No.

In the Supreme Court of the United States

TAVARIS BETTS,
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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State's no-intent burglary statute qualifies as generic burglary under the Armed Career Criminal Act.

PARTIES TO THE PROCEEDING

Petitioner Tavaris Betts was the defendant in the district court and the appellant in the Sixth Circuit. Respondent United States of America was the plaintiff in the district court and the appellee in the Sixth Circuit.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Tavaris Betts*, 22-5006, 6th Cir. (Aug. 5, 2022) (affirming judgment); and
- *United States v. Tavaris Betts*, 3:20-cr-33, M.D. Tenn. (Dec. 17, 2021) (rejecting argument that Betts's conviction under Tenn. Code Ann. § 39-14-403 does not qualify as a violent felony for purposes of the Armed Career Criminal Act and sentencing Betts to imprisonment for 180 months);

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tavaris Betts respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is unreported but available at 2022 WL 3137710. Pet.App.2a-6a. The opinion of the district court is unreported but available at 2021 WL 5989911. Pet.App.7a-9a.

JURISDICTION

The opinion of the court of appeals was filed on August 5, 2022. Pet.App.2a. On September 13, 2022, the court denied rehearing en banc. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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).

18 U.S.C. § 924(e)(2)(B) states:

[T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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 . . . .

Tenn. Code Ann. § 39-14-403(a) (2016) states:

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

Tenn. Code Ann. § 39-14-402(a)(3) (2016) states:

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

(3) Enters a building and commits or attempts to commit a felony theft or assault . . . .

STATEMENT

This case presents an ideal vehicle to resolve a recurring and important issue under the Armed Career Criminal Act (ACCA) that this Court left open in *Quarles v. United States*, 139 S. Ct. 1872 (2019): whether a State's no-intent burglary statute qualifies as generic burglary under ACCA. This question has divided the circuits. Defendants thus are subjected to highly disparate treatment and ACCA's harsh mandatory minimum 15-year sentence depending solely on where they are sentenced. Only this Court can correct such arbitrary disuniformity.

The Seventh Circuit and district courts in Eighth Circuit consistently have held that Minnesota's no-intent burglary statute is broader than generic burglary and thus cannot serve as a predicate crime for purposes of ACCA. By contrast, within the Sixth Circuit, where petitioner Tavaris Betts was sentenced, Tennessee's substantially similar no-intent burglary statute is treated as generic burglary. Thus, convictions under Tennessee's no-intent burglary statute count for purposes of assessing

whether ACCA's mandatory minimum 15-year sentence applies.

This split calls out for the Court's immediate review. The circuits are entrenched in their respective positions. The Sixth Circuit, in particular, persists in rejecting all arguments concerning use of Tennessee's no-intent burglary statute to enhance sentences under ACCA. The Sixth Circuit refuses to entertain defendants' meritorious arguments regarding Tennessee's no-intent burglary statute, notwithstanding that this Court expressly left the question open in *Quarles*. By refusing to entertain and address the argument, the Sixth Circuit has effectively rejected it, subjecting numerous defendants in the Sixth Circuit to ACCA's mandatory minimum sentence. Two years ago, Justice Sotomayor cautioned the Sixth Circuit "to give the argument full and fair consideration in a future case." *Gann v. United States*, 142 S. Ct. 1 (2021) (Sotomayor, J., concurring in denial of certiorari). This is that future case. Yet the Sixth Circuit again refused to decide the issue. Given the Sixth Circuit's intransigence, the Court's intervention is imperative.

The conflict between the circuits is too important to ignore. Whether ACCA applies carries enormous consequences. Here, application of ACCA replaced a Sentencing Guidelines recommendation of 57-71 months with a mandatory minimum sentence of 15 years—approximately three times higher—all because a prior aggravated burglary conviction purportedly qualified Betts for treatment as an armed career criminal. The district judge acknowledged the many mitigating factors warranting a lower sentence but lamented that ACCA tied her hands. And Betts is not alone in facing this harsh treatment. Tennessee's federal courts produce a disproportionately high number of federal ACCA convictions each year. This

issue has arisen in numerous cases, and in each case the Sixth Circuit reached a conclusion that courts in the Seventh and Eighth Circuits unanimously would have rejected. This Court should grant the petition to resolve this split.

1. Petitioner Tavaris Betts was born into difficult circumstances. He was raised "in a tough neighborhood" riddled with violence and by a father with "drug issues." Pet.App.14a. Betts himself experimented with drugs at a young age, and was placed into the custody of the Department of Children's Services when he was 17 years old. Pet.App.13a-14a. His education was handicapped by "learning issues," and he never advanced past the eighth grade. Pet.App.14a. Betts also suffers from untreated mental health issues. R. 67 at 22.

At the age of 26, Betts, a felon, was arrested in possession of a firearm. Betts was indicted shortly thereafter under 18 U.S.C. §§ 922(g)(1) and 924(e)(1). R. 67 at 1. Section 922(g)(1) punishes the carrying of firearms by felons. Section 924(e)(1), enacted in ACCA, Pub. L. No. 98-473, tit. II, ch. XVIII, 98 Stat. 2185 (1984), imposes a harsh mandatory minimum 15-year sentence on recidivist offenders convicted of a federal felon-in-possession offense who have a record of three or more "serious drug" or "violent felony" convictions, 18 U.S.C. § 924(e)(1). "Violent felony" encompasses certain enumerated crimes, including "burglary." *Id.* § 924(e)(2)(B)(ii).

Betts eventually pleaded guilty without reaching a sentencing agreement with the government. R. 67 at 5. The Probation Office prepared a presentence report (PSR) stating that Betts was an armed career criminal subject to an enhanced sentence under 18 U.S.C. § 924(e) in light of three prior state felonies: a 2012 aggravated assault conviction, a 2017 robbery conviction, and a 2017

aggravated burglary conviction. R. 67 at 7-8. The PSR thus recommended, and the government sought, a term of imprisonment of 180 months—the statutorily required minimum sentence under section 924(e). R. 67 at 22.

Betts objected to the PSR Guidelines calculation and argued that he did not qualify as an armed career criminal. R. 55 at 2. Betts contended that his 2017 aggravated burglary conviction did not qualify as a "violent felony" under ACCA because Tennessee's aggravated burglary statute does not require proof of intent—a necessary element of generic "burglary" as used in ACCA. R. 55 at 2.

Tennessee defines aggravated burglary as "burglary of a habitation as defined in §§ 39-14-401 and 39-14-402." Tenn. Code Ann. § 39-14-403(a) (2016). The aggravated burglary statute cross-references and incorporates the burglary statute, section 39-14-402. The burglary statute contains several subsections, each defining a different variant of burglary. Betts was convicted under section 39-14-402(a)(3), which defines burglary as "enter[ing] a building and commit[ting] or attempt[ing] to commit a felony, theft or assault." Consistent with the language of that provision, Betts's aggravated burglary indictment alleged that, "without the effective consent of the property owner, [Betts] did enter the habitation of [C.W.] and did commit or attempt to commit a theft in violation of Tennessee Code Annotated § 39-14-403." R. 67 at 34. The plea colloquy and resulting judgment similarly omit any mention of Betts's mental state. R. 67 at 28-32, 37-46. Betts argued that Tennessee case law forecloses reading an intent requirement into Tenn. Code Ann. § 39-13-402(a)(3) and that Tennessee's pattern jury instructions confirm the statute's lack of an intent element. R. 55 at 5-7.

The district court overruled Betts's objection, reasoning it was "bound by Sixth Circuit precedent to conclude that Tennessee aggravated burglary is a crime of violence under the ACCA." Pet.App.9a (citing *United States v. Gann*, 827 F. App'x 566 (6th Cir. 2020), *cert. denied*, 142 S. Ct. 1 (2021) and *United States v. Brumbach*, 929 F.3d 791 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 974 (2020)). The district court characterized the 180-month sentence as a "tough result" that the court did not "agree with," but stressed that it did not "have any choice." Pet.App.12a. The district court concluded that its "hands [we]re tied, regardless of mitigating factors" present in the case. Pet.App.15a.

2. On appeal, a divided Sixth Circuit panel affirmed Betts's sentence. The majority, relying on *Brumbach*, 929 F.3d 791, tersely wrote that aggravated burglary in violation of Tenn. Code Ann. § 39-14-403 qualifies as an ACCA predicate felony, and refused to reconsider "published circuit precedent." Pet.App.2a-3a. *Brumbach* did not address an argument that section 39-14-402(a)(3) does not qualify as generic burglary because it lacks an intent element, and the majority did not cite any prior case deciding that question.

Judge Donald dissented. According to Judge Donald, the precedent cited by the majority did not "foreclose[] [the court's] consideration of" the issue. Pet.App.3a. Judge Donald accused the majority of "kicking the can down the road . . . and summarily treating the issue [presented] as foreclosed" when, in actuality, the court had never resolved the issue. Pet.App.3a-4a. Judge Donald traced "[t]he faulty path of foreclosure" to *United States v. Sawyers*, 409 F.3d 732 (6th Cir. 2007), which "created a slippery slope of opinions simply deferring to the analysis provided therein." Pet.App.4a. "[P]anel after panel has

mistakenly treated this issue as foreclosed without providing a reasoned basis for doing so." Pet.App.5a.

Judge Donald emphasized Justice Sotomayor's recent admonition that the Sixth Circuit should give this issue "full and fair consideration," and observed that "the majority fail[ed] to do so here," instead "entrench[ing] a troublesome precedent." Pet.App.5a-6a (quoting *Gann*, 142 S. Ct. 1 (Sotomayor, J., concurring in denial of certiorari)).

On September 13, 2022, the Sixth Circuit denied rehearing en banc over Judge Donald's dissent. Pet.App.1a.

REASONS FOR GRANTING THE PETITION

This petition is an ideal vehicle for resolving a clear split on an important and recurring question. The Seventh Circuit holds that Minnesota's no-intent burglary statute does not qualify as generic burglary for purposes of ACCA. District courts in the Eighth Circuit are in accord. The Sixth Circuit, in contrast, equates Tennessee's similar no-intent burglary statute with generic burglary. That split was outcome determinative below and resulted in Betts receiving a lengthy, mandatory minimum 15-year sentence. The circuits are committed to their respective positions. Only this Court can resolve this disuniformity.

I. The Circuits Are Split Over Whether a State Burglary Statute that Lacks a Specific-Intent Requirement Qualifies as Generic Burglary Under ACCA

The circuits are sharply divided over whether a no-intent state burglary statute qualifies as generic burglary under this Court's ACCA precedent.

1. This Court first addressed ACCA's burglary predicate in *United States v. Taylor*, 495 U.S. 575 (1990). *Taylor* answered the question whether "burglary," as used in 18 U.S.C. § 924(e), embraces any state law definition of

the crime. The Court concluded that "burglary" "must have some uniform definition independent of the labels employed by the various States' criminal codes," and adopted the crime's generic meaning: "unlawful or unprivileged entry into, or remaining in, a building or structure, *with intent to commit a crime*." 495 U.S. at 592, 599 (emphasis added).

Taylor requires courts to employ a "categorical approach" when assessing whether a prior conviction qualifies as a "violent felony." *Id.* at 600. Courts must "look[] only to the statutory definition of the prior offenses, and not to the particular facts underlying those convictions." *Id.* A "prior crime qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense." *Mathis v. United States*, 579 U.S. 500, 503 (2016).

This Court recently revisited the meaning of "burglary" in ACCA in *Quarles v. United States*, 139 S. Ct. 1872 (2019). *Quarles* involved a Michigan offense known as "remaining-in" burglary, which the Court explained "occurs when the defendant forms the intent to commit a crime at *any time* while unlawfully remaining in a building or structure." *Id.* at 1875. The question presented was whether remaining-in burglary qualifies as generic burglary or whether, instead, generic burglary requires that the intent to commit a crime be present when the defendant first enters the building. *Id.* The Court held that "generic remaining-in burglary occurs under § 924(e) when the defendant forms the intent to commit a crime at any time while unlawfully remaining in a building or structure." *Id.* at 1880.

The Court expressly reserved judgment as to whether a state statute with "no *mens rea* requirement"

corresponds to generic burglary, observing that the defendant had not preserved such an argument. *Id.* at 1880 n.2. But at no point did the Court suggest that a state burglary statute that lacks a specific-intent requirement qualifies as generic burglary. On the contrary, the Court reaffirmed that generic burglary requires proof of specific intent to commit a crime. *Id.* at 1877.

2. The Seventh Circuit has applied *Taylor* to hold that Minnesota's no-intent burglary statute—which is substantially similar to Tennessee's—does not qualify as generic burglary. *Van Cannon v. United States*, 890 F.3d 656, 664 (7th Cir. 2018). Minnesota law defines second-degree burglary to include "enter[ing] a building without consent and commit[ting] a crime while in the building." *Id.* at 663 (quoting Minn. Stat. § 609.582(2)(a)) (emphasis omitted). The Seventh Circuit held that this offense does not qualify as generic burglary under *Taylor* because "the Minnesota statute doesn't require proof of intent to commit a crime *at all*—not at *any* point during the offense conduct." *Id.* at 664. The court rejected the government's attempt to read an "implicit" intent requirement into Minnesota's no-intent burglary statute. *Id.* It also recognized that "*Taylor*'s elements-based approach does not countenance imposing an enhanced sentence[] based on *implicit* features in the crime of conviction." *Id.*

Van Cannon pre-dated *Quarles*'s holding regarding when a defendant can form the requisite intent, but the Seventh Circuit has since concluded "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*." *Chazen v. Marske*, 938 F.3d 851, 860 (7th Cir. 2019).

District courts in the Eighth Circuit consistently have reached the same conclusion. "[G]eneric burglary requires that the perpetrator intend to commit a crime; Minnesota burglary does not." *United States v. Bugh*, 459 F. Supp. 3d 1184, 1202 (D. Minn. 2020). Thus, burglary convictions under Minnesota's law "are not violent felonies for purposes of the ACCA." *Id.* at 1203; *see also United States v. Raymond*, 466 F. Supp. 3d 1008, 1015 (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) (same). The Eighth Circuit has not passed on the question presented only because the government declines to appeal adverse district court decisions on this issue in the Eighth Circuit. Thus, the law of the district courts effectively serves as the law of the circuit.

3. In stark contrast, the Sixth Circuit below concluded that Tenn. Code Ann. § 39-14-402(a)(3) qualifies as an ACCA predicate. That decision squarely conflicts with the law in the Seventh and Eighth Circuits. Section 402(a)(3) of Tennessee's burglary statute is nearly identical to Minnesota's no-intent burglary law. In relevant part, subsection (a)(3) states, "[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) (2016). The statute does not require intent, full stop. Yet the Sixth Circuit held below that an aggravated burglary conviction under Tenn. Code Ann. §§ 39-14-403 and 39-14-402(a)(3) qualifies as an "ACCA predicate felon[y]." Pet.App.2a. The decision below and *Van Cannon* are irreconcilable.

To be sure, the Sixth Circuit has never expressly analyzed whether section 402(a)(3) requires intent. Instead, for years, the court has deferred to precedents resolving a *different* ACCA challenge to Tennessee's aggravated burglary statute. Those precedents trace back to *United States v. Sawyers*, 409 F.3d 732 (6th Cir. 2007). As Judge Donald explained, "*Sawyers* was a facilitation case, not an aggravated burglary case," and addressed "whether a Tennessee conviction for facilitation of aggravated burglary constituted a 'violent felony' under the ACCA." Pet.App.4a. The court concluded that "while aggravated burglary in Tennessee meets this standard, its facilitation does not." *Sawyers*, 409 F.3d at 737. *Sawyers* suggested that aggravated burglary in Tennessee is equivalent to generic burglary, but for a panel decision to qualify as a holding, "it must be clear that the court intended to rest the judgment (if necessary) on its conclusion about the issue." *Wright v. Spaulding*, 939 F.3d 694, 701 (6th Cir. 2019). *Sawyers*'s judgment did not rest on whether aggravated burglary itself qualifies as generic burglary. The court in *Sawyers* did not consider the question presented in this case. And the court's judgment rested on ACCA's now-unconstitutional residual clause.

Sawyers's statement that Tennessee aggravated burglary qualifies as generic burglary under ACCA "must be considered dicta, not binding precedent." Pet.App.4a. Yet panel after panel has deferred to *Sawyers*'s dicta, and to its progeny citing that dicta, to conclude that an aggravated burglary under Tennessee law qualifies as a "violent felony." *See, e.g.*, *Brumbach*, 929 F.3d 791; *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015); *United States v. Nance*, 481 F.3d 882 (6th Cir. 2007). The Sixth Circuit now rejects out of hand any argument that a Tennessee aggravated burglary conviction does not satisfy ACCA,

even where, as here, it has never decided the legal argument advanced by a defendant. *See, e.g.*, *Brumbach*, 929 F.3d at 795 (refusing to consider argument "that Tennessee's definition of 'entry' is so broad that it treats an attempted burglary as a completed burglary," "[e]ven if there is merit" to the argument).

As Judge Donald emphasized, "Justice Sotomayor highlighted this mistake in a recent statement respecting the denial of certiorari." Pet.App.5a. In *Gann v. United States*, 142 S. Ct. 1 (2021), the petitioner raised the same question presented here. Justice Sotomayor observed that no Sixth Circuit decision decided or even discussed "whether Tennessee aggravated burglary comports with the requirement that generic burglary include the intent to commit a crime." *Gann v. United States*, 142 S. Ct. 1 (2021) (Sotomayor, J., concurring in denial of certiorari). She expressed the view that "further consideration by the lower courts would assist this Court's analysis" and noted that she "expect[ed] the Sixth Circuit to give the argument full and fair consideration in a future case." *Id.*

This is that future case. Yet the Sixth Circuit ignored Justice Sotomayor's admonition. As in *Gann*, the Sixth Circuit simply refused to consider a meritorious argument, summarily invoking precedent that did not even consider the argument. By denying en banc rehearing, the Sixth Circuit made clear that it has no intention of giving the argument "full and fair consideration." The Sixth Circuit has drawn the line and will not budge. Unless this Court intervenes, defendants sentenced under ACCA as a consequence of having been convicted under Tennessee's no-intent burglary statute will be treated differently than defendants facing ACCA sentences stemming from convictions under Minnesota's similar no-intent burglary statute.

4. No further percolation is needed. The Seventh and Sixth Circuits have hewed to their respective positions across myriad cases. *See, e.g.*, *supra* pp. 10-13. District courts in the Eighth Circuit have adopted the Seventh Circuit's reasoning without exception, and the government refuses to appeal those decisions. The circuits have dug in and will not move unless this Court intervenes. And with the Sixth Circuit disregarding a sitting Justice's rebuke, the Court's intervention is imperative. *See* Pet.App.5a-6a.

Other circuits are unlikely to address the issue. When ACCA was enacted, the vast majority of state burglary statutes required proof of specific intent to commit a crime. Def.'s CA6 Br. endnote 1. Today, three states in addition to Tennessee and Minnesota—North Carolina, Michigan, and Texas—have burglary statutes that, on their face, do not require proof of intent.[1] But the question presented is unlikely to arise in litigation concerning these laws.

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[1] *See* Mich. Comp. Laws Ann. § 750.110a(2) ("breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault"); N.C. Gen. Stat. § 14-53 ("enter the dwelling house of another with intent to commit any felony or larceny therein, or being in such dwelling house, shall commit any felony or larceny therein, and shall, in either case, break out of such dwelling house in the nighttime"); Tex. Penal Code Ann. § 30.02(a)(3) ("enters a building or habitation and commits or attempts to commit a felony, theft, or an assault"). Montana's trespass-plus-crime statute also dispenses with intent language, but requires proof that the trespasser "knowingly or purposely commits any [] offense," and thus is categorically different than the other no-intent statutes. *See* Mont. Code Ann. § 45-6-204(1)(b); *id.* § 45-6-204(2)(a)(ii).

North Carolina's no-intent burglary statute lacks *both* the specific intent and unlawful entry elements of generic burglary. *See* N.C. Gen. Stat. § 14-53; *Taylor*, 495 U.S. at 598 (defining elements of generic burglary). And most burglary prosecutions proceed under a separate statute, N.C. Gen. Stat. § 14-51, which requires proof of intent and "categorically matches the generic definition of burglary," *United States v. Mack*, 855 F.3d 581, 586 (4th Cir. 2017); *see United States v. Evans*, 924 F.3d 21, 27 (2d Cir. 2019). Thus, the precise issue raised here is unlikely to surface in North Carolina.

The Sixth Circuit has considered and rejected the argument that "Michigan's third-degree home invasion statute sweeps more broadly than generic burglary by criminalizing actions that do not require criminal intent." *United States v. Paulk*, 46 F.4th 399, 403 (6th Cir. 2022). But it is highly unlikely that the Sixth Circuit will extend *Paulk*'s analysis—which itself is problematic—to Tennessee's no-intent burglary statute. In *Paulk*, rather than apply the categorical approach, the court asked whether the defendant had shown "a realistic probability, not a theoretical probability, that the State would apply its statute to conduct that falls outside the generic definition of [the] crime"—*i.e.*, a no-intent crime. *Id.* at 403 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). Because the defendant had "not pointed to any Michigan caselaw involving a third-degree home invasion conviction predicated on [no-intent] fact patterns," his conviction qualified as a "violent felony" for ACCA purposes. *Id.* at 404.

The Sixth Circuit has never applied *Paulk*'s analysis in any of the countless cases considering whether Tennessee's burglary statute corresponds to generic burglary. Nor could it: on-point Tennessee caselaw demonstrates

that aggravated burglary does not require evidence of intent, negating the possibility that the court could apply *Paulk* in future cases involving Tenn. Code Ann. § 39-14-402(a)(3). *See, e.g.*, *State v. Bradley*, 2018 WL 934583, at *7 (Tenn. Crim. App. Feb. 15, 2018) (subsection (a)(3) burglary conviction based on "reckless aggravated assault"); *infra* pp. 21-22. *Paulk* thus provides no obstacle to review. If anything, *Paulk* confirms that the Sixth Circuit is bent on evading this issue as it relates to Tennessee defendants.

Texas's law, though facially a no-intent statute, has been interpreted by the Fifth Circuit to include an implicit specific-intent requirement. *See, e.g.*, *United States v. Herrold*, 941 F.3d 173, 179 (5th Cir. 2019) (citing *DeVaughn v. State*, 749 S.W.2d 62, 65 (Tex. Crim. App. 1988); *Flores v. State*, 902 S.W.2d 618, 620 (Tex. App. 1995); *Leaks v. State*, 2005 WL 704409, at *2 (Tex. App. Mar. 24, 2005). *But see United States v. Wallace*, 964 F.3d 386, 388 (5th Cir.) ("[Defendant] cites 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); *United States v. Pena*, 952 F.3d 503, 511 (4th Cir. 2020) (declining to address "interesting argument" that Texas's burglary statute is broader than generic burglary). The Fifth Circuit has adhered to this position across numerous decisions. *See, e.g.*, *United States v. Stringer*, 2022 WL 489331 (5th Cir.), *cert. denied*, 142 S. Ct. 2845 (2022); *United States v. Jackson*, 30 F.4th 269 (5th Cir.), *cert. denied*, 2022 WL 4654809 (2022); *United States v. Bell*, 2021 WL 6097508 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 2662 (2022). The question presented thus is unlikely to arise in litigation concerning Texas's burglary statute.

* * *

Presently, the two circuits where the question presented is most likely to arise are deadlocked. The split is intractable and requires this Court's attention.

II. The Question Presented Is Exceptionally Important, Constantly Recurring, and Squarely Presented

1. The question presented has enormous consequences. Betts's classification as an armed career criminal at the young age of 28 is life-changing. He currently is serving a mandatory minimum sentence of 15 years. Had the Sixth Circuit concluded that Betts's prior aggravated burglary conviction did not qualify as a "violent felony" for purposes of ACCA, the resulting Guidelines range would have been 57-71 months. *See* R. 67 at 7-8, 18. The district court itself acknowledged that mitigating factors weighed in favor of a lower sentence but lamented that ACCA tied its "hands." Pet.App.15a. Even after Betts is released, the label of armed career criminal will forever follow him, jeopardizing his chance of reintegrating into society and becoming a contributing citizen.

If Betts had been sentenced in the Seventh or Eighth Circuits, his outlook would be dramatically different. Whether a defendant is classified as an armed career criminal undoubtedly impacts sentencing. In 2021, the average sentence for offenders convicted of violating section 922(g) (felon in possession) but not sentenced under ACCA was 55 months. U.S. Sent'g Comm'n, *Quick Facts: Felon in Possession of a Firearm* (2021), bit.ly/3UQdi1V. A determination that ACCA applied catapulted the average sentence length to 186 months, more than three times higher. *Id.*

This differential treatment of criminal defendants across circuits is an affront to the administration of justice. Disuniformity is always problematic, but disparities

in sentencing undermine Congress' intentions. *See* 18 U.S.C. § 3553(a)(2)(6) ("The court, in determining the particular sentence to be imposed, shall consider—. . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."). Congress enacted its 1984 criminal reform package, of which ACCA is part, with the hope of minimizing disparities in sentencing. *See* 28 U.S.C. § 991(b)(1)(B); U.S. Sent'g Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, at i (Aug. 1991) [hereinafter *Mandatory Minimum Penalties*]. In reality, ACCA's mandatory minimum 15-year sentence creates disparities by treating dissimilar defendants and offenses the same and by effectively transferring sentencing authority to federal prosecutors. *See* Eric Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 Cardozo L. Rev. 1, 13, 18 (2010); *Mandatory Minimum Penalties*, *supra*, at ii-iii. Divergent treatment of no-intent burglary crimes under ACCA only aggravates these disparities.

2. Betts's situation is far from unique. No-intent burglary convictions are common in Tennessee. That should come as no surprise: prosecutors naturally prefer to charge offenses that do not require them to prove intent. Time and again, defendants have challenged their classification as armed career criminals on the basis that Tennessee's no-intent burglary statute cannot serve as an ACCA predicate. And time and again, the Sixth Circuit has summarily rejected the argument with no analysis. *See, e.g.*, *United States v. Gann*, 827 F. App'x 566 (6th Cir. 2020), *cert. denied*, 142 S. Ct. 1 (2021); *Lurry v. United States*, 823 F. App'x 350, 355 (6th Cir. 2020); *United States v. Schumaker*, 820 F. App'x 378, 382 (6th Cir.), *cert. denied*, *McClurg v. United States*, 141 S. Ct. 937 (2020); *Booker v. United States*, 810 F. App'x 443 (6th Cir.), *cert.*

denied, *McClurg v. United States*, 141 S. Ct. 937 (2020); *United States v. Morris*, 812 F. App'x 341 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1121 (2021).

That Tennessee's federal courts account for a shockingly disproportionate number of ACCA convictions raises the stakes. The number of ACCA convictions nationwide in 2019 was 312. U.S. Sent'g Comm'n, *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways*, at 19 (Mar. 2021), http://bit.ly/3UFzPPu. Of those 312 convictions, about *ten percent* came from Tennessee's federal courts. *See id.* at 21. In contrast, during the same year, Tennessee's federal courts accounted for just over two percent of all criminal convictions. *See* Dep't of Justice, *U.S. Attorneys' Annual Statistical Report FY 2019*, at 7, http://bit.ly/3Tx3GYM. The Sixth Circuit's habit of summarily dismissing ACCA challenges to Tennessee's no-intent burglary statute thus disproportionately affects the administration of ACCA.

3. This case is the ideal vehicle to resolve the circuit split. Betts squarely presented the question whether Tennessee's no-intent burglary statute can serve as an ACCA predicate to both the district court and the Sixth Circuit. And both the district court and the Sixth Circuit rejected the argument out of hand. That the Sixth Circuit denied Betts's petition for rehearing en banc only confirms that the Sixth Circuit is not interested in giving this issue "full and fair consideration." *Gann*, 142 S. Ct. 1 (Sotomayor, J., concurring in denial of certiorari).

Those decisions were outcome determinative. The government did not dispute below that Betts was convicted under Tenn. Code Ann. § 39-14-402(a)(3). It did not dispute that Betts's ACCA sentence depends on finding that his aggravated burglary conviction under section 39-14-402(a)(3) qualifies as a "violent felony." And it did not

dispute that had the Sixth Circuit followed the Seventh Circuit's lead, Betts would have received a lower sentence. Indeed, the district court said as much at sentencing. *See supra* p. 7.

III. The Decision Below Is Egregiously Wrong

The Court repeatedly has confirmed that an essential element of generic burglary is specific intent to commit a crime. *See United States v. Taylor*, 495 U.S. 575, 598 (1990); *Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019). The Sixth Circuit's treatment of Tennessee's no-intent burglary statute as generic burglary for purposes of ACCA flouts those holdings. Pet.App.2a-3a.

1. The text of the Tennessee statute is "clear and unambiguous on its face" and establishes that intent is not required. *See State v. Welch*, 595 S.W.3d 615, 619 (Tenn. 2020). Section 39-14-402(a)(3) proscribes "enter[ing] a building" "without the effective consent of the property owner" and "commit[ting] or attempt[ing] to commit a felony, theft or assault." Missing from the text is any mention of intent. That omission is particularly glaring because each of the other burglary variant definitions expressly requires intent. *See* Tenn. Code Ann. §§ 39-14-402(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) (citation omitted). Thus, like the analogous Minnesota statute, subsection (a)(3) must be read not to "require

proof of intent to commit a crime *at all*." *Van Cannon*, 890 F.3d at 664; *see* Jonathan Harwell, *Burglary at Wal-Mart: Innovative Prosecutions of Banned Shoplifters under Tenn. Code Ann. § 39-14-402*, 11 Tenn. J. L. & Pol'y 81, 87 (2016) ("Section (a)(3) . . . has nothing to do with intent.").

2. Even if the language of the statute were ambiguous (it is not), Tennessee case law forecloses reading an intent requirement into subsection (a)(3). The Tennessee Court of Criminal Appeals has 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.

State v. Goolsby, 2006 WL 3290837, at *2 (Tenn. Crim. App. Nov. 7, 2006) (citation omitted). The court of appeals thus rejected an argument that "the trial court's charge was erroneous because it allowed the jury to find [the defendant] guilty of the burglary charges on a finding that he acted either intentionally, knowingly or recklessly." *Id.* The court observed that "when a crime's definition is silent as to the culpable mental state, a general provision of Tennessee's statutory scheme, Tenn. Code Ann. § 39-11-301(c), supplies the requisite *mens rea*." *Id.* In such a circumstance, "intent, knowledge, *or recklessness* suffices to establish the culpable mental state." Tenn. Code Ann. § 39-11-301(c) (emphasis added).

Other Tennessee courts have affirmed *Goolsby*'s holding. For example, in *State v. Bradley*, 2018 WL 934583, at *6 (Tenn. Crim. App. Feb. 15, 2018), the court upheld a subsection (a)(3) burglary conviction based on "reckless aggravated assault." *State v. Lawson*, 2019 WL 4955180 (Tenn. Crim. App. Oct. 8, 2019), further reinforces *Goolsby*. There, the court straightforwardly stated that "[t]he culpable mental state for burglary under subsection (a)(3) can be intentional, knowing, or reckless." *Id.* at *8.

3. Tennessee's pattern jury instructions further confirm the plain meaning of Tenn. Code Ann. § 39-14-402(a)(3). The instructions define as an "essential element[]" of burglary under that subsection "that the defendant acted either intentionally, knowingly, or recklessly." Tenn. Pattern Jury Instr.–Crim. 14.02, pt. C (24th ed. 2020). An accompanying note remarks that because the elements of other variants "include entering with 'intent,' some trial judges believe that only 'intent' should be charged for this offense." *Id.* n.4. However, 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.*

* * *

The Sixth Circuit refuses to entertain these meritorious arguments. Review by this Court is the only means to address this problem and relieve defendants serving unjust sentences under ACCA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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