NO. _____

IN THE UNITED STATES SUPREME COURT

_____ TERM

TRAVIS MILES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does Tennessee's burglary statute, which defines "entry" so broadly as to encompass mere attempted burglary, qualify as a "generic burglary" under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (the "ACCA")?

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2. Memorandum Opinion, United States District Court for the Eastern District of Tennessee at Chattanooga, *Travis Miles v. United States of America*, District Court No. 3:14-cr-100, denying 18 U.S.C. § 2255 motion and denying certificate of appealability, May 9, 2019.

3. Judgment Order, United States District Court for the Eastern District of Tennessee at Chattanooga, *Travis Miles v. United States of America*, District Court No. 3:14-cr-100, denying 18 U.S.C. § 2255 motion and denying certificate of appealability, May 9, 2019.

JURISDICTIONAL STATEMENT

Mr. Miles was sentenced under the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e)(2)(B)(i) on July 20, 2015. On June 14, 2016 he filed a motion to modify sentence under 18 U.S.C. § 2255 and *Johnson v. United States*, 135 S. Ct. 2551 (2015), challenging the application of the ACCA and its 15-year mandatory minimum sentence. The District Court for the Eastern District of Tennessee denied the § 2255 motion and denied a certificate of appealability. On October, 23, 2019, the United States Court of Appeals for the Sixth Circuit also denied a certificate of appealability. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1). Rule 13 of the Supreme Court allows for ninety days within which to file a Petition for a Writ of Certiorari after entry of the order of the Court of Appeals. Accordingly, this Petition is timely filed.

Pursuant to Rule 29.4(a), appropriate service is made to the Solicitor General of the United States and to Assistant United States Attorney Debra A. Breneman, who appeared in the United States Court of Appeals for the Sixth Circuit on behalf of the United States Attorney's Office, a federal office which is authorized by law to appear before this Court on its own behalf.

PRAYER FOR RELIEF

Petitioner Travis Miles respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit. The question presented in this case is already pending before this Court as Docket Number 19-6968 in a Petition for Writ of Certiorari filed by Mr. David Brumbach. Thus, Mr. Miles alternatively requests that the Court hold any decision in this case pending the outcome of Mr. Brumbach's petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial[] by . . . jury[.]."

The Armed Career Criminal Act provides that a prior conviction qualifies as a "violent felony" if it is a conviction for "burglary." 18 U.S.C. § 924(e)(2)(B)(ii).

STATEMENT OF THE CASE AND FACTS

Mr. Miles pled guilty to one count of being in possession of a firearm as a convicted felon, under 18 U.S.C. § 922(g)(1). (Appx. at 6). In 2014 he was sentenced as an armed career criminal under 18 U.S.C. § 924(e), and thus had a mandatory minimum sentence of 15 years. (*Id.*). This enhancement was based on one prior Tennessee aggravated burglary and three prior Tennessee regular burglary convictions. (*Id.*). He was ordered to serve the mandatory minimum – 180 months of imprisonment. (*Id.*).

On June 14, 2016, through appointed counsel, Mr. Miles filed a motion to vacate or modify his sentenced under 28 U.S.C. § 2255 based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). (*Id.* at 6-7). *Johnson* held that the residual clause of the ACCA was void for vagueness.[1] (*Id.* at 7). He argued

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1 Under the ACCA, a prior offense qualifies as a "violent felony" if it satisfies the following definition:

> (B) The term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . 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.*

that, after *Johnson* and in the absence of the residual clause, his prior burglary and aggravated burglary convictions no longer qualified as predicate convictions to trigger application of the armed career criminal act, and its 15-year mandatory minimum sentence. (*Id.* at 8).

The district court denied that motion, finding itself bound by prior Sixth Circuit precedent holding that Tennessee's regular burglary statute is categorically a generic burglary under the ACCA. (*Id.* at 10). It also noted that this Court's holding in *United States v. Stitt*, 139 S. Ct. 399 (2018), indicated that Tennessee aggravated burglary also qualified as a generic burglary under the ACCA. (*Id.*). Finding that reasonable jurists could not debate whether Mr. Miles qualified for the ACCA enhancement, the district court denied a certificate of appealability. (*Id.* at 11, 12).

Mr. Miles appealed, and the Sixth Circuit also denied a certificate of appealability, also relying upon it's prior precedent. (*Id.* at 3). It also noted that it had reaffirmed the conclusion that Tennessee burglary qualified as a generic burglary under the ACCA, citing to its holding in *Brumbach v. United*

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18 U.S.C. § 924(e)(2)(B) (emphasis added). The final clause of § 924(e)(2)(B)(ii) - "otherwise involves conduct that presents a serious potential risk of physical injury to another" - is the "residual clause," held void for vagueness by *Johnson*. 135 S. Ct. at 2563.

States, 929 F.3d 791, 794 (6th Cir. 2019). (*Id.*). Mr. Brumbach challenged Tennessee's regularly burglary statute (which is also incorporated into its aggravated burglary statute)[2] on the element of "entry." Specifically, he argued that unlike generic burglary under the ACCA, in Tennessee a person can be convicted of "burglary" when they have only attempted an entry (by crossing the threshold, not with one's body, but only with an instrument used only to attempt entry). Thus, he argued, Tennessee burglary encompasses mere attempted burglary, and thus does not qualify as a "generic burglary" under the ACCA.

Mr. Brumbach filed a Petition for Certiorari with Court, which is pending as Docket Number 19-6968. Mr. Miles's case raises the identical issues as those being litigated in Brumbach. Accordingly, he requests this Court hold his case pending the outcome in *Brumbach*, or alternatively, to grant certiorari review here.

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[2] In Tennessee "aggravated burglary" means "burglary of a habitation as defined in §§ 39-14-401 [defining habitation] and 39-14-402 [defining burglary]." Tenn. Code Ann. § 39-14-403.

REASONS FOR GRANTING OF THE WRIT

This Court has not yet defined what constitutes a sufficient "entry" for generic burglary under the ACCA. And, while the Sixth Circuit declined to address these specific arguments in *Brumbach*, finding that it was bound by prior precedent, the question remains pending before another panel of that Court in *United States v. Buie*, No. 18-6185. Further, in the context of a § 2255 appeal, the Sixth Circuit granted a certificate of appealability on this same question. See *Carter v. United States*, No. 19-5814, App. R. 5-2, Page 3-4 (6th Cir. Oct. 4, 2019). Thus, this is an important question which has not been conclusively determined, and which appears to be causing tension in the lower courts.

This case presents this Court with the opportunity to define the element of "entry" for generic burglary in the ACCA. As noted above, Mr. Miles's case presents the same issues currently being litigated by this Court in *Brumbach v. United States*, pending as Docket Number 19-6968. He thus requests this Court hold his case pending the outcome in *Brumbach*, or alternatively, to grant certiorari review here.

The ACCA, and it's harsh 15-year mandatory minimum sentence – an enhancement that mandates a sentence 5 years longer than the otherwise

applicable 10-year statutory maximum – was wrongly applied to Mr. Miles. Moreover, as detailed in Mr. Brumbach's petition, many defendants were released *via* § 2255 motions challenging their prior Tennessee burglary convictions under *Johnson* and the Sixth Circuit's *en banc* holding in *Stitt* (which was later overturned by this Court). Had Mr. Miles's § 2255 motion been resolved earlier, he too, likely would currently be released to society. These individuals, some who have had no problems while released, are now facing the possibility that they will be forced to return to jail under the re-application of the ACCA.

No individual should be forced to serve a 15-year mandatory sentence in the absence of complete certainty that he qualifies for that enhancement. Here, Mr. Miles's only potential predicates are 3 burglaries of buildings which are not homes/being used for habitation purposes, and one burglary of a habitation. Yet, under Tennessee law, each of these convictions could have only been for mere attempted entry – mere attempted burglary – which does not qualify as a predicate under the ACCA. This Court should grant certiorari review to ensure that individuals such as Mr. Miles, and Mr. Brumbach, are not serving (or are not required to return to prison to complete) an unconstitutional

sentence based on a statute that is broad enough to encompass mere attempted burglary.

ARGUMENT

I. Mr. Miles's convictions for Tennessee burglary and aggravated burglary are not "violent felonies" because he could have committed them by merely attempting a burglary.

To count as an ACCA predicate, a burglary conviction must satisfy any one of the three clauses that comprise the ACCA's definition of "violent felony." With the all-encompassing residual clause now struck down as unconstitutional, *Johnson*, 135 S. Ct. at 2563, and with the force clause inapplicable, *United States v. Prater*, 766 F.3d 501, 509 (6th Cir. 2014), Mr. Miles's burglary convictions count as ACCA predicates only if Tennessee burglary satisfies the enumerated offenses clause, which lists "burglary" but not "attempted burglary" as a qualifying offense. 18 U.S.C. § 924(e)(2)(B)(ii). Thus, to count as an ACCA predicate, his burglary convictions must be for generic "burglary," not merely attempted burglary.

To determine whether Mr. Miles's aggravated burglary convictions qualify as generic burglary, the Court applies the "categorical approach." *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). Under this approach, the Court compares the statutory elements of Mr. Miles's Tennessee burglary offenses to the elements of generic burglary. *Id.* If the elements of the Tennessee burglary offense "are the same as, or narrower than, those of

[generic burglary]," then his conviction counts as a "violent felony" predicate under the ACCA. *Id.* Otherwise, it does not. *Id.* Here, the Tennessee elements are broader than the generic elements, and so the conviction does not count as generic burglary.

A. Generic burglary requires an entry, not merely an attempted entry.

Under the ACCA, generic burglary is "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990). *Stitt* addressed just one element of this generic definition: the term "structure," as that term meant when Congress enacted the Armed Career Criminal Act in 1986. *Stitt,* 139 S. Ct. at 405. Addressing that term, *Stitt* held that Tennessee's "habitation" element in its aggravated burglary statute sweeps no more broadly than the term "structure." But *Stitt* did not settle everything when it comes to Tennessee burglary.[3]

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[3] More recently, this Court addressed yet another aspect of generic burglary, holding that generic "remaining-in" burglary (a form of generic burglary under *Taylor*) "occur[s] when the defendant forms the intent to commit a crime at any time while unlawfully present in a building or structure." *Quarles v. United States*, 139 S. Ct. 1872 (2019). *Quarles* also did not address generic "entry," so its outcome does not affect Mr. Miles's arguments here.

Generic burglary also requires an "entry," an element unaddressed by *Stitt*. According to the common law and a majority of jurisdictions, an "entry" is made when any part of the person, such as a hand, crosses the threshold of the structure. See *Commonwealth v. Cotto*, 752 N.E.2d 768, 771 (Mass. App. 2001). An "entry" may also be made when the person does not use a part of their body, but only an instrument—such as a coat hanger, Molotov cocktail, or screwdriver—to cross the threshold. Jurisdictions differ, however, about what is required for this "entry" by instrument. The distinction turns on the defendant's purpose in using the threshold-crossing instrument.

As discussed below, the majority view is that if the person used the instrument itself in an effort to commit the intended felony inside the structure (*e.g.* used a coat hanger to snag an item or used a Molotov cocktail to start a fire), then an "entry" is made when the instrument crosses the threshold and thus a burglary is committed (assuming the other elements are established). Mr. Miles will refer to this as the "entry-plus-crime" view of the required use of an instrument when no part of the person crosses the threshold.

The minority view, in contrast, is that if the person used the instrument 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 instead

only an attempted burglary is committed (assuming, again, the other elements are established). Mr. Miles will refer to this as the "entry-only" view of the required use of an instrument when no part of the person crosses the threshold.

This distinction started with the common law, which took the more restrictive, entry-plus-crime approach. Under common law, "[i]n cases where only an instrument crossed the threshold of the dwelling house, there is no entry where the instrument was used only for the breaking . . . [h]owever, where the instrument is used to commit the felony within, there is an entry." *Cotto*, 752 N.E.2d. at 771 (summarizing common law sources); *see Commonwealth v. Burke*, 467 N.E.2d 846, 849 (Mass. 1984) (relying on common law to conclude that "if only an instrument (e.g., a crowbar) intruded into this space, it must be proved that the instrument was *not only* used for the purpose of facilitating the break, but that it also provided the means 'by which the property was capable of being removed, introduced subsequent to the act of *breaking,* and after that essential preliminary had been fully completed'") (quoting *Rex v. Hughes,* 1 Leach 406, 407 (1785)) (emphasis in *Hughes*); *Russell v. State*, 255 S.W.2d 881, 884 (Tex. Crim. App. 1953) (adhering to common-law rule as stated in *Hughes*).

In the *Hughes* case from 1785, the "accused had bored a hole through the panel of a door; the point of the centrebit and some of the chips had entered the house, but nothing more." *Russell*, 255 S.W.2d at 884. The court held that the intrusion was not enough to be an "entry":

> The court there said that when one instrument is employed to break and is without capacity to aid otherwise than by opening a way of entry, and another instrument must be used, or the instrument used in the breaking must be used in some other way or manner to consummate the criminal intent, the intrusion of the instrument is not, of itself, an entry.

Id. Thus, for example, under that common-law rule, when a defendant has crossed the threshold with a tool while trying to pry open a door or window, he is guilty only of "an attempt to commit the crime of burglary and not burglary itself." *Id.*

A few jurisdictions have deviated from this common-law rule and adopted a broader rule holding that an entry occurs whenever any instrument crosses the threshold. *See People v. Davis*, 958 P.2d 1083, 1086 (Cal. 1998) ("a burglary may be committed by using an instrument to enter a building—whether that instrument is used solely to effect entry, or to accomplish the intended larceny or felony as well"); *Hebron v. State*, 627 A.2d 1029, 1038 (Md. App. 1993) (holding that "the term 'entering,' as used in [the Maryland burglary statute], requires that some part of the body of the intruder or an

instrument used by the intruder crosses the threshold, even momentarily, of the house"); *State v. Tixier*, 551 P.2d 987, 989 (N.M. App. 1976) (expressly rejecting the common-law rule so that an "entry" is made whenever any instrument crosses the threshold).

Jurisdictions adopting this less restrictive, entry-only view of the required use of an instrument remain the "minority." *Cotto*, 752 N.E.2d 771. The "majority of jurisdictions" hold that an entry is made when the instrument crosses the threshold *and* is used in an effort to commit the intended felony, but not when the instrument is used solely in an attempt to make entry. *Id.* (citing cases, *Wharton's Criminal Law*, *Perkins & Boyce Criminal Law*, and *Nolan & Henry Criminal Law*).

Finally, the majority modern rule as stated in Professor LaFave's *Substantive Criminal Law*—which is the treatise upon which the Supreme Court placed reliance when defining generic "burglary" in the first place, *see Taylor*, 495 U.S. at 598—maintains this very same distinction. That treatise explains:

> If the actor instead used some instrument which protruded into the structure, no entry occurred unless he was simultaneously using the instrument to achieve his 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.

Wayne R. LaFave, *Substantive Criminal Law* § 21.1(b) (2d ed. 2003).

Thus, the common law, the majority of jurisdictions, and LaFave's treatise are all in agreement: crossing a threshold with an instrument that itself is being used to commit the intended felony is a generic "entry," but crossing a threshold with an instrument used simply to break in is an attempted entry. When the other elements of generic burglary are met, the former crime is burglary; the latter is just attempted burglary.

The distinction matters. Under longstanding precedent, mere "attempted burglary" does not qualify as a generic burglary under the ACCA. *James v. United States*, 550 U.S. 192, 198 (2007) (holding that because the enumerated offenses clause lists only completed burglary, Florida attempted burglary could only qualify as a violent felony under the now-defunct residual clause); *United States v. Bureau,* 52 F.3d 584, 591-93 (6th Cir. 1995) (collecting cases showing that, if attempted burglary is to count as a "violent felony," it must present enough risk to satisfy the residual clause). As shown next, Tennessee uses the broader, non-generic definition of "entry," permitting conviction when the instrument merely crosses into the structure, with no requirement that the defendant use the instrument to commit the crime inside.

B. Tennessee follows the minority rule, such that a mere attempt may be treated as a burglary.

Under Tennessee law, Mr. Miles could have been convicted of burglary and aggravated burglary even if the proof showed only an attempted burglary. This is because Tennessee follows the less restrictive, entry-only approach when a person uses an instrument to cross the threshold of the structure. Tennessee's burglary statute provides four separate types of burglary. A "burglary" occurs when an individual "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 or theft;
>
> (2) Remains concealed, with the intent to commit a felony or theft, in a building;
>
> (3) Enters a building and commits or attempts to commit a felony or theft; 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) (1995).[4] And, Tennessee's aggravated burglary statute incorporates this definition, as "aggravated burglary" means "burglary of a habitation as defined in §§ 39-14-401 and 39-14-402." Tenn. Code Ann. § 39-14-403.

Several sources make clear that in order for a person to be convicted of "burglary," and thus of "aggravated burglary," it is enough that he crossed the threshold of a habitation with an instrument in an effort to make entry. These sources are (1) case law leading to the adoption of the 1989 statute; (2) the pre-1989 pattern jury instructions; (3) the definition of "entry" in the 1989 statute (and continuing today); and (4) caselaw interpreting the term "entry" as used in the 1989 statute.

The starting place 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

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4 The fourth subsection, which addresses burglary of cars and other motor vehicles, has been considered outside the Supreme Court's *Taylor* definition of burglary, and thus has not been counted as a predicate offense under the ACCA. *United States v. Moore*, 578 F. App'x 550, 554 (6th Cir. 2014).

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 appellate court reversed, finding proof of an "entry" lacking. *Id.* at 753. The Tennessee Supreme Court disagreed. In reaching its conclusion, it first acknowledged both the majority and minority rules regarding instruments by citing authority stating each. *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"). It ultimately held that the proof sufficed to show an entry (and conviction for burglary) 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). Thus, according to the Tennessee Supreme Court, there were two alternative ways the jury could have convicted Crow of burglary: either he split the burlap with the instrument <u>or</u> he reached his hand through the burlap. It was thus enough that the defendant stuck an instrument

through a door frame trying, but failing, to make entry. *Id.* In other words, this *attempted* but failed burglary was sufficient for a conviction of "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 likewise sufficient to show only a violation of the entry-only use of an instrument. 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, after *Crow*, Tennessee appellate courts often summarized *Crow*'s guidance by stating that simply crossing the threshold with any instrument—as occurred in *Ferguson*—constitutes an "entry" without need for the instrument itself to be used or intended to be used to commit the crime inside the structure. *E.g.*, *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."); *State v. Summers*, 1990 Tenn. Crim. App. LEXIS 681, *3-4 (Tenn. Crim. App. Oct. 10, 1990) (context of pre1989 second-degree burglary) ("The 'entry' element of burglary can be accomplished by penetration of the space within the premises by the hand or an instrument held by the hand."); *State v. Moore*, 1990 Tenn. Crim. App. LEXIS 96, *4 (Tenn. Crim. App. Feb. 7, 1990) (context of pre-1989 third-degree burglary) ("The 'entry' element can be accomplished by the penetration of the space within the premises by the hand or an instrument held in the hand.").

Citing *Crow* and *Ferguson,* the pre-1989 pattern jury instructions for burglary also defined "entry" as follows: "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." Tennessee Pattern Jury Instructions – Criminal §§ 11.01, 11.02, at 90, 93 (2d ed. 1988) (emphasis added); *see also id.* at §§ 11.03, 11.04, 11.05, 11.06, at 96, 99, 102, 104.[5]

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[5] Mr. Miles attaches for the Court's convenience these burglary pattern instructions in their entirety, as they are no longer in use and are presently difficult to obtain. *See* Appx 13-33.

Juries were not required to find that, if entry was done by an instrument, the person must have intended to use the instrument to commit the felony within the dwelling place.

In 1989, 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 *Crow*'s endorsement of the minority rule regarding the requirements for an "entry." *See* Tenn. Code Ann. § 39-14-401 *et seq.* The 1989 statute essentially codified *Crow* and has ever since defined "entry" for purposes of all burglary offenses as: "Intrusion of any part of the body" or "Intrusion of *any object* in physical contact with the body or any objected controlled by remote control, electronic or otherwise." Tenn. Code Ann. § 39-14-402(b) (italics added). The 1989 statute does not require that the intruding object be an object that is used in an effort to commit the intended felony; rather, it simply requires that it be "any object" that the defendant holds or controls. *Id.*

Finally, recent case law confirms that Tennessee courts understand this statutory definition of entry to be as expansive as the Tennessee Supreme Court's explanation of the concept in *Crow*. In a post-1989 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*, 2012 Tenn. Crim. App. LEXIS 293, *11-12 (Tenn. Crim. App. May 20, 2012); *see also State v. House,* 2013 Tenn. Crim. App. LEXIS 567, *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 could be sustained based on the entry-only, minority rule.[6]

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[6] The broad language of Tennessee's 1989 statutory definition of "entry" is just like that of the statutes in Delaware, Arizona, Utah and Texas, which in 1986 had also adopted the entry-only view of burglary-by-instrument, reflected by their similarly broad statutory language. *See* 11 Del. Code § 829(c) ("A person 'enters' upon premises when the person introduces any body part or any part of any instrument, by whatever means, into or upon the premises."); *Bailey v. State*, 231 A.2d 469, 469-79 (Del. 1967) (interpreting materially-equivalent precursor to 11 Del. Code § 829(c); acknowledging that the common law followed the entry-plus-crime view; adopting the entry-only view in light of the statute's broad language); Ariz. Rev. Stat. Ann. § 13-1501(3) ("'Entry' means the intrusion of any part of any instrument or any part of a person's body inside the external boundaries of a structure or unit of real property."); Tex. Penal Code Ann. § 30.02(b) ("'[E]nter' means to intrude: (1) any part of the body; or (2) any physical object connected with the body") (overruling *Russell v. State*, *see Hayes v. State*, 656 S.W.2d 926, 927 (Tex. Ct. App. 1983)); Utah Code Ann. § 76-6-201(4) ("'Enter' means: (a) intrusion of any part of the body; or (b) intrusion of any physical object under control of the actor.").

C. Mr. Miles's convictions could be for what was nothing more than an attempted burglary.

"[S]entencing courts must 'presume that the conviction rested upon nothing more than the least of the acts criminalized.'" *United States v. Burris*, 912 F.3d 386, 406 (6th Cir. 2019) (*en banc*) (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013)). As shown above, the "least of the acts criminalized," *id.*, by the Tennessee aggravated-burglary statute is that act of sticking an instrument through a door frame in a failed effort to pry it open—that is, the act of attempting a burglary without making a generic "entry." Therefore, sentencing courts must presume that a conviction for Tennessee burglary or aggravated burglary rested upon nothing more than an attempted burglary. Sentencing courts must, in other words, presume that a conviction for Tennessee burglary is *not* a generic burglary. *See James*, 550 U.S. at 198 (attempted burglary is not generic burglary).

Thus, after *Johnson*, Mr. Miles's convictions for Tennessee regular and aggravated burglary no longer qualify as generic "burglary" convictions. He was thus wrongly denied § 2255 relief, and wrongly denied a certificate of appealability. Mr. Miles's prior convictions simply do not qualify as generic

burglaries under the ACCA, and thus cannot support application of the ACCA's 15-year mandatory minimum.

CONCLUSION

In consideration of the foregoing, Petitioner urges the Court to hold his case pending the outcome in *Brumbach*, Docket Number 19-6968, or alternatively to grant certiorari review in order to resolve this important constitutional question.

Petitioner respectfully submits that the Petition for Certiorari should be granted, the order of the Sixth Circuit Court of Appeals vacated, and the case remanded for further consideration.

Respectfully submitted,

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