No. 20-_____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBBIE SHANE BATEMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

ELIZABETH B. FORD
Federal Community Defender
JENNIFER NILES COFFIN
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

QUESTION PRESENTED

The Armed Career Criminal Act's mandatory penalty can be triggered by prior convictions for "burglary." 18 U.S.C. § 924(e), (e)(2(B)(ii). The term "burglary" carries the meaning that the majority of jurisdictions gave it in 1986 when the ACCA was enacted. *United States v. Stitt*, 139 S. Ct. 399, 405 (2018). At that time, the majority rule was that burglary requires an "entry" either by any part of the person or, if not the person, by an instrument used to commit the felony inside the building or structure. Under this majority rule, an "entry" does not occur when just the instrument has crossed the threshold and was not itself used or intended to be used to commit the felony. Tennessee law, in contrast, defines "entry" to include the use of an instrument merely to try to make entry—thereby criminalizing mere attempted burglary as "burglary."

The question presented is whether Tennessee aggravated burglary qualifies as a generic burglary, or whether instead the state's unusual definition of "entry," because it encompasses mere attempted burglary, disqualifies aggravated burglary as an ACCA predicate.

PARTIES TO THE PROCEEDINGS

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

RELATED CASES

(1) *United States v. Robbie Shane Bateman*, No. 3:11-cr-42, District Court for the Eastern District of Tennessee. Amended judgment entered October 13, 2017.

(2) *United States v. Robbie Shane Bateman*, No. 3:11-cr-144, District Court for the Eastern District of Tennessee. Amended judgment entered October 13, 2017.

(3) *United States v. Robbie Shane Bateman*, No. 1:11-cr-65, District Court for the Western District of North Carolina. Transferred to the Eastern District of Tennesseee as No. 3:11-cr-144, December 6, 2011.

(4) *Robbie Shane Bateman v. United States*, No. 3:14-cv-00270, District Court for the Eastern District of Tennessee. Judgment entered August 23, 2017.

(5) *Robbie Shane Bateman v. United States*, No. 3:14-cv-00271, District Court for the Eastern District of Tennessee. Judgment entered August 23, 2017.

(6) *United States v. Robbie Bateman*, Nos. 17-6340/17-6343, U.S. Court of Appeals for the Sixth Circuit. Opinion and judgment reversing grant of § 2255 relief, entered October 16, 2019.

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Petitioner Robbie Shane Bateman 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 unpublished opinion of the United States Court of Appeals for the Sixth Circuit appears at pages 1a to 4a of the appendix to this petition, and is available at 780 F. App'x 355 (6th Cir. 2019). The memorandum opinion and judgment order of the district court granting § 2255 relief appear at pages 5a to 13a and 20a to 21a of the appendix, respectively. The amended judgment of the district court imposing a

reduced sentence appears at pages 14a to 19a of the appendix.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals' judgment vacating the district court's grant of relief under 28 U.S.C. § 2255 was entered on October 16, 2019. Pet. App. 1a. This petition is timely filed under Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial[] by . . . jury[.]

18 U.S.C. § 922(g) provides:

> It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[]
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(e)(1) provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(2)(B) provides:

> As used in this subsection-- (B) 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 . . .

Tenn. Code Ann. § 39-14-402(a) provides:

> A person commits burglary who, without the effective consent of the property owner . . . [e]nters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault[.]

Tenn. Code Ann. § 39-14-403 provides:

> Aggravated burglary is burglary of a habitation as defined in §§ 39-14-401 and 39-14-402.

STATEMENT OF THE CASE

Overview. When Robbie Bateman was convicted in 2012 for being a felon in possession of a firearm, courts accepted that any prior conviction for Tennessee aggravated burglary counted as a "violent felony" for purposes of the enhanced penalty under the Armed Career Criminal Act (ACCA). Robbie Bateman had seven such convictions. He was sentenced to 188 months in prison under the ACCA.

Three years later, after this Court in *Johnson* struck down the ACCA's residual clause, Mr. Bateman filed for relief under 28 U.S.C. § 2255, asserting that after

Johnson his aggravated burglary convictions do not count as ACCA predicates. At the time, the government agreed that Mr. Bateman's entitlement to § 2255 relief depended on the Sixth Circuit's decision in *Stitt*, and that he should be granted relief after the Sixth Circuit held in *Stitt* that, due to Tennessee's overbroad definition of "habitation," Tennessee aggravated burglary does not count as a generic "burglary." Accordingly, the district court granted relief and reduced Mr. Bateman's sentence to 71 months, and he was released in October 2017. The government appealed.

Four months later, this Court reversed *Stitt*, holding that Tennessee's definition of "habitation" matches the generic definition of building or structure. The government thereafter urged the Sixth Circuit to reverse the district court's grant of relief, which would force Mr. Bateman to return to prison to serve out the remainder of the ACCA prison term. Mr. Bateman resisted, urging the Sixth Circuit to affirm on the ground that Tennessee's definition of "entry"—unaddressed by *Stitt*—is so broad that Tennessee treats what is really only attempted burglary as a completed burglary. And attempted burglary, this Court has made clear, does not qualify as "burglary" under the ACCA. But the Sixth Circuit rejected his argument, relying on pre-*Stitt* precedent holding that Tennessee aggravated burglary qualifies as an ACCA predicate.

The Court should grant certiorari because the Sixth Circuit has made an error that not only requires many in Mr. Bateman's shoes to return to prison, but many defendants going forward to serve unlawful ACCA sentences. The question is of crucial importance, as the ACCA increases the penalty range in firearms cases like

this one from a maximum of ten years to a minimum of fifteen years, and increases the average sentence imposed by more than a decade. Because the Sixth Circuit relied on binding circuit precedent to reject Mr. Bateman's challenge, this case presents an excellent vehicle in which to resolve the question. His petition for a writ of certiorari should therefore be granted.

Factual background. In 2000, Robbie Shane Bateman pled guilty in Sevier County, Tennessee to five counts of aggravated burglary, in violation of Tenn. Code Ann. § 39-14-403, for offenses committed when he was 21 years old. (Presentence Report (PSR) (revised Feb. 27, 2012) at ¶¶ 35, 36.) For these five offenses, he was sentenced on the same day. (Id.) In 2004, he pled guilty to two more counts of aggravated burglary, again sentenced on the same day for both. (Id. at ¶¶ 39, 40.)

In late 2010, he pawned two firearms and then after a traffic stop was found to be in possession of a .38 caliber revolver in his car, which he had stolen from his brother-in-law. (Id. at ¶¶ 7, 10.) He admitted possessing all three firearms, and in July 2011 pled guilty in the Eastern District of Tennessee to three counts of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). (Id. ¶ 2; Minutes, No. 3:11-cr-42, R. 17.) Soon thereafter, he was charged in the Western District of North Carolina for pawning another firearm in Asheville, North Carolina, also in late 2010. (PSR ¶ 3.) That case was transferred to the Eastern District of Tennessee (Rule 20 Transfer, Case No. 3:11-cr-144, R. 1), and Mr. Bateman pled guilty to that charge as well, (Minutes, Case No. 3:11-cr-144, R. 9.) He was sentenced for all four felon-in-possession offenses at the same time.

The statutory penalty for each of Mr. Bateman's offenses was zero to 120 months in prison, except that if he qualified for the enhancement under the ACCA, the mandatory minimum increased to 180 months. 18 U.S.C. § 924(a)(2), (e). Mr. Bateman qualifies for the ACCA's enhanced penalty only if he has three prior convictions for "violent felonies" committed on different occasions. *Id.* § 924(e)(2)(B). The term "violent felony" is defined by three clauses: (1) The force clause, which requires the offense to have "as an element the use, attempted use, or threatened use of physical force against the person of another"; (2) the enumerated offenses clause, which lists four qualifying offenses, including "burglary," although for a conviction to count as, e.g., a "burglary" it must have all the elements of what is defined by federal courts to be a generic burglary, *Taylor v. United States*, 495 U.S. 575, 598 (1990); and, (3) the residual clause, which describes offenses that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another," requiring courts to assess the ordinary risk of physical injury posed by the typical instance of the offense. *Id.* § 924(e)(2)(B)(i)-(ii).

The PSR determined that Mr. Bateman qualified for the ACCA's enhanced penalty, identifying the seven aggravated burglaries as ACCA predicates. (PSR ¶¶ 28, 35, 36, 39, 40.) Mr. Bateman did not object to the determination that they qualified as "violent felonies," as it would have been fruitless given the broad sweep of the residual clause. A conviction for Tennessee aggravated burglary (and even a conviction for *attempted* Tennessee aggravated burglary) satisfied the ACCA's residual clause. *United States v. Brown*, 516 F. App'x 461, 465 (6th Cir. 2013) (holding

any Tennessee burglary satisfies the residual clause); *United States v. Ghoston*, 530 F. App'x 468, 469-70 (6th Cir. 2013) (so holding for Tennessee attempted aggravated burglary); *cf. Chaney v. United States*, 917 F.3d 895, 900 (6th Cir. 2019) (declining to "fault [petitioner] for not making an argument that would have had no practical effect whatsoever given the then-viable residual clause," as that "would be a harsh outcome under any circumstances"). The district court therefore sentenced Mr. Bateman as an armed career criminal and imposed a term of 188 months' imprisonment, the bottom of the applicable guideline range. (PSR ¶73; Judgment, No. 3:11-cr-42, R. 21; Judgment, No. 3:11-cr-144, R. 11.)

In 2014, Mr. Bateman filed a counseled motion under 28 U.S.C. § 2255 asserting that, in light of *Descamps v. United States*, 133 S. Ct. 2276 (2013), his seven aggravated burglary convictions were not for "generic" burglary as defined by the this Court in *Taylor*, 495 U.S. at 598, and therefore were not "violent felonies" under the ACCA. (Motion to Vacate, No. 3:11-cr-42, R. 24; Mem. in Support, No. 3:11-cr-42, R. 25.)[1] As a result, he contended, he had been erroneously sentenced under the ACCA.

While that motion was pending, this Court struck down the ACCA's residual clause as unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551 (2015). Then, in 2016, the Sixth Circuit granted *en banc* review in *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017) (en banc) (*Stitt I*), to revisit—in light of *Johnson* and *Descamps*—the question whether Tennessee aggravated burglary qualifies as generic

[1] Mr. Bateman hereafter cited only the documents as filed in Case No. 3:11-cr-42. He contemporaneously filed these same documents in Case No. 3:11-cr-144.

burglary under the enumerated offenses clause. Mr. Bateman thereafter supplemented his § 2255 motion to add a claim based on *Johnson*, noting the grant of en banc review in *Stitt I*. (Supplement, R. 26.)

In light of these developments, the government asked the district court to defer ruling on Mr. Bateman's still-pending § 2255 motion, acknowledging that if the Sixth Circuit "were to conclude that aggravated burglary is not a qualifying felony under the enumerated-offense clause, but only under the now-invalid residual clause, [Mr. Bateman] would then be eligible for relief." (Motion to Defer Ruling, R. 28.)

Approximately a year later, in June 2017, the Sixth Circuit held in *Stitt I* that Tennessee aggravated burglary is not a generic "burglary" because Tennessee's statutory definition of "habitation" includes places that are not structures (vehicles), and it held the statute is indivisible. *Stitt*, 860 F.3d at 857-58. The result was that no conviction for Tennessee aggravated burglary could satisfy the enumerated-offenses clause. *Id.* at 862. That meant that in light of *Johnson* no such conviction could count as an ACCA predicate.

In the wake of *Stitt I*, the government agreed that Mr. Bateman's prior Tennessee aggravated burglary convictions "no longer count as violent felonies under the ACCA," and further that (1) "absent those convictions, [Mr. Bateman] has insufficient other prior convictions to be subject to the ACCA's enhanced penalties"; (2) he is "eligible for § 2255 relief"; and (3) he was entitled to a sentence reduction. (Joint Status Report, R.31.) The district court, noting that "it is undisputed that [Mr. Bateman] no longer qualifies as an armed career criminal under the ACCA," granted

the motion, vacated the sentence, and ordered resentencing. (Mem. Op., R. 32; Judgment Order, R. 33.)

Before resentencing, but after Mr. Bateman's sentence had been vacated, the government filed a sentencing memorandum in which it urged the district court to impose a sentence of 120 months, the statutory maximum in absence of the ACCA enhancment. (Gov't Sent'g Mem., R. 34.) In a footnote appended to its citation to *Stitt I*, the government said that it "maintains that *Stitt* was wrongly decided and preserves that issue for possible further review should *Stitt* be undermined or overruled by subsequent authorities." (*Id.*) The district court imposed a sentence of 71 months. (Amended Judgment, R. 37.)

The government appealed and had the case held in abeyance until this Court reversed *Stitt I*. This Court held that the "relevant language" of Tennessee's burglary statute—its definition of "habitation"—was narrow enough that Tennessee aggravated burglary falls within the scope of generic "burglary." *United States v. Stitt*, 139 S. Ct. 399, 406 (2018) (*Stitt II*). Specifically, it held that the term habitation's "coverage of vehicles designed or adapted for overnight use [does not] take[] the statute outside the generic burglary definition." *Id.* at 407. The Court did not determine that Tennessee aggravated burglary is necessarily a generic burglary in every respect because it did not examine all aspects of the Tennessee statute; nor did it hold that the offense is necessarily a violent felony under the ACCA. *Id.* at 406-08.

Relying on *Stitt II*, the government asked the Sixth Circuit to reverse the grant

of § 2255 relief. In response, Mr. Bateman asked the court to affirm on the ground that Tennessee's definition of "burglary" is overbroad for yet another reason, unaddressed by *Stitt II*. (Sixth Cir. Appellee Br. at 16-35.) He showed that Tennessee follows a minority rule for defining its "entry" element of burglary, broader than the "entry" element in *Taylor*'s generic definition of "entry," permitting conviction for burglary even if the putative entry was merely the crossing of the structure's threshold with an instrument used to try to make entry. Because Tennessee law endorses such a broad concept of "entry," Mr. Bateman's burglary convictions do not count as a generic burglary or, consequently, as ACCA predicates. That fact leaves Mr. Bateman still without any ACCA predicates.

The Sixth Circuit nevertheless reversed. It held that it was bound by pre-*Stitt I* precedent holding that Tennessee burglary is generic burglary. Pet. App. 2a (relying on *Brumbach v. United States*, 929 F.3d 791, 795 (6th Cir. 2019), *cert. denied*, No. 19-6969 (Jan. 27, 2020); *United States v. Nance*, 481 F.3d 882, 888 (6th Cir. 2007)). The court remanded the case to the district court with instructions to reinstate the original 188-month sentence. *Id.* On March 12, 2020, the district court reinstated the sentence. (Order, No. 3:11-cr-42, R. 64; Order, No. 3:11-cr-144, R. 22.)

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit has made a serious error that requires many defendants in Mr. Bateman's shoes to return to prison.

Many defendants like Mr. Bateman received reduced sentences—and were released from prison—due to the combined effect of *Johnson* and the Sixth Circuit's

en banc decision in *Stitt*.[2] After this Court reversed *Stitt I*, defendants like Mr. Bateman are now being forced to return to prison to serve many more years of an ACCA sentence. But they should not have to return. The Sixth Circuit should have held that the reversal of *Stitt* was immaterial because Tennessee aggravated burglary, notwithstanding this Court's ruling on Tennessee's "habitation" requirement, categorically fails to qualify as a violent felony due to Tennessee's broad definition of "entry."

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). Generic burglary is a completed offense, and does not include attempted burglary. *James v. United States*, 550 U.S. 192, 198 (2007). Under the categorical approach, a prior burglary conviction "qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense." *Descamps v. United States*, 570 U.S. 254, 257 (2013). By operation of its unusual definition of "entry," Tennessee treats some attempted burglaries as if they were completed burglaries. As a result, the aggravated burglary statute sweeps more broadly than generic burglary.

[2] *See, e.g., Dawson v. United States,* Nos. 17-5930/5931, 2019 U.S. App. LEXIS 34627 (6th Cir. Nov. 20, 2019); *United States v. Merriweather,* No. 18-5567, 2019 U.S. App. LEXIS 32520 (6th Cir. Oct. 29, 2019); *United States v. Johnson,* Nos. 18-6006/6123, 2019 U.S. App. LEXIS 32246 (6th Cir. Oct. 25, 2019); *United States v. Ammons,* No. 17-5920/17-5922, 2019 U.S. App. LEXIS 32243 (6th Cir. Oct. 25, 2019).

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

The common law and a majority of jurisdictions make clear that an "entry" is made when 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). They also address the 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. But 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 (which Mr. Bateman will call the "instrument-for-crime rule"), and in contrast 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,[3] the vast majority of states defined burglary in their respective codes as requiring an entry, without any statutory definition of "entry." *See infra.* 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 naturally follows 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 v. State,* 63 Ala. 49, 51 (1879); *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

[3] When defining generic "burglary," the courts must ascertain the majority rule as of the date of the ACCA's enactment in 1986. *See United States v. Stitt*, 139 S. Ct. 399, 405 (2018).

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).[4]

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) (2d ed. 2003). 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 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.; *see Taylor,* 495 U.S. at 580, 593, 598 & nn.3-4 (placing significant reliance on LaFave's treatise to define generic burglary).

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. 11 Del. Code § 829(c);[5] Ariz. Rev. Stat. Ann. § 13-

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[4] Before 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 Jury Instr. – Crim. § 1300.12; and Okla. Uniform Jury Instr. – Crim. § 5-18. 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).

[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.

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.

In *State v. Crow*, 517 S.W.2d 753, 755 (Tenn. 1974), 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 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

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Id. at 470. But in light of the statute's broader language, it adopted the any-instrument rule.

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 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 likewise sufficient to show only a violation of the any-instrument definition of "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.*

The bottom line is that, as of 1986, just six jurisdictions had deviated from the long-standing and traditional instrument-for-crime rule.[6] Accordingly, this Court should hold that a "generic" burglary requires an entry by the person or by an instrument used to commit the felony.

B. In 1989, Tennessee codified by statute its broader, any-instrument rule.

If *Crow* were not clear enough, in 1989 Tennessee adopted by statute the broader, any-instrument rule, defining "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); 1989 Tenn. Pub. ch. 591. The government itself argued in the Sixth Circuit that when a state code uses this "any" instrument language, the state (*e.g.,* Delaware, Arizona, Texas or Utah) has certainly adopted the any-instrument rule. (Gov't Reply Br. at 8-9.) Accordingly, by using the "any" instrument language, the Tennessee code makes it clear that, at least by 1989, Tennessee had likewise certainly adopted the any-instrument rule.

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[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).

Although there is no need to further establish this point, it is reassuring that ever since the Tennessee Supreme Court issued *Crow* in 1974, this any-instrument rule has been reiterated repeatedly by Tennessee cases and jury instructions. *Hall v. State*, 584 S.W.2d 819, 821 (Tenn. Crim. App. 1979); *State v. Summers*, 1990 Tenn. Crim. App. LEXIS 681, *3-4 (Tenn. Crim. App. Oct. 10, 1990); *State v. Moore*, 1990 Tenn. Crim. App. LEXIS 96, *4 (Tenn. Crim. App. Feb. 7, 1990); Tennessee Pattern Jury Instr. – Crim., Vol. 7 at §§ 11.01, 11.02, 11.03 (2d ed. 1988) (pre-1989 burglary statutes); Tenn. Code Ann. § 389-14-402(b) (1989).

Because Tennessee follows the minority rule, permitting conviction for mere attempted burglary, a post-1989 Tennessee conviction for aggravated burglary cannot qualify as generic burglary for ACCA purposes. *Descamps*, 570 U.S. at 257. The district court was correct to reduce Mr. Bateman's sentence to 71 months.

C. The government's counterargument conflicts with *James*.

In the court below, the government argued that when someone sticks a screwdriver through a doorframe to try to make entry, that crime is just as dangerous as sticking a coat hanger through a window to snag an item, and so the distinction between the instrument-for-crime rule and the any-instrument rule is not significant enough to define the contours of generic burglary. It calls the distinction "arcane." (Gov't Reply Br. at 13-14.)

What the government ignores is that there is a clear conceptual difference between the two rules, which is why the distinction has been repeated over and over again by courts and treatises for centuries. The coat-hanger scenario is a *completed*

burglary because the defendant made entry in the manner intended to commit the crime therein; in contrast, the screwdriver scenario is an *attempted* burglary because the defendant only tried to make the desired entry.

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 v. United States*, 550 U.S. 192, 200 (2007). Accordingly, the *James* Court held that Florida attempted burglary does not qualify as a generic burglary. *Id.* at 197.

Plus, *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. *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*

Taylor, 495 U.S. at 600 n.9 (explaining the residual clause might cover break-in crimes falling beyond scope of "burglary").

In effect, the government seeks to compensate for the loss of the residual clause by ignoring an age-old distinction between burglary and attempted burglary and by lumping the two crimes together. This Court should reject that effort.

II. This case presents an excellent vehicle to resolve this important question.

This question is of exeptional importance and is recurring. Each year, hundreds of federal defendants are sentenced under the ACCA. *See* U.S. Sent'g Comm'n, *Quick Facts – Felon in Possession of a Firearm* 1 (2019) (showing that 288 offenders were sentenced under the ACCA in fiscal year 2018). The effect is severe. The ACCA increase the minimum penalty by at least five years, with the average increase in the sentence imposed being 127 months longer than for those sentenced without the ACCA—over a decade longer. *Id.* at 2. Burglary offenses are common predicate offenses.

This is an excellent vehicle to decide the question presented. Mr. Bateman's case perfectly reflects the ACCA's severity, as it will increase the 71-month sentence he received upon the grant of relief to a mandatory minimum of 15 years and a guideline range of 188-235 months. This issue is of great importance not only to the many defendants in Mr. Bateman's shoes who will be sent back to prison based on *Stitt II* (some of whom have done so well after release that the district court terminated their supervised release early, *e.g. Phillip Gilliam v. United States*, No. 1:11-cr-108 (E.D. Tenn.) (appeal pending, Sixth Cir. No. 18-5050)), but also to every

defendant going forward who may be subject to the ACCA's harsh penalty based on Tennessee burglary convictions.

CONCLUSION

The petition for a writ of certiorari should be granted.

ELIZABETH B. FORD
Federal Community Defender
JENNIFER NILES COFFIN
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 Robbie Shane Bateman

March 13, 2020