NO. ____________

IN THE UNITED STATES SUPREME COURT

_________________ TERM

DAVID EARL BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTIONS PRESENTED FOR REVIEW

Does Tennessee’s aggravated 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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JURISDICTIONAL STATEMENT

Mr. Brown was sentenced under the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e)(2)(B)(i) on November 29, 2010. He later 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 granted his § 2255 motion, but the government appealed. On April 24, 2020, the United States Court of Appeals for the Sixth Circuit reversed and remanded his case for reinstatement of the ACCA sentence. He filed a petition for en banc rehearing, which was denied on July 14, 2020.

This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1). Pursuant to Rule 13 of the Supreme Court and this Court's March 19, 2020 COVID-19 Order, the time for filing a petition for certiorari review is 150 days after the issuance of an order denying a petition for rehearing. 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, Mr. David Earl Brown, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit.

Alternatively, he asks that the Court hold this petition pending its review of *United States v. Yerkes*, 820 F. App'x 334 (2020), a direct appeal which addresses whether Georgia's definition of "entry" in its burglary statute suffers from the same overbreadth as that raised herein. In *Yerkes*, the Sixth Circuit issued a divided opinion, with Judge Moore explaining in detail how the majority erroneously reached a conclusion in conflict with this Court's precedent. *Yerkes*, 820 F. App'x at 339-46 (Moore, J. dissenting). She further explained why "generic burglary" does not encompass an "entry" made by only an instrument that crosses the threshold of a building in only a failed attempt to gain admittance. *Id*. The petition for certiorari in Mr. Yerkes case was filed November 20, 2020, and is pending before the Court as case number 20-6450.

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). "As used in this section, 'enter' means: (1) Intrusion of any part of the body; or (2) Intrusion of any object in physical contact with the body or any object controlled by remote control, electronic or otherwise." Tenn. Code Ann. § 39–14–402(b) (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

When Mr. Brown was originally convicted of being in possession of a firearm as a convicted felon, under 18 U.S.C. § 922(g)(1), he received the ACCA's 15-year mandatory minimum sentence due solely to his three, non-violent prior Tennessee aggravated burglary conviction. His sentence was later reduced to 63 months after he filed a motion under 28 U.S.C. § 2255 and *Johnson*, 135 S. Ct. 2552 (finding the residual clause of the ACCA void for vagueness[1]). During the nearly 3 years that he has been released he has lived in the community, productively, without any violations or modifications of his supervised release. After serving a substantial 63-months on this instant conviction, he successfully completed his term of supervised release, and should be a free man.

The government, however, had appealed the district court's grant of § 2255 relief pending the outcome of this Court's decision in *United States v. Stitt*, 139 S. Ct. 399 (2018). While the government appeal was pending, this Court determined in *Stitt* that Tennessee's

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

> (B) The term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that –
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*.

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.

aggravated burglary statute was not overbroad on the locational element because the term "habitation" was limited to buildings or other vehicles and structures that had been adapted for overnight accommodation. *See id*.

While acknowledging that *Stitt* foreclosed his original argument before the district court, Mr. Brown argued that Tennessee's aggravated burglary statute was nonetheless overbroad, because the "entry" element swept in mere attempted burglaries. Specifically, Mr. Brown argued that unlike generic burglary in the ACCA, a person can be convicted of "burglary" in Tennessee when they have only attempted an entry (by crossing the threshold, not with one's body, but with an instrument used only in a failed attempt at access). Thus, Mr. Brown argued, Tennessee aggravated burglary encompasses mere attempted burglary, and does not qualify as a "generic burglary" under the ACCA.

The Sixth Circuit declined to adopt Mr. Brown's position. The *Brown* panel 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. *United States v. Brown*, 957 F.3d 679, 683 (6th Cir. 2020). But, neither *Nance* nor *Brumbach* addressed the issue raised here—whether Tennessee's aggravated burglary statute is overbroad on the "entry" element. However, the *Brown* panel proceeded to discuss, in dicta, the merits due to the importance of the issue. *Id*. at 684. The Sixth Circuit would later rely on the reasoning in *Brown* in its divided *Yerkes* opinion to concluded that generic burglary extends to attempted entries. 820 F. App'x at 336-37 (*relying on Brown*, 957 F.3d at 683, 685, 687-88).

The *Brown* panel concluded that at the time the ACCA was passed in 1986, a majority of states as well as the common law limited the entry element of burglary. *Id*. at 688. To count as an "entry" for burglary either the individual's body must cross the threshold or when only an instrument crosses the threshold that instrument *must* be used or intended to be used to complete a further crime within (referred to herein as the "instrument-for-crime" variant). *Id*. at 688. Only a small minority of states defined "entry" expansively, to include those instances where an instrument crosses the threshold and 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 to the instrument-for-crime variant. *Id*. at 684-85.

Mr. Brown filed a petition for en banc rehearing. The Sixth Circuit ordered the government to respond, but ultimately denied rehearing because less than a majority of judges voted for rehearing, thus leaving the *Brown* panel opinion intact. Mr. Brown remains out of custody at this time, with a self-report date in February of 2021. Undersigned is also 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. Mr. Gilliam has a petition for certiorari pending before the Court as case number 20-6306, and Mr. Morris's petition for certiorari is pending as case number 20-6461.

During this same time period the Sixth Circuit also issued its divided opinion in *Yerkes*, 820 F. App'x 334, a direct appeal which addressed whether Georgia's definition of "entry" and whether "generic burglary" is defined by looking to the view of a majority of the states in 1986. The majority in *Yerkes* adopted wholesale the reasoning in *Brown*. *Id*. at 336-38. But, Judge Moore dissented, explaining in detail that the majority's conclusion (which rested on *Brown*) not only ignores this Court's clear, controlling precedent, but is also based on three additional errors—an erroneous view of the early common law, 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 of violence. *Id.* at 342-44 (Moore, J., dissenting). Mr. Yerkes's petition for certiorari review is pending before the Court as case number 20-6450, and Mr. Brown asks the Court to hold the instant petition pending its review of *Yerkes*.

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, a potential life sentence, 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* and *Yerkes*, 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; *Taylor v. United States*, 495 U.S. 575 (1990); *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).

The Sixth Circuit was correct that at the time the ACCA was passed in 1986 a majority of states and the common law 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 684, 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*. It is instead merely an attempted burglary. *Yerkes*, 820 F. App'x at 343 (Moore, J., dissenting). 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 below ran afoul of this Court's precedent. Despite the fact that the majority view of "entry" is the narrow view, the Sixth Circuit erroneously concluded that "generic burglary" in the ACCA is not so limited. *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*, 495 U.S. at 598. 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 Sixth Circuit 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 its relevant decisions. Here, under Tennessee law the government was only ever required to prove an attempted, but failed, entry. The ACCA, and it's harsh fifteen-year mandatory minimum sentence was wrongly applied to Mr. Brown.

This Court should grant certiorari review to define the scope of the "entry" element of generic burglary, and this case presents the Court with an excellent opportunity. Certiorari review is appropriate. Or, alternatively, it would also be appropriate to hold this case pending the Court's review of the *Yerkes* petition.

ARGUMENT

Mr. Brown'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. Brown'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. Brown'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 Tennessee burglary offenses to the elements of generic burglary. *Id.* If the elements of Tennessee burglary "are the same as, or narrower than, those of [generic burglary]," then his convictions count as "violent felony" predicates under the ACCA. *Id.* Otherwise, they do 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 in the majority of state jurisdictions 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" 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, 337 (*quoting Brown*, 957 F.3d at 684, 688); s*ee also 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.

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

[2] More recently, the 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. Brown's arguments here.

remove property from the premises or injure or threaten an occupant'" (collecting cases and statutes)). As noted above, Mr. Brown 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. Brown will refer to this as the "instrument-for-attempted-entry" variant, as this is only an attempted entry and thus only an 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)). 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, "[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.

Almost every single court that had interpreted "entry" by 1986 had endorsed the common law's narrow 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).[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:

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 California in *People v. Osegueda*, 210 Cal. Rptr. 182, 185-87 (Cal. App. Dep't Super

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State v. Faria, 60 P.3d 333, 339 (Haw. 2002), and *People v. Rhodus*, 303 P.3d 109, 113 (Colo. App. 2012).

Ct. 1984); Georgia in *Mullinnix v. State*, 338 S.E2d 752, 753 (1985) and Tennessee in *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] "As used in this section, 'enter' means: (1) Intrusion of any part of the body; or (2) Intrusion of any object in physical contact with the body or any object controlled by remote control, electronic or otherwise." Tenn. Code Ann. § 39–14–402(b) (1995). And, Tennessee's aggravated burglary statute incorporates

[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).

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, 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

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

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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 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. Brown 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* App. 19-39.

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 Sixth Circuit 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 the 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. *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"). 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) (explaining that "'several recent studies' by outside researchers find[] that burglaries rarely result in physical violence" (*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) (which further explained that attempted burglaries were significantly less likely to be violent than completed burglaries)).[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—when it was not what Congress intended.

D. Mr. Brown's convictions could be for what was nothing more than 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

[7] Available at https://www.ncjrs.gov/pdffiles1/nij/grants/248651.pdf (last visited Dec. 10, 2020).

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 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 aggravated burglary statute overbroad. Mr. Brown's convictions do not qualify as generic "burglaries." He was thus erroneously denied § 2255 relief and is wrongly facing the prospect of returning to prison to serve a 15-year mandatory minimum sentence, despite his excellent rehabilitation.

CONCLUSION

In consideration of the foregoing, Mr. Brown submits that the petition for certiorari should be granted, the order of the Sixth Circuit Court of Appeals vacated, and his case remanded for re-imposition of his non-ACCA sentence.

Alternatively, he asks that the Court hold this petition pending its review of *Yerkes*, 820 F. App'x 334, a direct appeal resulting in a divided opinion addressing whether Georgia's definition of "entry" suffers from the same overbreadth as that raised herein. The petition for certiorari in Mr. Yerkes's case is currently pending before the Court as case number 20-6450.

Respectfully submitted,

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