
NO. _____

IN THE UNITED STATES SUPREME COURT

_____ TERM

MARK NORRIS,

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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QUESTION PRESENTED FOR REVIEW

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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OPINIONS BELOW

1. Order, United States Court of Appeals for the Sixth Circuit, *Mark Norris v. United States*, Court of Appeals No. 19-6030, denying certificate of appealability, February 6, 2020.

2. Memorandum Opinion, United States District Court for the Eastern District of Tennessee at Chattanooga, *Mark Norris v. United States*, District Court Nos. 1:15-cr-25, 1:18-cv-66, denying 28 U.S.C. § 2255 motion and denying certificate of appealability, July 10, 2019.

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JURISDICTIONAL STATEMENT

Mr. Norris was sentenced under the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e)(2)(B)(i) on July 8, 2015. On April 17, 2018 he filed a motion to modify sentence under 28 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 February 2, 2020, 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 generally 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. However, in its March 19, 2020 Order, and in response to COVID-19, the Court extended the time for filing a petition for certiorari review to 150 days after the issuance of an order denying discretionary review. 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 Mark Norris respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit. However, the question presented in this case is also pending before the Sixth Circuit in *United States v. Brown*, No. 18-5356. The *Brown* panel concluded that it was bound by prior Sixth Circuit precedent—precedent which did not address the "entry" element at issue here—to conclude that all Tennessee aggravated burglary convictions under Tenn. Code Ann. § 39-14-403 are generic. *Brown*, 957 F.3d 679, 683 (6th Cir. 2020) (Sixth Circuit Case No. 18-5356). However, it deemed the arguments regarding the entry element in Tennessee burglary "weighty enough to warrant a response . . . on the merits too". *Id*. at 684. It thus proceeded to discuss the merits, and suggested that Mr. Brown seek en banc rehearing. *Id*.

Upon Mr. Brown's filing of a petition for panel rehearing or rehearing en banc, the Sixth Circuit ordered the government to respond. That petition remains pending. Thus, Mr. Norris alternatively requests that the Court hold any decision in this case pending the outcome of Mr. Brown's petition for rehearing currently pending before the Sixth Circuit in Case No. 18-5356.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The ACCA 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).

Tennessee defines burglary as occurring 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). 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.

STATEMENT OF THE CASE AND FACTS

Mr. Norris 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 2.) In 2015 he was sentenced as an armed career criminal under 18 U.S.C. § 924(e), and thus had a mandatory minimum of 15 years' incarceration. (*Id.*) This enhancement was based on two prior Georgia burglary convictions and approximately three dozen Tennessee aggravated burglary convictions. (*Id.*) After granting the government's motion for a downward departure, Mr. Norris was sentenced to serve 151 months of imprisonment. (*Id.*)

In December of 2017, Mr. Norris filed a *pro se* motion asking to correct or modify his sentence. (*Id.* at 2-3.) That motion was later treated as a motion to vacate under 28 U.S.C. § 2255, and was supplemented by appointed counsel. (*Id.* at 3.) Mr. Norris's argument was based on *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the residual clause of the ACCA was void for vagueness.[1] (*Id.* at 4.) He argued that, after *Johnson* and in the

[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 –

absence of the residual clause, his prior Tennessee aggravated burglary convictions no longer qualified as predicate convictions to trigger application of the ACCA, and its 15-year mandatory minimum sentence. (*Id.* at 4).

The district court denied that motion, relying upon this Court's holding in *United States v. Stitt*, 139 S. Ct. 399 (2018), which addressed the location element of Tennessee burglary. (*See* Appendix at 3.) Finding that reasonable jurists could not debate whether Mr. Norris qualified for the ACCA enhancement, the district court also denied a certificate of appealability. (*Id.*)

Mr. Norris appealed, arguing that while *Stitt* foreclosed his original argument before the district court, Tennessee's aggravated burglary statute was nonetheless overbroad, because the "entry" element swept in mere attempted burglaries. (*Id*. at 4.) Specifically, he argued that unlike generic burglary in the ACCA, a person can be convicted of "burglary" in Tennessee when they

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> (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) (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.

have only attempted an entry (by crossing the threshold, not with one's body, but only with an instrument used only in a failed attempt at access). Thus, he argued, Tennessee burglary encompasses mere attempted burglary, and does not qualify as a "generic burglary" under the ACCA.

The Sixth Circuit, however, declined to address the question on the merits, noting that Mr. Norris had not raised the "entry" argument below. (*Id.* at 3). It also held it was controlled by *Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019), which in turn relied upon *United States v. Nance*, 481 F.3d 882, 888 (6th Cir. 2007), to conclude that all Tennessee aggravated burglary convictions under Tenn. Code Ann. § 39-14-403 are generic. But, neither *Nance* nor *Brumbach* addressed the issue raised here—whether Tennessee's aggravated burglary statute is overbroad on the "entry" element. (*Id*. at 5.) Regardless, the Sixth Circuit denied his request for a certificate of appealability. (*Id*.)

After that denial, the Sixth Circuit issued its opinion in *Brown*. Like Mr. Norris's panel, the *Brown* panel concluded it was bound by *Nance* and *Brumbach*. *Brown*, 957 F.3d at 683. However, it proceeded to discuss the merits due to the importance of the issue. *Id*. at 684. The *Brown* panel concluded that at the time the ACCA was passed in 1986, a majority of states

limited the entry element of burglary to when either the individual's body crosses the threshold or when only an instrument crosses the threshold *and* that instrument was used in an effort to complete a further crime (referred to herein as the "instrument-for-crime" variant). *Id*. at 688. Thus, only a small minority of states expanded "entry" to include those instances where only an instrument crosses the threshold, but that instrument is used only in a failed effort to gain admittance to the building (referred to herein as the "instrument-for-attempted-entry" variant). *See id*.

Yet, despite concluding that the narrow instrument-for-crime view was the majority view, and without citing *James v. United States*, 550 U.S. 192 (2007) (burglary does not include attempted burglaries), the *Brown* panel held that the distinct forms of entry were merely a modest deviation—only an "'arcane distinction' that *Taylor* would disavow." *Id*. at 685. It thus opined that the generic definition of burglary under the ACCA, unlike the majority view amongst the states, is not limited the instrument-for-crime variant. *Id*. at 684-85.

Mr. Brown filed a petition for en banc rehearing, and the Sixth Circuit ordered the government to respond. Mr. Norris's case raises the identical issue as that being litigated in *Brown*. Accordingly, he requests this Court

hold his case pending the outcome in *Brown*, or alternatively, to grant certiorari review here.

REASONS FOR GRANTING OF THE WRIT

This Court has not yet defined what constitutes a sufficient "entry" for generic burglary under the ACCA. Yet, because application of the ACCA has such drastic consequences—application of a 15-year mandatory minimum, and a sharp increase in an individual's sentencing guideline range—its proper interpretation (and thus scope) is an important question of federal law. And, here it is a question that has not been, but should be, settled by this Court. *See* Rules of the Supreme Court 10(c). Moreover, after *Brown* the Sixth Circuit has now addressed this question "in a way that conflicts with relevant decisions of this Court," namely *James*, 550 U.S. 192; *Stitt*, 139 S. Ct. 399; and *Quarles v. United States*, 139 S. Ct. 1872 (2019), and the cases they rely upon. Rules of the Supreme Court 10(c).

Brown was correct that at the time the ACCA was passed in 1986 a majority of states defined "entry" in a narrow way—by requiring that when an instrument (but not the body) crosses the threshold of a building that instrument must be used in an effort to commit a further crime within. *Brown*, 957 F.3d at 688. A state which allows the element of "entry" to be met when an instrument (but not the body) crosses the threshold in only an attempt to gain admittance is thus broader than the element of "entry" utilized by most states.

See id. And, importantly, this Court has already held that attempted burglary does not qualify as a "generic burglary." *James*, 550 U.S. at 197. The Sixth Circuit in *Brown* ran afoul of this Court's precedent by concluding that despite the fact that the majority view of "entry" is the narrow view, "generic burglary" in the ACCA is encompasses broader statutes. *Brown*, 957 F.3d at 683-84, 688.

But, this Court has always defined the generic definition of burglary in the ACCA by looking primarily to the "'prevailing view in the modern codes' and what modern statutes 'generally require' and 'typically describe.'" *Taylor v. United States*, 495 U.S. 575, 598 (1990). Indeed, its two most recent jaunts into this topic both emphasized the majority view in 1986 as establishing the contours of "generic burglary." *Stitt*, 139 S. Ct. at 406; *Quarles*, 139 S. Ct. at 1878. Moreover, the *Brown* opinion never cited *James*, and thus did not explain how its conclusion comports with this Court's pronouncement that attempted burglary does not qualify as "generic burglary."

The Sixth Circuit has thus interpreted an important question of federal law, currently unaddressed by this Court, in a way that conflicts with the relevant decisions of this Court. This case presents the Court with the opportunity to define the element of "entry" for generic burglary in the ACCA, and thus certiorari review is appropriate. Or, alternatively, because the Sixth

Circuit is currently considering whether to revisit *Brown* en banc, it would also be appropriate to hold Mr. Norris's case pending the outcome in *Brown*.

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. Norris. No individual should be subjected to the ACCA in the absence of complete certainty that he qualifies for that enhancement. Here, Mr. Norris's only potential predicates are non-violent burglaries, and under Tennessee law, the government was only ever required to prove an attempted, but failed, entry. This Court should grant certiorari review to define the scope of the "entry" element of generic burglary.

ARGUMENT

Mr. Norris's convictions for Tennessee 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. Norris'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, one's burglary conviction must be for generic "burglary," not merely attempted burglary.

To determine whether Mr. Norris'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 his Tennessee burglary offense to the elements of generic burglary. *Id.* If the elements of the Tennessee burglary "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*, 495 U.S. at 598. *Stitt* addressed just one element of this generic definition: the term "structure," as that term meant when Congress enacted the ACCA 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.[2]

Generic burglary also requires an "entry," an element unaddressed by *Stitt*. According to the common law and a majority of jurisdictions, an "entry"

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[2] 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*, 139 S. Ct. 1872. *Quarles* also did not address generic "entry," so its outcome does not affect Mr. Norris's arguments here.

is made when any part of the person, such as a hand, crosses the threshold of a 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 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), then an "entry" is made when the instrument crosses the threshold and thus a burglary is committed. *See Brown*, 957 F.3d at 688 (acknowledging that the majority of jurisdictions in 1986 "limited an 'entry by instrument' 'to the situation where the instrument is used to remove property from the premises or injure or threaten an occupant'" (collecting cases and statutes)). As noted above, Mr. Norris refers to this as the "instrument-for-crime" variant.

The minority view, in contrast, is that if the threshold was crossed with only an instrument, used only in a failed effort to gain admittance (*e.g.*, a screwdriver used to pry at the door), then no "entry" is made, and instead only

an attempted burglary is committed. As also noted above, Mr. Norris will refer to this as the "instrument-for-attempted-entry" variant.

This distinction started with the common law, which took the more restrictive, instrument-for-crime approach. *Brown*, 957 F.3d at 688 (collecting cases and statutes, and *citing* Wayne R. LaFave & Austin W. Scott, *Substantive Criminal Law* § 8.13(b), at 467–68 (1986)). 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.*

As of 1986, when Congress enacted the ACCA, the vast majority of states defined burglary 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 follows that the vast majority of states were following the instrument-for-crime rule as of 1986. *See also Brown*, 957 F.3d at 688 (noting that in 1986 a majority of jurisdictions had retained the narrow, common-law rule, *i.e.*, the instrument-for-crime rule). 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 . . . envisioned . . . an adoption by the courts of common-law . . . definitions of both bodily and instrumental entry"); *see also* Nev. Rev. Stat. § 193.0145 (1985); Wash. Rev. Code § 9A.52.010(2) (1985).[3]

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[3] 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 the rule 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 the rule was new: *State v. Faria*, 60 P.3d 333, 339 (Haw. 2002), and *People v. Rhodus*, 303 P.3d 109, 113 (Colo. App. 2012).

Accordingly, the leading modern treatise on the subject, Wayne R. LaFave, *Substantive Criminal Law*—the treatise relied upon by the *Brown* panel, and by this Court when defining generic "burglary" in the first place, *see Taylor*, 495 U.S. at 598—reports that the instrument-for-crime rule is still the blackletter rule on burglary "entry." *Id.* § 21.1(b) (2d ed. 2003); *see also Brown*, 957 F.3d at 688 (relying upon LaFave's treatise). 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..

As of 1986, states deviating from that rule were few. By statute, four states had defined "entry" against the grain, to include instrument-for-attempted-entry. 11 Del. Code § 829(c); 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 include instruments used for only attempted entries. One was an intermediate court of appeals in New Mexico that, after acknowledging the

common-law majority rule, simply announced that in its "opinion" an instrument-for-attempted-entry rule was better. *State v. Tixier*, 551 P.2d 987, 989 (N.M. Ct. App. 1976). The other was the Tennessee Supreme Court. *State v. Crow*, 517 S.W.2d 753, 755 (Tenn. 1974).

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

Tennessee law allows individuals to be convicted of aggravated burglary even if the proof showed only an attempted burglary. This is because Tennessee follows the less restrictive, instrument-for-attempted-entry approach when a person uses an instrument to cross the threshold of a 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.

In *Crow*, 517 S.W.2d at 755, 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 Tennessee Supreme Court first acknowledged both the majority and minority rules regarding instruments by citing authority stating each. *Id.* at 754 (discussing the majority rule and, for the minority rule,

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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).

stating that some cases hold "entry of the hand or an instrument to be sufficient to supply the element of entry"). It ultimately found the proof sufficed to show an entry (and conviction for burglary) because the jury could find:

> *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 instrument-for-attempted-entry view. 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.*

If *Crow* were not clear enough, in 1989 Tennessee adopted by statute the broader, instrument-for-attempted-entry 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).[5] Accordingly, by using the "any" instrument language, the Tennessee code makes clear that, at least by 1989, Tennessee had certainly adopted the instrument-for-attempted-entry rule.

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[5] 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 instrument-for-attempted-entry 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

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 instrument-for-attempted-entry 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); Tenn. Pattern Jury Instr.–Crim., Vol. 7 at §§ 11.01, 11.02, 11.03 (2d ed. 1988) (pre-1989 burglary statutes);[6] Tenn. Code Ann. § 39-14-402(b) (1989). With respect to the "entry" requirement, the law in Tennessee has been the same ever since *Crow*

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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 instrument-for-crime view; but adopting the instrument-for-attempted-entry 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.").

[6] Mr. Norris attaches for the Court's convenience these pattern burglary instructions in their entirety, as they are no longer in use and are difficult to obtain. *See* Appx 15-35.

issued in 1974: a conviction could be sustained based on the broad instrument-for-attempted-entry view.

C. The Sixth Circuit's rational conflicts with *James*.

Even though the majority view in 1986 excluded the instrument-for-attempted-entry view from the burglary definition, the *Brown* panel concluded the distinction was meaningless. *See Brown*, 957 F.3d at 685. But this ignores the clear conceptual difference between attempted and completed burglaries, a distinction that has been repeated by courts and treatises for centuries. Indeed, Congress and this Court have recognized that a completed burglary and an attempted burglary are two different crimes. Importantly, 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. Attempted burglary simply does not qualify as a generic burglary. *Id.* at 197.

What is more, *James* made it clear that the degree of dangerousness could not be of controlling significance. The *James* Court presumed that attempted burglary 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 attempt offense 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. *See id*. at 197. Completed burglary of whatever sort is not the same offense as attempted burglary. That distinction is "common-sense." *Tragani*, 449 N.Y.S.2d at 926.

James instead establishes that attempts that are as dangerous as burglary are covered by the residual clause. 550 U.S. 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"). The residual clause is now gone, but *James*'s interpretation of "burglary" remains binding. Congress justifiably wanted to incapacitate the most dangerous individuals who had proven by their prior conduct that they are willing to repeatedly engage in intentional violence. But, as Mr. Norris—who has no violence in his background at all—exemplifies, typical burglaries and attempted burglaries do not involve such violence.

Congress's belief that burglary, is "inherently dangerous," has since been proven false—a fact that caused the United States Sentencing Commission to remove burglary crimes from its career offender enhancement. USSG App. C, amend 798, at 118-22 (2016 Supp.) (Reason for Amendment) (explaining that "'several recent studies' by outside researchers find[] that burglaries rarely result in physical violence and that attempted burglaries were significantly less

likely to be violent than completed burglaries" (*citing* Richard S. Culp et al., *Is Burglary a Crime of Violence? An Analysis of National Data 1998-2007* at xi, 29, 34, 36-38 (2015).[7] Erroneous presumptions about the inherent dangerousness of burglary are not sufficient to read into generic burglary attempts, when that was not the majority view of burglary in 1986.

D. Mr. Norris'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" by the Tennessee aggravated burglary statute is the 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 aggravated burglary rested upon nothing more than an attempted burglary. Sentencing courts must, in other words, presume that a conviction for Tennessee burglary

[7] Available at https://www.ncjrs.gov/pdffiles1/nij/grants/248651.pdf (last visited July 2, 2020).

is *not* a generic burglary. *See James*, 550 U.S. at 198 (attempted burglary is not generic burglary).

In sum, Tennessee's unusually broad definition of "entry" renders its burglary statute overbroad. Mr. Norris's convictions for Tennessee aggravated burglary do not qualify as generic "burglary" convictions. He was thus erroneously denied § 2255 relief and erroneously denied a certificate of appealability. He is thus wrongly serving a sentence based on the ACCA's 15-year mandatory minimum.

CONCLUSION

In consideration of the foregoing, Mr. Norris urges the Court to hold his case pending the outcome of the pending petition for en banc rehearing in *Brown*, Sixth Circuit Case Number 18-5356, or alternatively to grant certiorari review in order to resolve this important question of federal law. He 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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