will, supra, for this rule); Hammons v. Norfolk S. Corp., 156 F.3d 701, 703 n.6 (6th Cir. 1998) (same). Indeed, stare decisis is not a rigid rule that ignores the nuances of the complexities of the law. See Johnson, 135 S. Ct. at 2563 (explaining that stare decisis does not matter for its own sake, and even decisions rendered after full adversarial

presentation may have to yield to the lessons of subsequent experience). Instead, "the best approach to stare decisis is to give prior decisions the precedential effect that best fits the decision." 18 Moore's Federal Practice – Civil § 134.03[3].

Moreover, this Court has recognized that a published, non-dictum statement on a point may lack precedential value when "[t]he most that can be said is that the point was in the cases if anyone had seen fit to raise it." Webster v. Fall, 266 U.S. 507, 511 (1925). In short, under this slightly more flexible approach to stare decisis, prior unexamined assumptions lack the weight of precedent.

This principle is aptly applied here. To decide whether Tennessee aggravated burglary (and, in some of the cases, burglary) was categorically generic burglary, the lower court panels would have had to decide, at a minimum, whether the Tennessee offense had the requisite entry element, locational element, and mens rea. But, Sawyers and its progeny left the entry element utterly unexamined. In fact, Sawyers described only an entry involving the offender's person. Not only did those decisions skip over an examination of the entry issue but their inherent assumptions were inaccurate.

Plus, Sawyers was issued in 2005, which was before this Court decided in James that a mere attempted burglary does not constitute a generic burglary. Thus, even if Sawyers had engaged in some analysis, it would have lacked the benefit of what is now the binding guidance of the James Court. Under James, an entry-only-view burglary, which is nothing more in actuality than an attempted burglary, does not qualify as a generic burglary. The decisions in Sawyers and its progeny merely reiterated Sawyer's unexamined statement, which is at odds with James.

Because such previously unexamined assumptions run afoul of this Court's ruling in James, the lower court panels should have considered themselves bound by James to correct the error in

Nance and other cases that made the same unwarranted assumption about Tennessee's term "entry." See generally Cradler v. United States, 891 F.3d 659, 672 (6th Cir. 2018) (abrogating circuit precedent that classified a Tennessee burglary third degree offense as a "violent felony," because it was in conflict with Supreme Court precedent).

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully pray that this Court will grant certiorari to review the judgment of the Sixth Circuit in their cases.

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Respectfully submitted,

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