

IN THE
SUPREME COURT OF THE UNITED STATES

SAMUEL ALEX GANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

LISA S. BLATT
AMY MASON SAHARIA
DAVID PETERS*
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, DC 20005

JENNIFER NILES COFFIN
Counsel of Record
Assistant Federal Defender
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street
Suite 2400
Knoxville, Tennessee 37929
(865) 637-7979

* Admitted only in Pennsylvania. Practice supervised by D.C. Bar members pursuant to the D.C. Court of Appeals Rule 49(c)(8).

TABLE OF CONTENTS

REPLY ARGUMENT.....	1
I. THE QUESTION PRESENTED DIVIDES THE COURTS OF APPEALS	2
II. THIS CASE IS AN IDEAL VEHICLE TO DECIDE THIS IMPORTANT QUESTION.....	11
CONCLUSION.....	12

TABLE OF AUTHORITIES

CASES

<i>Booker v. United States</i> ,	
810 F. App'x 443 (6th Cir. 2020)	10
<i>Bowen v. Massachusetts</i> ,	
487 U.S. 879 (1988)	9, 10
<i>Brumbach v. United States</i> ,	
929 F.3d 791 (6th Cir. 2019)	10
<i>Chazen v. Marske</i> ,	
938 F.3d 851 (7th Cir. 2019)	3
<i>Ferguson v. United States</i> ,	
139 S. Ct. 2712 (2019)	11
<i>Greer v. United States</i> ,	
140 S. Ct. 1234 (2020)	12
<i>Moncrieffe v. Holder</i> ,	
569 U.S. 184 (2013)	9
<i>Quarles v. United States</i> ,	
139 S. Ct. 1872 (2019)	2, 3
<i>State v. Bradley</i> ,	
2018 WL 934583 (Tenn. Crim. App. Feb. 15, 2018)	5
<i>State v. Goolsby</i> ,	
2006 WL 3290837 (Tenn. Crim. App. Nov. 7, 2006)	2, 4, 5, 8
<i>State v. Ivey</i> ,	
2018 WL 5279375 (Tenn. Crim. App. Oct. 23, 2018)	7, 8
<i>State v. Lawson</i> ,	
2019 WL 4955180 (Tenn. Crim. App. Oct. 8, 2019)	5, 9
<i>State v. Pope</i> ,	
427 S.W.3d 363 (Tenn. 2013)	6
<i>State v. Welch</i> ,	
595 S.W.3d 615 (Tenn. 2020)	8
<i>Taylor v. United States</i> ,	
495 U.S. 575 (1990)	1, 2, 3
<i>United States v. Boldt</i> ,	
2020 WL 5407910 (D. Minn. Sept. 9, 2020)	3
<i>United States v. Brown</i> ,	
957 F.3d 679 (6th Cir. 2020)	4, 10
<i>United States v. Bugh</i> ,	
459 F. Supp. 3d 1184 (D. Minn. 2020)	3
<i>United States v. Herrold</i> ,	
941 F.3d 173 (5th Cir. 2019)	9

<i>United States v. Isaacson,</i> 2020 WL 6566466 (D. Minn. Nov. 9, 2020).....	3
<i>United States v. Priddy,</i> 808 F.3d 676 (6th Cir. 2015)	10
<i>United States v. Raymond,</i> 466 F. Supp. 3d 1008 (D. Minn. 2020)	3
<i>United States v. Sims,</i> 2020 WL 7232254 (D. Minn. Dec. 8, 2020)	3
<i>United States v. Smith,</i> 2020 WL 6875402 (D. Minn. Nov. 23, 2020).....	3
<i>United States v. Wallace,</i> 964 F.3d 386 (5th Cir. 2020)	9
<i>Van Cannon v. United States,</i> 890 F.3d 656 (7th Cir. 2018)	1, 3, 4, 6
STATUTES	
Tenn. Code Ann. § 39-13-1002	1
Tenn. Code Ann. § 39-14-402	1
Tenn. Code Ann. § 39-14-402(a)(1).....	5, 6, 10
Tenn. Code Ann. § 39-14-402(a)(2).....	5, 6, 10
Tenn. Code Ann. § 39-14-402(a)(3).....	<i>passim</i>
Tenn. Code Ann. § 39-14-402(a)(4).....	5, 6
2021 Tenn. Laws Pub. Ch. 545 (H.B. 1338).....	1
OTHER AUTHORITIES	
American Law Institute, Model Penal Code § 2.02 (1980).....	5
Tennessee Pattern Jury Instructions, Criminal 14.02 (24th ed. 2020)	6

REPLY ARGUMENT

The government brazenly rewrites Tennessee law to avoid conceding that the decision below conflicts with Seventh Circuit authority and this Court’s ACCA decisions. The Court should reject out of hand the government’s incorrect, unsupported revision of Tennessee law, and it should grant the petition to correct the manifest error below.

This Court has held that one essential element of generic burglary under the ACCA is “intent to commit a crime.” *Taylor v. United States*, 495 U.S. 575, 598 (1990). Applying *Taylor*, the Seventh Circuit has held that Minnesota’s no-intent burglary statute is not generic burglary under the ACCA because it omits that element. *Van Cannon v. United States*, 890 F.3d 656, 664 (7th Cir. 2018). In the decision below, the Sixth Circuit treated Tennessee’s analogous no-intent burglary statute, Tenn. Code. Ann. § 39-14-402(a)(3),¹ as generic burglary, requiring Mr. Gann to serve the ACCA’s severe 15-year mandatory minimum. The resulting conflict on this federal-law question demands this Court’s review.

The government does not dispute that a conflict among the courts of appeals on this question would warrant this Court’s review. The government instead reads an intent requirement into subsection (a)(3) to distinguish the Tennessee statute

¹ On July 1, 2021, Tennessee repealed section 39-14-402 and replaced it with the substantively identical section 39-13-1002. *See* 2021 Tenn. Laws Pub. Ch. 545 (H.B. 1338). Subsection (a)(3), the provision at issue here, remains unchanged in relevant part.

from the Minnesota one. But the Tennessee statute’s text contains no such requirement. And Tennessee courts apply the statute as written, holding that no proof of intent is needed. *State v. Goolsby*, 2006 WL 3290837, at *2 (Tenn. Crim. App. Nov. 7, 2006) (“Subsection (3) . . . does not contain a mental state element . . .”). The government offers the Court no authority endorsing its atextual intent requirement.

Absent this Court’s review, individuals such as Mr. Gann will be subject to the ACCA’s 15-year mandatory minimum in the Sixth Circuit even though their prior convictions required no proof of “intent to commit a crime.” *Taylor*, 495 U.S. at 598. The same individuals in the Seventh Circuit will not. The Sixth Circuit will not fix the situation; it now summarily rejects any and all ACCA arguments involving Tennessee’s burglary statutes, no matter how meritorious. Only this Court can remedy this inequitable treatment of similarly situated defendants. The Court should grant the petition.

I. THE QUESTION PRESENTED DIVIDES THE COURTS OF APPEALS

1. *Taylor* holds that the “generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, *with intent to commit a crime.*” 495 U.S. at 598 (emphasis added). The Court has reaffirmed *Taylor*’s burglary definition on several occasions, most recently in *Quarles v. United States*, 139 S. Ct. 1872 (2019). There, the Court held that “[f]or burglary predicated on unlawful *remaining*, the defendant must have the intent to commit a crime at the time of remaining, which is any time

during which the defendant unlawfully remains.” *Id.* at 1878. By contrast, it explained, “for burglary predicated on unlawful *entry*, the defendant must have the intent to commit a crime at the time of entry.” *Id.* The Court has never suggested—not in *Quarles* or any other decision—that a state burglary statute that lacks a specific-intent requirement counts as generic burglary.

The government offers no argument in its brief in opposition that a state burglary statute that lacks any intent requirement could constitute generic burglary under *Taylor*. As the government acknowledges (BIO 12), the Seventh Circuit, applying *Taylor*, has concluded that Minnesota’s no-intent burglary statute does not qualify as generic burglary because “the Minnesota statute doesn’t require proof of intent to commit a crime *at all*—not at *any* point during the offense conduct.” *Van Cannon*, 890 F.3d at 664; *see also Chazen v. Marske*, 938 F.3d 851, 860 (7th Cir. 2019) (reaffirming *Van Cannon* after *Quarles*). The government does not argue that the Seventh Circuit’s decision is wrong.

Nor does the government take issue with the decisions of at least six district courts in the Eighth Circuit that have reached the same conclusion. *See United States v. Raymond*, 466 F. Supp. 3d 1008, 1015 (D. Minn. 2020); *United States v. Bugh*, 459 F. Supp. 3d 1184, 1202-03 (D. Minn. 2020); *United States v. Sims*, 2020 WL 7232254, at *2 (D. Minn. Dec. 8, 2020); *United States v. Smith*, 2020 WL 6875402, at *2 (D. Minn. Nov. 23, 2020); *United States v. Isaacson*, 2020 WL 6566466, at *3 (D. Minn. Nov. 9, 2020); *United States v. Boldt*, 2020 WL 5407910, at *2 (D. Minn. Sept. 9, 2020).

The Eighth Circuit has not passed on the question presented only because the government consistently has declined to challenge any of those adverse rulings on appeal, effectively cementing these district court decisions as the law of the circuit.

2. The decision below squarely conflicts with the Seventh Circuit’s decision in *Van Cannon*. Subsection (a)(3) of Tennessee’s burglary statute, like its Minnesota counterpart, contains no specific-intent requirement. Subsection (a)(3) punishes a form of unlawful-entry burglary. In relevant part, the statute provides that “[a] person commits burglary who, without the effective consent of the property owner . . . [e]nters a building and commits or attempts to commit a felony, theft or assault.” Tenn. Code Ann. § 39-14-402(a)(3). By its plain language, the statute does not require proof of intent. The court below, however, held that an “aggravated-burglary conviction under Tennessee law”—including one under subsection (a)(3)—“categorically counts as a burglary under the Supreme Court’s generic definition and so falls within [the ACCA].” Pet. App. 3a (quoting *United States v. Brown*, 957 F.3d 679, 682 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1286 (2021)).

The government’s only response is to argue that no conflict exists because the Tennessee statute *implicitly* contains an intent requirement. BIO 7-9. The government offers no support for that proposition, however, and all indicia of statutory meaning demonstrate that subsection (a)(3) lacks a specific-intent requirement.

First, Tennessee case law forecloses the government’s implicit intent requirement. In *Goolsby*, the Tennessee Court of Criminal Appeals held that the trial court

properly “instruct[ed] the jury that it could find [the defendant] guilty of the burglary charges if it found that he acted ‘either intentionally, knowingly, or recklessly.’” 2006 WL 3290837, at *2. As the court explained:

Subsections (1), (2), and (4) [of Tenn. Code Ann. § 39-14-402(a)] require that the person act “with intent to commit a felony, theft or assault.” Subsection (3), however, does not contain a mental state element: under this definition, it is burglary if a person enters any building without the effective consent of the owner and actually commits a felony, theft, or assault, rather than merely intending to do so.

Id. (citations omitted). For that reason, the *Goolsby* court rejected “the defendant’s argument that the trial court’s charge was erroneous because it allowed the jury to find him guilty of the burglary charges on a finding that he acted either intentionally, knowingly or recklessly.” *Id.* Other Tennessee courts agree. *See State v. Lawson*, 2019 WL 4955180, at *8 (Tenn. Crim. App. Oct. 8, 2019) (“The culpable mental state for burglary under subsection (a)(3) can be intentional, knowing, or reckless.”), *appeal denied* (Mar. 25, 2020); *State v. Bradley*, 2018 WL 934583, at *7 (Tenn. Crim. App. Feb. 15, 2018) (upholding subsection (a)(3) burglary conviction based on “reckless aggravated assault”); *see also* Model Penal Code § 2.02 (distinguishing between purposeful, knowing, and reckless mental states).

Second, the plain text establishes that subsection (a)(3) does not require proof of intent. As described above, the statute proscribes the commission of, or attempt to commit, “a felony, theft or assault” after entering a building without its owner’s consent. Tenn. Code Ann. § 39-14-402(a)(3). Subsection (a)(3) contains no requirement that the defendant intend to commit the felony, theft, or assault—whether at the time

of entry or any subsequent time. That omission is particularly instructive because other subsections of Tennessee’s burglary statute do contain express intent requirements. *See id.* §§ (a)(1) (“with intent to commit a felony, theft or assault”), (a)(2) (“with the intent to commit a felony, theft or assault”), (a)(4) (“with intent to commit a felony, theft or assault”). “[W]here the legislature includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that the legislature acted purposefully in the subject included or excluded.”

State v. Pope, 427 S.W.3d 363, 368 (Tenn. 2013) (internal quotation marks omitted). According to the statute’s plain terms, then, subsection (a)(3), like the equivalent Minnesota statute, “doesn’t require proof of intent to commit a crime *at all*—not at *any* point during the offense conduct.” *Van Cannon*, 890 F.3d at 664.

Third, Tennessee’s pattern jury instructions confirm that subsection (a)(3) requires no proof of specific intent. The pattern instructions define as an “essential element[]” of burglary “that the defendant acted either intentionally, knowingly, or recklessly.” Tenn. Pattern Jury Instr.—Crim. 14.02, pt. C (24th ed. 2020). An accompanying note clarifies that although “some trial judges believe that only ‘intent’ should be charged for th[e] offense” of burglary, if subsection (a)(3) “is charged, the element of entering with ‘intent’ is not required, and there is no conflict with the definitions of ‘knowingly’ and ‘recklessly.’” *Id.* at n.4. The government complains that the pattern instructions “do not have the force of law,” BIO 10 (citation omitted), but they reinforce the statute’s plain text and all relevant case law.

3. The foregoing fatally undermines the government’s argument (BIO 7-9, 11) that subsection (a)(3) requires intent. The government’s contrary argument—that the Tennessee Court of Criminal Appeals “definitive[ly]” construed subsection (a)(3) to require intent in a case having nothing to do with intent—is exceptionally misleading.

In *State v. Ivey*, a defendant who previously had been “banned by Walmart from entering its property” was convicted of subsection (a)(3) burglary after he “entered [a] Walmart building and stole meat.” 2018 WL 5279375, at *2 (Tenn. Crim. App. Oct. 23, 2018). The defendant contended that the statute was unconstitutionally vague because “he was not provided fair warning” that “an individual commit[s] burglary who, having been previously provided with a notice banning him or her from a retail store, subsequently enters that store at a time when it is open to the public and then shoplifts.” *Id.* at *3, *6. The court rejected the defendant’s vagueness challenge. *Id.* at *3. The court did not address whether subsection (a)(3) requires proof of specific intent, because the question was not at issue.

In rejecting the vagueness challenge, the *Ivey* court recited in dicta commentary from the Tennessee Sentencing Commission that appears in subsection (a)(3)’s legislative history. *See id.* at *10. The government stakes its argument for a specific intent requirement on that dicta. In particular, the government states that *Ivey* “cited commentary . . . that ‘[s]ubsection (a)(3) includes as burglary the conduct of one who enters without effective consent but, lacking intent to commit any crime at the

time of the entry, *subsequently forms that intent* and commits or attempts a felony or theft.” BIO 8 (quoting *Ivey*, 2018 WL 5279375, at *10).

The government strains to characterize this commentary as an authoritative construction of subsection (a)(3)’s intent requirement. BIO 8-10. It plainly isn’t. As the Tennessee Supreme Court recently made clear, subsection (a)(3) “is clear and unambiguous on its face,” and “no matter how illuminating legislative history is, it cannot provide a basis for departing from clear codified statutory provisions.” *State v. Welch*, 595 S.W.3d 615, 619, 624 (Tenn. 2020) (internal quotation marks omitted).

Even if commentary quoted in dicta had any precedential value, the language quoted does not suggest that the statute contains an implicit intent requirement. The government’s argument confuses the sufficient for the necessary: that subsection (a)(3) “*includes as burglary* the conduct of one who enters without effective consent but . . . subsequently forms that intent,” *Ivey*, 2018 WL 5279375, at *10 (citation omitted and emphasis added), does not mean that the statute *requires* the formation of such intent. Rather, a jury can “find [a defendant] guilty of [subsection (a)(3)] burglary charges if it [finds] that he acted ‘either intentionally, knowingly, or recklessly.’” *Goolsby*, 2006 WL 3290837, at *2.

The government’s related argument (BIO 10)—that some subsection (a)(3) convictions seemingly involve intentional conduct—is equally unpersuasive. When applying the categorical approach courts must “focus on the minimum conduct crimi-

nalized by the state statute” and “then determine whether even those acts are encompassed by the generic federal offense.” *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013).

The minimum conduct criminalized by subsection (a)(3) is (at least) reckless conduct.

The government also points out that Tennessee modeled subsection (a)(3) on a similarly worded Texas law and that at least some Texas state courts have interpreted the Texas law to require proof of specific intent. BIO 8-9 (citing *United States v. Herrold*, 941 F.3d 173, 179 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 273 (2020)). Even if true, that point is irrelevant, as Tennessee courts have made clear that “[t]he culpable mental state for burglary under subsection (a)(3) can be intentional, knowing, or reckless.” *Lawson*, 2019 WL 4955180, at *8. In any event, it is unclear that those courts have correctly construed Texas law. See *United States v. Wallace*, 964 F.3d 386, 388 (5th Cir.) (“[Defendant] cites to a handful of Texas cases that he says have upheld convictions . . . on the basis of post-entry offenses requiring only recklessness”), *cert. denied*, 141 S. Ct. 910 (2020).

4. Lastly, the government invokes this Court’s “settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law” to argue that “whether the court of appeals properly interpreted the Tennessee burglary statute’s intent requirement does not warrant this Court’s review.” BIO 11 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 908 (1988)).

The decision below, however, did not “interpret[] the Tennessee burglary statute’s intent requirement.” The Sixth Circuit refuses to answer the question whether

subsection (a)(3) burglary qualifies as generic burglary notwithstanding the lack of an intent element in its text. According to the Sixth Circuit, circuit precedent rejecting a different ACCA challenge to “Tennessee’s aggravated-burglary statute” forecloses all future ACCA challenges to any subsection of Tennessee’s burglary statutes on any grounds. *Brumbach v. United States*, 929 F.3d 791, 793 (6th Cir. 2019) (citation omitted), *cert. denied*, 140 S. Ct. 974 (2020); *see also Brown*, 957 F.3d at 689 (noting that (a)(3) is divisible from other burglary offenses); *United States v. Priddy*, 808 F.3d 676, 684-85 (6th Cir. 2015) (stating that subsections (a)(1), (a)(2), and (a)(3) qualify as generic burglary under the ACCA without considering any arguments directed at the text of subsection (a)(3) or the cases applying it); Pet. App. 4a-5a. Accordingly, there is no reasoned, on-point “construction of state law” from the Sixth Circuit to which this Court can defer. *Bowen*, 487 U.S. at 908. Absent this Court’s intervention, the Sixth Circuit will continue to decline to consider meritorious ACCA arguments, even in the face of conflicting authority, as here. *See, e.g., Booker v. United States*, 810 F. App’x 443, 445 (6th Cir.) (noting intent argument with respect to subsection (a)(3) but concluding that circuit precedent “leaves no room for raising still more arguments about Tennessee aggravated burglary”), *cert. denied sub nom. McClurg v. United States*, 141 S. Ct. 937 (2020).

II. THIS CASE IS AN IDEAL VEHICLE TO DECIDE THIS IMPORTANT QUESTION

The question presented is critically important. The consequences of classification as an armed career criminal under the ACCA are life-changing and severe. In this case, absent the 15-year ACCA enhancement, Mr. Gann would likely have been sentenced to no more than three years in prison. Pet. 4. Because of it, Mr. Gann will languish another decade-plus behind bars. Pet. 4. The differential treatment of ACCA defendants across circuits is inimical to the administration of justice. As a result of the decision below, similarly situated defendants in the Sixth, Seventh, and Eighth Circuits face drastically different sentencing consequences for analogous state-court burglary convictions.

This case is an ideal vehicle to address the federal-law issue. The government does not dispute that the question presented is dispositive. Nor could it. Three of Mr. Gann's four predicate ACCA convictions were for subsection (a)(3) burglary. Pet. 5. If the Court were to conclude, as it should, that the Tennessee statute does not count as generic burglary, Mr. Gann would no longer be subject to the ACCA's 15-year mandatory minimum sentence.

This case is also a far superior vehicle than the earlier petitions cited by the government. *See* BIO 6-7, 13. As the government recognizes (BIO 6), most of the cited petitions arising from the Sixth Circuit did not even involve the question presented but rather presented other ACCA challenges. Of the two Sixth Circuit cases that did raise the question presented, one petitioner waived the issue below, *Ferguson*

v. United States, 139 S. Ct. 2712 (2019) (No. 17-7496), and the other failed to identify the relevant circuit split, *Greer v. United States*, 140 S. Ct. 1234 (2020) (No. 19-7324). Neither defect afflicts this petition, and the Court’s denial of those petitions says nothing about the importance of the question presented. As for the other petitions cited by the government (BIO 13), none involved Tennessee’s burglary statute and each challenged the Fifth Circuit’s construction of state law. For the reasons set forth above, the Court need not resolve any question of state law to decide this petition because Tennessee courts have already confirmed what is plain from subsection (a)(3)’s text: (a)(3) does not require proof of intent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LISA S. BLATT
AMY MASON SAHARIA
DAVID PETERS*
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, DC 20005

JENNIFER NILES COFFIN
Counsel of Record
Assistant Federal Defender
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street
Suite 2400
Knoxville, Tennessee 37929
(865) 637-7979

* Admitted only in Pennsylvania. Practice supervised by D.C. Bar members pursuant to the D.C. Court of Appeals Rule 49(c)(8).