No. 20-_____

IN THE
SUPREME COURT OF THE UNITED STATES

SAMUEL ALEX GANN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

An essential element of generic "burglary" is that the person formed the specific intent to commit a crime at some point during the commission of the offense. *Taylor v. United States*, 495 U.S. 575, 598 (1990); *Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019). Tennessee, like a small handful of other states, has expanded its definition of burglary to omit the element of specific intent. Under this expanded definition, a person may be convicted of burglary when he or she trespasses in a building with no intent to commit a crime and, while there, commits a reckless or negligent crime, never having formed the specific intent to commit a crime at any time. *See* Tenn. Code Ann. § 39-14-402(a)(3).

Is a burglary statute that omits the element of specific intent a generic "burglary" for purposes of the Armed Career Criminal Act, 18 U.S.C. § 924(e)?

PARTIES TO THE PROCEEDINGS

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

RELATED CASES

(1) *United States v. Gann*, No. 3:19-cr-00165 / 3:18-cr-00088, District Court for the Eastern District of Tennessee. Judgment entered November 1, 2019.

(2) *United States v. Gann*, No. 19-6287, U.S. Court of Appeals for the Sixth Circuit. Order denying petition for rehearing *en banc* entered November 6, 2020.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

OTHER AUTHORITIES

No. 20-_____

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Petitioner Samuel Alex Gann respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Sixth Circuit.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Sixth Circuit affirming the district court's judgment appears at pages 1a to 5a of the appendix to this petition and is available at 827 F. App'x 566 (6th Cir. 2020). The unpublished order of the United States Court of Appeals for the Sixth Circuit denying rehearing *en banc* appears at page 6a of the appendix. The judgment of the

district court appears at pages 7a to 13a of the appendix.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals' order affirming the conviction and sentence was entered on September 29, 2020. Pet. App. 1a. The court denied rehearing *en banc* on November 6, 2020. Pet. App. 6a. This petition is timely filed under Supreme Court Rule 13.1, as extended by Order of March 19, 2020.

STATUTORY PROVISIONS INVOLVED[1]

18 U.S.C. § 922(g) states in relevant part:

> It shall be unlawful for any person –
>
> > (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . .
>
> to . . . possess in or affecting commerce, any firearm or ammunition . . . .

18 U.S.C. § 924(e)(1) states:

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

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

> (a) A person commits burglary who, without the effective consent of the property owner:

[1] Additional state statutes involved are set forth in the Appendix. *See* Pet. App. 14a-18a.

> (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;
>
> (2) Remains concealed, with the intent to commit a felony, theft or assault, in a building;
>
> (3) Enters a building and commits or attempts to commit a felony, theft or assault; 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. § 39-14-403(a) (aggravated burglary) states:

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

STATEMENT OF THE CASE

Overview. In order for a person convicted of being a felon in possession of a firearm to be sentenced to the 15-year mandatory minimum under the Armed Career Criminal Act ("ACCA"), he must have at least three prior convictions for a "serious drug offense" or "violent felony." 18 U.S.C. § 924(e). Section 924(e) defines "violent felony" to include "burglary," which means generic burglary. *Taylor v. United States*, 495 U.S. 575 (1990). Generic burglary requires proof that the person formed the specific intent to commit a crime. *Id.* at 598; *Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019).

Tennessee defines one variant of burglary to omit the specific intent element. This variant allows prosecutors to convict a person for burglary if he enters or remains in a building with no intent to commit a crime and while inside commits a reckless or negligent crime, never forming an intent to commit a crime at any time.

See Tenn. Code Ann. § 39-14-402(a)(3). This variant is uncommon, adopted by just a handful of states and colloquially known as "trespass-plus-crime." The question presented here is whether Tennessee's trespass-plus-crime offense is generic burglary.

This Court's narrow holding in *Quarles*, 139 S. Ct. at 1879, did not reach this question or foreclose its answer, and the circuits are now split. Since *Quarles*, the Seventh Circuit has held that a Minnesota burglary statute omitting the specific intent element is not generic burglary. At least four district courts in the Eighth Circuit have reached the same conclusion.

The Fifth and the Sixth Circuits, in contrast, hold that the trespass-plus-crime statutes in Texas and Tennessee are generic burglary, and are firmly entrenched in that view.

The Court should intervene to resolve the circuit split, and this case presents an excellent vehicle for doing so. The question was preserved, cleanly presented, and outcome-determinative. There is no dispute that Samuel Gann's ACCA sentence depends on his prior Tennessee convictions under Tenn. Code Ann. § 39-14-402(a)(3), while Tennessee law is clear that this variant of burglary encompasses trespass plus the commission of any theft or other felony, including one requiring only a reckless or negligent *mens rea*. Without the ACCA enhancement, Mr. Gann's advisory guideline range would be just 30 to 37 months.

The question presented here is recurring, affecting many individuals in the Fifth and Sixth Circuits subject to the ACCA's severe penalty due to trespass-plus-

crime convictions. Meanwhile, trespass-plus-crime convictions are not counted as ACCA predicates in other Circuits. Only this Court can resolve the circuit split on this important question. The Court should grant the petition and reverse.

Background. Mr. Gann pled guilty in the Eastern District of Tennessee to a single count of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). Pet. App. 7a. He was classified as an armed career criminal under the ACCA, 18 U.S.C. § 924(e), based on three prior Tennessee convictions for aggravated burglary and one prior Tennessee conviction for burglary of a building. *Id.* All three aggravated burglary convictions were for the trespass-plus-crime variant of burglary defined at Tenn. Code Ann. § 39-14-402(a)(3), which requires proof only that he "enter[ed] a [habitation] and commit[ed] or attempt[ed] to commit a felony, theft, or assault." Pet. App. 2a.[2]

Mr. Gann objected to the ACCA classification, arguing (among other things) that Tennessee's trespass-plus-crime variant of burglary, because it omits the specific intent element, does not qualify as generic burglary for ACCA purposes, so is not a predicate "violent felony." Pet. App. 2a. The district court rejected the argument, viewing itself bound by circuit precedent. *Id.* This determination triggered the ACCA's severe 15-year mandatory minimum and increased Mr. Gann's guideline

[2] *See* Collective Exhibit to Objection to PSR, Doc. 32-1 (filed in Case No. 3:18-cr-88). There are two district court case numbers in this case because Mr. Gann initially pled guilty in Case No 3:18-cr-88 to a one-count indictment charging him with being a felon in possession of a firearm in violation of § 922(g)(1). After this Court decided *Rehaif v. United States*, 139 S. Ct. 2191 (2019), he pled guilty to a one-count information in Case No. 3:19-cr-165, and the government thereafter dismissed the indictment in Case No. 3:18-cr-88. Pet. App. 7a.

range from 30 to 37 months to 180 to 210 months—a five-fold increase. *Id.* Mr. Gann was sentenced to 180 months in prison, the mandatory minimum.

On appeal, Mr. Gann again pressed his challenge to Tennessee's trespass-plus-crime variant of burglary. He showed that in 1986, when the ACCA was enacted, the vast majority of state burglary statutes required proof of the specific intent to commit a crime, reflecting burglary's long history as a quintessential specific intent crime. *See* Sixth Cir. App. Br. at 22-30; Reply Br. Add. And he showed that the vast majority of state burglary statutes today still require proof of specific intent, identifying the small handful of state burglary statutes that omit the specific intent to commit a crime. *Ibid*. He urged the court to follow the Seventh Circuit's lead in *Van Cannon v. United States*, 890 F.3d 656 (7th Cir. 2018), in which that court held, and then later reconfirmed in *Chazen v. Marske*, 938 F.3d 851, 860 (7th Cir. 2019), that Minnesota's version of trespass-plus-crime is not generic burglary because it omits the element of specific intent.

A panel of the Sixth Circuit affirmed. The panel said that it was bound to reject Mr. Gann's challenge to Tennessee's trespass-plus-crime variant under *Brumbach v. United States*, 929 F.3d 791 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 974 (2020), in which the court held that *all* Tennessee aggravated burglary offenses categorically qualify as generic burglary under its broad holding in *United States v. Nance*, 481 F.3d 882 (6th Cir. 2007), which was resurrected by *United States v. Stitt*, 139 S. Ct. 399 (2018). *See Brumbach*, 929 F.3d at 794 ("*Nance*'s holding . . . is once again the law of this circuit."). The Sixth Circuit made clear that light of *Brumbach*, *en banc*

review would be the only way the court could review any challenge to the use of a Tennessee aggravated burglary conviction as a "violent felony," no matter how meritorious. *United States v. Morris*, 812 F. App'x 341, 347 (6th Cir. 2020) (Moore, J., concurring) ("Until this court grants en banc review, we must follow *Brumbach*, no matter how 'weighty' the underlying substantive issues or how thoughtfully the issues are addressed.").

Mr. Gann filed a petition for *en banc* review of the question whether Tennessee's trespass-plus-crime variant of burglary is generic burglary, but the Sixth Circuit denied it. Pet. App. 7a. With the lower court now having directly ruled it cannot consider this question by way of panel review, and with the full court having made clear that it does not intend to revisit the question, review by this Court is the only way to resolve the circuit split on this important question.

REASONS FOR GRANTING THE PETITION

I. The circuits are split on the question whether a burglary statute that omits the element of specific intent qualifies as generic burglary.

Burglary is the quintessential specific intent crime. Without the element of the intent to commit a crime inside the building, it is nothing but a trespass. 4 William Blackstone, *Commentaries on the Laws of England* 227 (1769) ("[I]t is clear, that [the] breaking and entry must be with a felonious intent, otherwise it is only a trespass."). Tennessee has adopted a modern version of burglary that dispenses with the need to prove a person's specific intent to commit a crime, permitting instead conviction when the person unlawfully enters or remains in the building and commits any felony, theft, or assault—including those that are merely reckless, negligent, or strict

liability. Tenn. Code Ann. § 39-14-402(a)(3). This variant of burglary is known as "trespass-plus-crime." *Van Cannon v. United States*, 890 F.3d 656, 664 (7th Cir. 2018).

Four states today define burglary to include trespass-plus-crime—Michigan, Minnesota, Tennessee, and Texas.[3] In these states, prosecutors can convict a defendant for burglary by proving that he committed a reckless, negligent, or strict liability crime while trespassing. Pet. App. 18a. As the Seventh Circuit has rightly held, these burglary offenses are broader than generic burglary because they lack the element of "intent" to commit another crime inside the building. The Sixth Circuit, in contrast, holds that Tennessee's trespass-plus-crime variant of burglary is generic burglary. The Fifth Circuit, too, holds that Texas's identical trespass-plus-crime variant of burglary is generic burglary.

A. The Seventh Circuit correctly holds that a burglary statute that dispenses with the intent element is not generic burglary.

"[T]he generic, contemporary meaning of burglary" is the crime as defined by the majority of jurisdictions in 1986 when the ACCA was enacted in its current form. *Taylor v. United States*, 495 U.S. 575, 598 (1990). Drawing from a contemporary survey of the modern statutes, this Court has identified the generic meaning of burglary as having three elements: "an unlawful or unprivileged entry into, or

[3] Montana is a fourth state with a trespass-plus-crime offense, but it requires proof that the person "knowingly or purposely commits any [] offense." Mont. Code Ann. § 45-6-204(1)(b); *id.* § 45-6-204(2)(a)(ii). Michigan and North Carolina also have statutes that appear on their face to dispense with intent to commit a crime. *See* Pet. App. 18a.

remaining in, a building or other structure, with intent to commit a crime." *Id.* (citing 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(a), (c), (e), at 466, 471, 474 (1986)).

The third element, "with intent to commit a crime," corresponds to the common law definition of burglary and its status as a quintessential specific intent crime. *Taylor*, 495 U.S. at 580 n.3; *see* 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2(e) (3d ed. 2017). The difference between the common-law intent element and the third element of generic burglary is that by 1986, modern statutes had expanded the element to cover intent to commit any crime, not just intent to commit a felony. LaFave & Scott, *supra*, § 8.13(e), at 474 ("[T]he prevailing view in the modern codes is that an intent to commit any offense will do."). As noted by this Court, the prevailing usage also "approximates that adopted by the drafters of the Model Penal Code": "'A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.'" *Taylor*, 495 U.S. at 598 n.8 (quoting American Law Institute, Model Penal Code § 221.1 (1980)).

By 1986 every state's primary burglary statute required a specific intent (or purpose) to commit a crime. *See* Pet. App. 14a-18a. Most states also had lesser degrees of burglary, each likewise having an element of specific intent. *Id.* Two states, Texas and North Carolina, had a single variant of a lesser degree of burglary missing the element of specific intent. Pet. App. 16a, 17a. In all, there were 118 statutes across

all fifty states that required proof of the specific intent to commit a crime, as did several federal burglary-type statutes. *E.g.*, 18 U.S.C. § 2113(a) (defining bank burglary as "enter[ing] or attempt[ing] to enter any bank . . . with intent to commit in such bank . . . any felony affecting such bank").

By overwhelming measure, a burglary statute lacking the element of specific intent deviates sharply from the majority rule. *Cf. Descamps v. United States*, 570 U.S. 254, 259 (2013) (holding that Cal. Penal Code § 459 is not generic burglary because it "does not require the entry to have been unlawful in the way most burglary laws do"). And such a deviant statute reflects no "minor variation[] in terminology" or "modest . . . deviation[]" from generic burglary. *Quarles v. United States*, 139 S. Ct. 1872, 1180 (2019). Rather, it creates an entirely different crime, equivalent to eliminating "unlawful" from the entry element, or allowing conviction for burglarizing a vending machine. *Descamps*, 570 U.S. at 259; *Taylor*, 495 U.S. at 599. It "goes beyond the normal, 'generic' definition of burglary," and is therefore not a violent felony under the ACCA. *Descamps*, 570 U.S. at 259.

Quarles in no way undermines this conclusion. There, this Court rejected the argument that remaining-in burglary requires proof that the person formed the specific intent to commit a crime at the exact moment of the unlawful remaining in. *See Quarles*, 139 U.S. at 1879. But the Court still presumed that the specific intent must be formed *at some point*. *Id.*[4] For this reason, both before and after *Quarles*, the

[4] Quarles tried to raise the argument in the Supreme Court that the Michigan statute actually has no element of intent at all, but the Court declined to address it because Quarles "offer[ed] no support" for it and in any event had waived it. *Id.* at 1880 n.2.

Seventh Circuit has easily recognized that Minnesota's trespass-plus-crime statute is not generic burglary.

Minnesota's burglary statute defines burglary to include when a person "enters a building without consent and commits a crime while in the building." Minn. Stat. § 609.582(2)(a). Before *Quarles*, the Seventh Circuit held that this statute does not qualify as generic burglary because it "doesn't require proof of intent to commit a crime at all—not at any point during the offense conduct." *Van Cannon v. United States*, 890 F.3d 656, 664 (7th Cir. 2018). In reaching this conclusion, the court rejected the government's contention that the required intent to commit a crime is implicit in the proof of a completed crime, reasoning that "not all crimes are intentional; some require only recklessness or criminal negligence." *Id.*

After *Quarles*, the Seventh Circuit confirmed that *Van Cannon* remains good law. In *Chazen v. Marske*, 938 F.3d 851, 860 (7th Cir. 2019), the court held "with confidence" that "*Quarles* did not abrogate *Van Cannon*'s conclusion that Minnesota burglary is broader than generic burglary because the state statute does not require proof of any intent at any point." *Id.* at 860 (noting that this Court expressly declined to address the question); *id.* at 865-66 (Barrett, J., concurring) (accepting without question the continued correctness of *Van Cannon* after *Quarles*). And since then, at least four district courts in the Eighth Circuit have independently considered the question after *Quarles* and likewise concluded that Minnesota's trespass-plus-crime statute, because it requires no specific intent to commit a crime at all, is not generic burglary. *See United States v. Raymond*, 466 F. Supp. 3d 1008, 1014-15 (D. Minn.

2020); *United States v. Bugh*, 459 F. Supp. 3d 1184, 1198-1200 (D. Minn. 2020); *United States v. Sims*, No. 13-cr-109, 2020 U.S. Dist. LEXIS 230249, at *4 (D. Minn. Dec. 8, 2020); *United States v. Isaacson*, No. 07-cr-320, 2020 U.S. Dist. LEXIS 209178, at *5-6 (D. Minn. Nov. 9, 2020).[5] As the district court in *Bugh* put it, *Taylor*'s definition of generic burglary "clearly requires that the perpetrator act with the highest level of culpability: purpose, or specific intent." *Bugh*, 459 F. Supp. 3d at 1199 & n.26.

B. The Fifth and Sixth Circuits are wrong that a trespass-plus-crime statute is generic burglary.

Like Minnesota, Tennessee is one of the handful of states that have adopted a burglary statute dispensing on its face with the element of specific intent to commit a crime in addition to the trespass. *See* Pet. App. 18a. In Tennessee, a person may be convicted of aggravated burglary if, "without the effective consent of the property owner," he

> (1) Enters a . . . habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;
>
> (2) Remains concealed, with the intent to commit a felony, theft or assault, in a [habitation];

[5] Before *Quarles*, the Eighth Circuit had held that Minnesota's comparable no-intent statute was non-generic because conviction "does not require that the defendant have formed the 'intent to commit a crime' at the time of the nonconsensual entry or remaining in." *United States v. McArthur*, 850 F.3d 925, 940 (8th Cir. 2017). These courts recognize that while *Quarles* abrogated *McArthur* insofar as it determined *when* the requisite intent may be formed for the purposes of committing generic burglary, it did not consider the question whether Minnesota's statute is non-generic because it never requires the formation of the requisite intent *at all*. *E.g.*, *Raymond*, 466 F. Supp. 3d at 1014.

> (3) Enters a [habitation] and commits or attempts to commit a felony, theft or assault[.]

Tenn. Code Ann. § 39-14-402(a)(1)-(3), -403. As plain from the statute's face, the burglary offenses defined under subsections (a)(1) and (a)(2) are specific intent crimes, while the (a)(3) variant is not. *See Harrell v. State*, 593 S.W.2d 664, 670 (Tenn. Crim. App. 1979) ("When the elements of a crime include a defendant's intent to achieve some result additional to the act, the additional language distinguishes the crime from those of general intent and makes it one requiring a specific intent." (internal quotation marks and citation omitted)). Rather, the (a)(3) variant "has nothing to do with intent," and its "failure to require felonious intent at some point" is "a departure from historical antecedents." Jonathan Harwell, *Burglary at the Wal-Mart: Innovative Prosecutions of Banned Shoplifters Under Tenn. Code Ann. § 39-14-402*, 11 Tenn. J. L. & Pol'y 81, 87-88 (2016).

The most obvious evidence of subsection (a)(3)'s deviant status is that it covers unlawful entry plus commission of any form of assault, which in Tennessee can be committed recklessly. Tenn. Code Ann. §§ 39-13-101(a)(1), -102(a)(1). Reading the statute for what it says, a Tennessee court instructed a jury that it could convict a defendant for aggravated burglary based on the theory that he entered an apartment and committed reckless aggravated assault. *See State v. Bradley*, No. M2017-00376-CCA-R3-CD, 2018 Tenn. Crim. App. LEXIS 102, at *20 (Tenn. Crim. App. Feb. 15, 2018). And by encompassing reckless assault, subsection (a)(3) logically precludes any requirement of specific intent. *State v. Madkins,* 989 S.W.2d 697, 699 (Tenn. 1999) ("It is illogical that someone could intend to cause [a result] through negligence or

even recklessness.") (internal citation and quotation marks omitted)). "[O]ne cannot intend to accomplish the unintended." *Id.* ("[I]t does not make sense to say that a defendant intended to kill the victim by being reckless.").

Other realistic examples of offenses plainly covered by subsection (a)(3) are statutory rape committed by acting recklessly about the age of the victim, *State v. Clark*, 452 S.W.3d 268, 296-97 (Tenn. 2014), and criminally negligent conduct resulting in death, *see* Tenn. Code Ann. § 39-13-212. While the person may have entered without privilege and may have engaged in volitional acts leading to the commission of the offense, there is no requirement that he ever formed a specific intent to commit a crime. *Harrell*, 593 S.W.2d at 670; *see also* 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2(e) (3d ed. 2017) (contrasting the specific intent required for crimes such as burglary with general intent, the latter of which "is only the intention to make the bodily movement which constitutes the act which the crime requires)." Still, the person has "[e]nter[ed] a [habitation] and commit[ted] . . . a felony." Tenn. Code Ann. § 39-14-402(a)(3), -403.

If any question could possibly remain about what subsection (a)(3) means, the Tennessee Supreme Court has emphatically confirmed that it means just what it says. *See State v. Welch*, 595 S.W.3d 615, 619-20, 622-24 (Tenn. 2020) (holding that its language "is clear and unambiguous on its face" and rejecting vagueness challenge to the statute). It has always permitted prosecution and conviction for the conduct it plainly prohibits. Indeed, in the litigation leading up to *Welch*, in *State v. Ivey*, No. E2017-02278-CCA-R3-CD, 2018 Tenn. Crim. App. LEXIS 789 (Tenn. Crim. App. Oct.

23, 2018), the defendant argued he did not have adequate notice that (a)(3) applied to his conduct (there, shoplifting after a no-trespass notice), because it had not previously been used by prosecutors in that way. *Id.* at *3-7. The court rejected his argument, reasoning that the language of the statute is not complex, but plain, and nothing prevented such a prosecution under its terms. *Id.* at *20. The absence of reported or unreported opinions, the court said, could not override its plain meaning or narrow its stated scope, as there is no way to know what a prosecutor might fairly pursue in the future or might have pursued in the past, and no way to know "if there have been convictions for burglary based on facts similar to the facts in this case that were never appealed." *Id.* at *20 n.4.

Finally, the state's pattern jury instructions confirm that subsection (a)(3) require no proof of specific intent. They advise judges to instruct the jury, as an element of the offense, that "the defendant acted either intentionally, knowingly, or recklessly." Tenn. Pattern Jury Instr.—Criminal 14.02, pt. C (Aggravated burglary). In a footnote, the Pattern Jury Instruction Committee explains that "if Part C is charged," i.e., subsection (a)(3), "the element of entering with 'intent' is not required, and there is no conflict with the definitions of 'knowingly' and 'recklessly.'" *Id.* 14.02 n.4.[6]

[6] The jury instructions do not explicitly mention the possibility that the crime committed might have only a negligent *mens rea*, but they leave a space for setting forth the elements of the underlying offense, so would necessarily allow for prosecution of a negligent felony.

Reading the Tennessee statute for what it says, it plainly criminalizes burglary premised on the commission of a trespass plus a reckless or negligent felony. Just as with the Minnesota statute at issue in *Van Cannon* and *Chazen*, the commission of the crime itself does not necessarily supply the proof of intent to commit a crime required for generic burglary. Because the statute eliminates the element of specific intent, it is not generic burglary. Yet under current Sixth Circuit precedent, it qualifies as generic burglary, and the full court has declined to reconsider the matter.

The Fifth Circuit has reached the same incorrect conclusion about a Texas statute that criminalizes a trespass-plus-crime variant of burglary. Like Tennessee, Texas defines one variant of burglary as when a person "enters a building or habitation and commits or attempts to commit a felony, theft, or an assault." Tex. Pen. Code § 30.02(a)(3). In *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc), *cert. denied*, 2020 WL 5882400 (Oct. 5, 2020) (*Herrold II*), on remand from this Court in light of *Quarles*, the en banc Fifth Circuit held "that Section 30.02(a)(3) is generic." *Id.* at 182. Any further challenge to the statute due to its lack of specific intent is currently foreclosed. *See United States v. Wallace*, 964 F.3d 386, 390 (5th Cir. 2020), *cert. denied*, S. Ct. No. 20-5588 (2020).

As it stands, the three Circuits in which this issue is most likely to arise—the Fifth, Sixth, and Seventh—have spoken definitively, and they are split.[7] The deadlock is intractable and untenable, and this Court should step in to resolve it.

[7] The Fourth Circuit recently acknowledged that it is an "interesting argument" that, despite the Fifth Circuit's holding in *Herrold II*, the Texas statute is not actually generic burglary for purposes of 8 U.S.C. § 1101(a)(43)(G), but declined to address the

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

This case presents an excellent vehicle to resolve this important question. Samuel Gann's ACCA sentence is predicated on three prior Tennessee convictions for trespass-plus-crime. The ACCA designation catapulted his guideline range from an advisory range of 30 to 37 months up to 180 to 210 months, and he was sentenced to the mandatory minimum of 15 years. Mr. Gann challenged the use of these convictions as predicate generic burglaries both in the district court and on appeal, and both courts addressed the question on the merits. When the Sixth Circuit said it could not reconsider the question except as the full court, he petitioned the full court for rehearing, but was denied.

This issue will not resolve itself. The Court's intervention is needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

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matter because it was raised for the first time at oral argument. *United States v. Pena*, 952 F.3d 503, 511 (4th Cir. 2020). Otherwise, because the North Carolina statute, known as "breaking out of a dwelling house burglary," Pet. App. 18a, lacks both specific intent *and* the unlawful entry element of generic burglary, it is unlikely to give rise to relevant litigation in the Fourth Circuit.