NO. _____

IN THE UNITED STATES SUPREME COURT

_____ TERM

LEE YERKES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Erin P. Rust
Assistant Federal Defender
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.
835 Georgia Avenue, Suite 600
Chattanooga, Tennessee 37402
(423) 756-4349

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

When defining the scope of each element of "generic burglary" for purposes of the Armed Career Criminal Act, 18 U.S.C. § 924(e) (the "ACCA"), this Court looks to how the majority of states defined that element in 1986 when the ACCA was passed. *Taylor v. United States*, 495 U.S. 575, 589 (1990); *United States v. Stitt*, 139 S. Ct. 399, 406 (2018); *Quarles v. United States*, 139 S. Ct. 1872, 1878 (2019).

The Court has not yet defined the precise scope of the "entry" element. In a split decision in this direct appeal, the Sixth Circuit acknowledged that Georgia defines the "entry" element of its burglary statute more broadly than the common law and the majority of states did in 1986 (and still do today) because it allows for conviction for conduct constituting mere *attempted* burglary. The lower court nonetheless concluded that Georgia's more expansive form of burglary reflects only a "minor deviation" from the definition of "generic" burglary, not enough to disqualify it from the ACCA's coverage. The dissenting judge, in contrast, would have held that this deviation is not minor at all, but reflects the material difference between burglary and attempted burglary that this Court recognized in *James v. United States*, 550 U.S. 192, 197 (2007) (overruled on other grounds by *Johnson v. United States*, 135 S. Ct. 2551 (2015)), with attempted burglary qualifying only under the now-defunct residual clause.

The question presented is this: Does Georgia burglary qualify as "generic burglary" under the ACCA?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Court Cases:

State Court Cases:

Other Cases:

Statutes:

Rules:

Other Sources:

OPINIONS BELOW

1. Opinion, United States Court of Appeals for the Sixth Circuit, *United States v. Lee Yerkes*, 820 F. App'x 334 (July 10, 2020).

2. Judgment, United States District Court for the Eastern District of Tennessee at Chattanooga, 1:18-cr-38 (July 15, 2019).

JURISDICTIONAL STATEMENT

This is a direct appeal from the judgment in a criminal case. *United States v. Yerkes*, 820 F. App'x 334, 335 (6th Cir. 2020).[1] Lee Yerkes was sentenced under the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e)(2)(B)(i), on July 15, 2019. (App. at 012-018.) He appealed that judgment to the United States Court of Appeals for the Sixth Circuit, arguing that the ACCA was wrongly applied. *Yerkes*, 820 F. App'x at 335. The Sixth Circuit affirmed the district court. *Id*. at 339.

This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1). Pursuant to Rule 13 of the Supreme Court as modified by this Court's March 19, 2020 Order regarding COVID-19, the time for filing a petition for certiorari review is currently 150 days after the date of the lower court judgment. 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.

[1] A copy of this opinion is included in the appendix filed contemporaneously herewith at pages App. 2 – App. 11.

PRAYER FOR RELIEF

Petitioner Lee Yerkes respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit.

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).

At the time of Mr. Yerkes's Georgia burglary convictions, Georgia defined burglary as:

> [W]hen, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof. . . .

Ga. Code Ann. § 16-7-1(a) (1980).

STATEMENT OF THE CASE AND FACTS

This is a direct appeal from the judgment in a criminal case. Mr. Yerkes pled guilty to one count of being in possession of a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). *Yerkes*, 820 F. App'x at 335. Relying on five Georgia burglary convictions and two Tennessee aggravated burglary convictions, the district court determined that he qualified for application of the ACCA. (*Id.*) Mr. Yerkes objected to that classification, arguing that generic burglary requires an individual to "enter" a premises by crossing the barrier with either a body part, or an instrument—so long as the instrument is also used, or intended to be used, in the commission of a further crime within. *See id*. at 335-36. (*See also* Objections, R. 32, Page ID# 119-27; Sent. TR, R. 51, Page ID# 289-91.)

Without such an entry, he argued, the crime is merely attempted burglary. (Objections, R. 32, Page ID# 120-123.) Because Georgia law allows the government to prove "entry" when an individual merely crosses the threshold with an instrument used in a failed attempt to gain access, it sweeps in mere attempted burglaries, and is thus broader than "generic burglary" under the ACCA. (Objections, R. 32, Page ID# 119-27; Sent. TR, R. 51, Page ID# 289-91.) The district court denied Mr. Yerkes' objection and sentenced him to 180 months (15 years), the lowest sentence allowed by the ACCA's mandatory minimum. (App. at 012-018.)

Mr. Yerkes timely appealed to the United States Court of Appeals for the Sixth Circuit, again challenging the district court's finding that his Georgia burglaries count as "generic burglary" under the ACCA. *Yerkes*, 820 F. App'x at 335-36. The government argued that "entry" in "generic burglary" extends to instruments used only in a failed effort

to gain access. (*See* Gov't Br. at 20-26, App. R. 23.) But it affirmatively conceded that Georgia's definition of "entry" encompasses this broader view. (*Id*. at 6, 19.)

In a divided opinion, the panel below affirmed. Relying wholesale on the Sixth Circuit's recent decision in *United States v. Brown*, 957 F.3d 679 (6th Cir. 2020), the panel majority rejected Yerkes's argument. *Yerkes*, 820 F. App'x at 336-38. It began by explaining that under the common law, an "entry" is made when any part of the person, such as a hand, or an instrument controlled by the person crosses the threshold of a structure. *Yerkes*, 820 F. App'x at 336, 337. But, under the common law, "[i]f only an instrument entered a home, by contrast, whether that entry sufficed depended on the reason for the entry." *Id*. (*quoting Brown*, 957 F.3d at 683). If the instrument is used to commit the intended felony within, then it qualifies as an "entry" for the crime of burglary. *Id*. (*quoting Brown*, 957 F.3d at 683). (Mr. Yerkes refers to this narrow version of "entry" as the "instrument-for-crime" view.) But, if the instrument is used only to commit the breaking, *i.e.*, only in a failed attempt to gain further access to the building, then an "entry" for purposes of burglary did not occur. *Id*. (*quoting Brown*, 957 F.3d at 683). (Mr. Yerkes refers to this broad version of "entry" as the "instrument-for-attempted-entry" view.[2])

Just as the Sixth Circuit had done in *Brown*, the panel majority acknowledged that in 1986 "the majority of jurisdictions that had examined this question . . . 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." *Id.* at 337 (*quoting Brown*, 957 F.3d at 685).

[2] Judge Moore referred to this broader view as the "any-instrument" view. However, for clarity, undersigned refers to the broader view as "instrument-for-attempted-entry."

It also acknowledged that the common law in 1986 similarly limited "entry" in this manner. *Id*. at 336-37 (*quoting Brown*, 957 F.3d at 685). Yet, despite this, and without acknowledging *James*, 550 U.S. at 192 ("burglary" does not include attempted burglaries), the panel majority held that Georgia's divergent form of entry was merely a modest deviation—no more than an "'arcane distinction' that *Taylor* would disavow." *Id*. at 337 (*quoting Brown* 957 F.3d at 685). It also theorized that the instrument-for-crime view and the instrument-for-attempted-entry view both encompass a similar risk of a violent encounter, which justified expanding "generic burglary" beyond the view of the common law and the majority of states. *Id*. (*quoting Brown* 957 F.3d at 685). It thus opined that the generic definition of burglary under the ACCA, unlike the majority view of the states, and unlike the common law view, is not limited to the instrument-for-crime variant. *Id*. at 684-85.

Judge Moore dissented. She explained in detail how the majority erroneously applied this Court's well-established precedent when it broadly defined "generic burglary." *Id.* at 339-46 (Moore, J., dissenting). She also emphasized the majority's failure to address, let alone discuss, *James* when it concluded, contrary to *James*'s holding that "burglary" means completed burglary, that Georgia's divergent statute was close enough to the majority view of entry. She also criticized the majority's erroneous reliance on the perceived risk of violence in the two versions of burglary, emphasizing that Congress intended attempted burglary to be covered by the now-defunct residual clause. *Id.* at 342-44.

Judge Moore concluded that because Georgia's burglary statute expands "entry" to include circumstances when an instrument crosses the threshold in a failed attempt to gain

further admittance to the building, it includes mere attempted burglaries based on attempted entries. *Id.* at 344-45. Because attempted burglary is not generic burglary, Judge Moore concluded that Georgia's burglary statute is overbroad and that Mr. Yerkes was wrongly designated an Armed Career Criminal. *Id.* at 345-46.

During the same time period that Mr. Yerkes's case was percolating through the Sixth Circuit, that court addressed multiple cases dealing with generic burglary's "entry" element and whether "entry" under Tennessee law is broader. In each of those cases the Sixth Circuit held it was bound by prior case law to conclude that Tennessee's aggravated burglary statute is categorically generic. *See* Joint Petition for Certiorari at 8-11, *McClurg et al. v. United States*, No. 20-6220 (Oct. 30, 2020). The Sixth Circuit also often pointed to the analysis in *Brown* as instructive. Mr. Brown sought en banc rehearing, and the Sixth Circuit ordered the government to respond but ultimately denied rehearing, leaving the *Brown* opinion intact. Mr. Brown remains out of custody at this time, with a self-report date in February of 2021, and will be filing a petition for certiorari review in the coming months.

Undersigned is aware of two additional individuals whose cases raise this "entry" argument and who remain out of custody. In both instances the Sixth Circuit granted the party's motion to stay the mandate, *Gilliam v. United States*, 18-5050, R. 58-2 (6th Cir. June 19, 2020); *United States v. Morris*, 18-5183/18-5197, R. 63-2 (6th Cir July 17, 2020), which requires a finding of "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a

likelihood that irreparable harm will result from the denial of a stay." *Indiana State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (*quoting Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)). These grants of the respective motions to stay the mandate indicate the gravity of the issue at stake, and because Judge Moore has laid out the better approach in her dissenting opinion below, Mr. Yerkes requests certiorari review.

REASONS FOR GRANTING OF THE WRIT

The panel majority, the dissenting judge, and Mr. Yerkes all agree—the majority of states in 1986 defined the "entry" element of burglary as requiring either (1) that a part of the perpetrator's body crossed the threshold, or (2) that an instrument alone crossed the threshold, *so long as* the instrument is also used or intended to be used in a further crime within. *Yerkes*, 820 F. App'x at 337 (*citing Brown*, 957 F.3d at 685); *id*. at 342 (Moore, J., dissenting).

Yet, despite this acknowledgement that "the majority of jurisdictions that had examined this question . . . 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," and despite its conclusion that by 1986 the common law *also* limited "entry" in this manner, the panel majority concluded that "generic burglary" is not so limited. *Id.* at 336-37. As Judge Moore explained in detail in her dissenting opinion, that conclusion not only ignores this Court's clear, controlling precedent, but is also based on an erroneous assertion that the difference between the two types of entry by instrument is insignificant, and an erroneous, excessive, reliance on comparative levels of risk. *Id.* at 342-44 (Moore, J., dissenting).

This Court has not yet defined the outer limits of what constitutes "entry" for generic burglary under the ACCA. But it has detailed—repeatedly—the method for discerning the different contours of generic burglary. *Taylor*, 495 U.S. at 589, 598; *Stitt*, 139 S. Ct. at 406; *Quarles*, 139 S. Ct. at 1878; *see also Yerkes*, 820 F. App'x at 340 (Moore, J., dissenting). Decades ago, this Court determined that "Congress meant by 'burglary' the generic sense in which the term is now used *in the criminal codes of most states*." *Yerkes*,

820 F. App'x at 340 (Moore, J., dissenting) (*citing Taylor*, 495 U.S. at 598 (emphasis added)).

This "majority state view" approach requires the federal courts to define generic burglary by looking to the definition of burglary adopted by a majority of the states in 1986, at the time the ACCA was passed. *Id.* at 340 (*citing Taylor*, 495 U.S. at 589 ("Congress, at least at that time [1986] had in mind a modern 'generic' view of burglary, roughly corresponding to the definitions of burglary *in a majority of the States' criminal codes*" (alteration and emphasis in *Yerkes*)). This Court has continued to rely upon this "majority state view" in its two most recent cases defining different elements of "generic burglary." *Id.* (*citing Quarles*, 139 S. Ct. at 1878 (addressing element of intent for remaining-in burglary); *Stitt*, 139 S. Ct. at 406 (addressing the locational element)).

It is true, as noted by the panel majority below, that a state burglary statute need not precisely track the wording of generic burglary, which requires: an "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, 495 at 599; *Yerkes*, 820 F. App'x at 337. However, this Court has never gone so far as to define generic burglary in a way that is inconsistent with the majority view of the states from 1986. *See Taylor*, 495 U.S. at 589, 598; *Stitt*, 139 S. Ct. at 406; *Quarles*, 139 S. Ct. at 1878; *see also Yerkes*, 820 F. App'x at 340 (Moore, J., dissenting). Despite the clear, consistent line of authority from this Court, the panel majority below determined it was not bound to define generic burglary by looking at the definitions in the majority of states in 1986. *Yerkes*, 820 F. App'x at 337-39.

Instead, the panel majority expanded "generic burglary" to include the instrument-for-attempted-entry view by concluding that the difference between the instrument-for-

crime view and the instrument-for-attempted-entry view is an "arcane distinction[] embedded in the commonlaw definition [that] ha[s] little relevance to modern law enforcement concerns." *Id*. at 337 (*quoting Taylor*, 495 U.S. at 593; *and relying upon Brown*, 957 F.3d at 685). But, as even the panel majority recognized, the distinction between the two views of entry was not a mere arcane distinction embedded only in the common law; it was *also* a distinction adopted by a majority of the states in their modern codes in 1986.

The panel majority then justified its expansion of "generic burglary" by arguing that the distinction between the two views had "no relevance" to Congress' chief concern that a burglary might result in a violent encounter. *Id*. (*citing Brown*, 957 F.3d at 685). But, as Judge Moore explained in her dissenting opinion, that attempt overlooks this Court's clear holding in *James* which held that while the level of risk involved in attempted burglary might equal or even surpass that inherent in completed burglary, such fact did not pull attempted burglary into the definition of "generic burglary." *Id*. at 344. Instead, attempted burglary was covered by the now-defunct residual clause. *Id*. ("these concerns [about dangerousness] did not motivate Congress to include attempted burglary in the enumerated offenses clause—instead, they motivated Congress to cover attempted burglary through the residual clause" (*citing James*, 550 U.S. at 197, 209)).

Tellingly, the panel majority does not even mention *James*, nor attempt to reconcile its broad holding with *James*. And, "properly applying *Taylor* to discern the contours of the entry element of generic burglary does not undermine congressional intent *as to* the inclusion of burglary in *the enumerated offenses clause*." *Id*. (Moore, J., dissenting) (emphasis added). Certainly, this Court has said that attempted burglary raises the same

specter of danger as a completed burglary, *James*, 550 U.S. at 203,[3] but that is no reason to expand *generic* burglary beyond the majority state view (even more so when the common law is consistent with the majority state rule).

The Sixth Circuit's error requires the attention of this Court. Not only is it contrary to this Court's precedent, erroneously expanding the ACCA's harsh reach, but if allowed to stand, its new "close enough" analysis creates new uncertainty. What other crimes fail to comport with the majority view in the states in 1986, but are "close enough" to qualify anyway? How do courts measure what is "close enough"? Where do courts draw that line, except by their own imagined risk assessments? How can a person be on notice of how a court will draw the line, and conduct themselves accordingly? This is particularly concerning here, as the difference between an entry where the instrument is used in a further

[3] Hindsight evidences that this belief was mistaken. The majority in *James* pointed to the fact that the United States Sentencing Commission included burglary of a dwelling and attempted burglary of a dwelling in its definition of "crime of violence." *James*, 550 U.S. at 206-07. The Court explained that "'[t]he Commission, which collects detailed sentencing data on virtually every federal criminal case, is better able than any individual court to make an informed judgment about the relation between' a particular offense and 'the likelihood of accompanying violence.'" *Id*. (quotation omitted). Because of this expertise, this Court saw the Commission's view of burglary and attempted burglary "as further evidence that a crime like attempted burglary poses a risk of violence similar to that presented by the completed offense." *Id*. at 207.

Tellingly, however, the Sentencing Commission has since *removed* burglary from its "crime of violence" definition precisely because "burglaries rarely result in physical violence". USSG App. C, amend 798, at 122 (2016 Supp.) (Reason for Amendment) (*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) (also finding that attempted burglaries are significantly less likely to involve violence than completed burglary), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/248651.pdf Even in *James*, three members of this Court cautioned that any confrontation that occurs during an attempted burglary "is likely to consist of nothing more than the occupant's yelling 'Who's there?' from his window, and the burglar's running away." *James*, 550 U.S. at 226 (Scalia, J., dissenting).

crime within the structure (the "instrument-for-crime" view), and an entry where the instrument is used only in a failed attempt to gain admittance (the "instrument-for-attempted-entry" view) is an important one: It is the difference between a completed burglary and an attempted one. *Id.* at 343 (Moore, J., dissenting) ("The difference between the two is *not* a distinction without a difference.").

The residual clause, as it turns out, is inoperable because it is void for vagueness (*Johnson*, 576 U.S. at 579), but that gives courts no license to reinterpret "generic burglary" beyond what Congress intended under the enumerated offense clause, and certainly not via an approach that depends on judicial imagination. The Sixth Circuit, through its "close enough" approach, reincarnates the constitutional flaws of the residual clause under a new name.

The Court should grant certiorari review to address this overstep, and this case presents the Court with an excellent vehicle.

ARGUMENT

I. Mr. Yerkes's convictions for Georgia 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, (*cf. United States v. Prater*, 766 F.3d 501, 509 (6th Cir. 2014)), Mr. Yerkes's burglary convictions count as ACCA predicates only if Georgia 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); *see James*, 550 U.S. at 197. Thus, to count as an ACCA predicate, one's burglary conviction must be for "generic burglary," not merely attempted burglary. *See James*, 550 U.S. at 197

To determine whether Mr. Yerkes's 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 Georgia burglary convictions to the elements of generic burglary. *Id.* If the elements of the Georgia 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 Georgia elements are broader than the generic elements, and so those convictions do not count as generic burglaries.

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 locational element, *i.e.* the term "structure," as that term meant when Congress enacted the ACCA in 1986. *Stitt*, 139 S. Ct. at 405. More recently, this Court addressed yet another aspect of generic burglary, looking to how the majority of states defined burglary in 1986. *Quarles*, 139 S. Ct. 1872 (holding that generic "remaining-in" burglary "occur[s] when the defendant forms the intent to commit a crime at any time while unlawfully present in a building or structure").

Generic burglary also requires an "entry," an element unaddressed by *Stitt*, or *Qualres*, or any prior case from this Court. 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 a structure. *Yerkes*, 820 F. App'x at 336; *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. *Yerkes*, 820 F. App'x at 336 (*quoting Brown*, 957 F.3d at 683). But, as noted by the panel majority below, "[i]f only an instrument entered a home, by contrast, whether that entry sufficed depended on the reason for the entry." *Id*. (*quoting Brown*, 957 F.3d at 683).

The majority view, and the view of the common law in 1986, 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 only the instrument crosses the threshold and thus a burglary is committed. *Yerkes*, 820 F. App'x at 336 (collecting common law authority) and at 337 (acknowledging that the majority of statutes in 1986 limited entry to this view); *see also id.* at 341 (Moore, J., dissenting) (collecting state statutes

and cases from 1986). As noted above, Mr. Yerkes refers to this as the "instrument-for-crime" variant.

The minority view, in contrast, expands the definition of "entry" to situations where 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). *Yerkes*, 820 F. App'x at 336, 337. As also noted above, Mr. Yerkes will refer to this as the "instrument-for-attempted-entry" variant, as this is only an attempted entry and thus attempted burglary is committed. *Id*. at 343 (Moore, J., dissenting).

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)); *see also Yerkes*, 820 F. App'x at 336 ("later cases held that if a person used an instrument merely to undertake the 'breaking' and did not also use it to commit the additional felony (for example, the person used a drill bit only to drill through a door), the entry of that instrument alone did not suffice" (*citing Rex v. Hughes*, 168 Eng. Rep. 305 (1785); 1William Hawkins, Pleas of the Crown 162 (6th ed. 1788))).

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 Hughes*, 1 Leach at 407) (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. Indeed, "[c]ontemporary commentators recognized that the instrument-for-crime approach was the majority rule . . . ." *Yerkes*, 820 F. App'x at 341 (Moore, J., dissenting) (*citing* Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(b) (1986); Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 254–55 (3d ed. 1982) ("But in any event the rule became firmly

established that the insertion of a tool or instrument does not constitute an *entry*, within the law of burglary, if it is used merely to effect a breaking.")); s*ee also Yerkes,* 820 F. App'x at 337; *accord Brown*, 957 F.3d at 688.

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 Yerkes,* 820 F. App'x at 341 (Moore, J., dissenting) (explaining that "[i]n 1986, the majority rule among the states was the instrument-for-crime approach; nineteen states had adopted the instrument-for-crime approach and eight had adopted the [instrument-for-attempted-entry] approach," and collecting cases); *see also, 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).[4]

[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 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,

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, as noted by Judge Moore in her dissent, just four courts had interpreted "entry" 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 states were Tennessee in *State v. Crow*, 517 S.W.2d 753, 755 (Tenn. 1974); California in *People*

---

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).

v. Osegueda, 210 Cal. Rptr. 182, 185-87 (Cal. App. Dep't Super Ct. 1984); and Georgia in *Mullinnix v. State*, 338 S.E2d 752, 753 (1985).

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

There was no disagreement between the parties below—the government affirmatively argued that Georgia follows the instrument-for-attempted-entry view, such that a mere attempted entry is sufficient to qualify as a Georgia burglary. (Gov't Br., App. R. 23, pages 6, 19). At the time of Mr. Yerkes's Georgia burglary convictions, the statute defined burglary as:

> [W]hen, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof. . . .

Ga. Code Ann. § 16-7-1(a) (1980). State case law established that "Georgia law on burglary does not require a breaking, but requires proof of entry . . . ." *Mullinnix*, 338 S.E.2d at 753. However, "entry" is sufficiently proven when an instrument (and not a body part) crosses the threshold only in an effort to attempt entry. *See id*. The *Mullinnix* court explained that "[w]here as here a defendant 'breaks the plane' of the structure by removing an alarm device with an instrument stuck in the door," the government has sufficiently met the "entry" element. *Id.* The Georgia Court of Appeals did not require that the instrument be used, or intended for use, in any further felony within. *See generally*, *id*. It was enough that the instrument was used in an attempt to gain further access to the structure.

This understanding of "entry" under Georgia law remains controlling today. The current Georgia Suggested Pattern Jury Instructions explains the "entry" element as:

> To constitute the offense of burglary, it is not necessary that it be shown that a break-in occurred. To constitute "entry," the evidence need only show a ""breaking of the plane" of the structure alleged by the defendant or by any part of his/her body or by any instrument controlled by him/her.

GAJICRIM 2.62.31 (Burglary; Entry—Amplified), Volume II: Criminal Cases, 4th ed. (2019). As the legal support for this instruction, only one case is cited – *Mullinnix*. *See also Meadows v. State*, 590 S.E.2d 173, 178 (Ga. Ct. App. 2003) (*citing the Mullinnix* definition of "entry" as prevailing law). Thus, as the government concedes, in Georgia a conviction could be sustained based on the broader, minority rule, the instrument-for-attempted-entry view. (Gov't Br., App. R. 23, pages 6, 19).

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

Even though the majority view in 1986 excluded the instrument-for-attempted-entry view from the burglary definition, the panel majority concluded the distinction was meaningless. *Yerkes*, 820 F. App'x at 337 (*citing 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. *Id*. at 343 (Moore, J., dissenting). Indeed, Congress and this Court have recognized that a completed burglary and an attempted burglary are two different crimes. *Id*. Importantly, Congress rejected an amendment to define the ACCA's "violent felony" to include attempted burglary, thereby restricting the enumerated offense clause in 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; *Yerkes*, 820 F. App'x at 343 (Moore, J., dissenting).

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; *see also Yerkes*, 820 F. App'x at 344 (Moore, J., dissenting). Completed burglary of whatever sort is not the same offense as attempted burglary. *Yerkes*, 820 F. App'x at 344 (Moore, J., dissenting). 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"); *Yerkes*, 820 F. App'x at 344 (Moore, J., dissenting) (concerns about the dangers of attempted burglary "did not motivate Congress to include attempted burglary in the enumerated offenses clause—instead, they motivated Congress to cover attempted burglary through the residual clause"). 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, 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). 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—when it was not the intent of Congress.

D. Mr. Yerkes'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 Georgia 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 Georgia burglary rested upon nothing more than an attempted burglary. Sentencing courts must, in other words, presume that a conviction for Georgia burglary is *not* a generic burglary. *See James*, 550 U.S. at 198.

In sum, Georgia's unusually broad definition of "entry" renders its burglary statute overbroad. Mr. Yerkes's convictions do not qualify as generic "burglary" convictions. He is wrongly serving a sentence based on the ACCA's fifteen-year mandatory minimum.

II. This case is an excellent vehicle for addressing the contours of "entry" and the Sixth Circuit's new "close enough" approach to the ACCA.

This direct appeal presents an excellent vehicle for the Court to review the question presented. Mr. Yerkes raised and preserved the question of the scope of the "entry" element of generic burglary in the district court, and the Sixth Circuit squarely addressed it. Everyone agreed in the court below that Georgia uses the broader instrument-for-attempted-entry view of "entry" in its burglary statute, so that the only question at issue here is whether

"generic burglary" includes a view of "entry" broader than that of the common law and the majority of states in 1986.

Nor will the issue resolve on its own. Through its holding below and its denial of *en banc* rehearing in *Brown* the Sixth Circuit has made clear that it will not reevaluate its conclusion that Georgia's "entry" element is "close enough" to the generic "entry" element, and that it will continue to apply its new "close enough" approach to the enumerated offenses. *Yerkes*, 820 F. App'x at 338 (*relying on Brown*, 957 F.3d at 685-87); *see also* Joint Petition for Certiorari at 8-11, *McClurg et al. v. United States*, No. 20-6220. As it stands, only this Court can resolve the question.

Finally, a decision holding that a burglary statute using the broader instrument-for-attempted-entry form of "entry" does not qualify as generic burglary would mean that Mr. Yerkes is entitled to relief on the merits. He would not be subject to the ACCA's statutory fifteen-year minimum, but would instead be subject only to a ten-year maximum. This case presents the ideal opportunity to resolve this extremely important question.

CONCLUSION

In consideration of the foregoing, Mr. Yerkes 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 resentencing.

Respectfully submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

By: */s/ Erin Rust*
Erin P. Rust
Assistant Federal Community Defender
835 Georgia Avenue, Suite 600
Chattanooga, Tennessee 37402
(423) 756-4349