No. 22-542

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

REPLY BRIEF FOR PETITIONER

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The question presented—whether a State's no-intent burglary statute qualifies as generic burglary under the Armed Career Criminal Act (ACCA)—is a recurring and important question that has divided the courts. The government does not contest the importance of the question presented or dispute that the question presented is dispositive. The government (at 7-8) instead evades the circuit split by rewriting Tennessee's law to include an intent element. But Tennessee's no-intent statute is clear and unambiguous, and the Tennessee Court of Criminal Appeals repeatedly has affirmed what is obvious from the

text: section 39-14-402(a)(3) "does not contain a mental state element" and thus does not require proof of specific intent. *State v. Goolsby*, 2006 WL 3290837, at *2 (Tenn. Crim. App. Nov. 7, 2006). The government's contrary position rests on irrelevant dicta and defies credulity.

The split in authority is apparent. The Seventh Circuit and district courts in the Eighth Circuit consistently have held that Minnesota's no-intent burglary statute does not qualify as generic burglary under ACCA. The Sixth Circuit, meanwhile, treats Tennessee's substantially similar no-intent burglary statute as generic burglary. To make matters worse, the Sixth Circuit refuses to consider meritorious ACCA arguments, instead issuing laconic opinions relying on inapposite precedents—even after a sitting Justice admonished the court to give this issue "full and fair consideration." *Gann v. United States*, 142 S. Ct. 1 (2021) (Sotomayor, J., concurring in denial of certiorari).

This Court's intervention thus is imperative. Without it, criminal defendants with substantially similar records will continue to face disparate treatment. Here, had the Sixth Circuit followed the Seventh Circuit's approach and concluded that Betts's aggravated burglary conviction did not qualify as a "violent felony" under ACCA, Betts's Sentencing Guidelines range would have been 57-71 months. Instead, Betts is now serving a sentence nearly three times that length. That convictions like Betts's under Tennessee's no-intent burglary statute are routine—as the government tacitly recognizes (at 6)—only heightens the need for this Court's review. The Court should grant the petition.

I. The Decision Below Deepens a Circuit Split

The circuits are intractably divided over whether a State's no-intent burglary statute qualifies as generic burglary under ACCA.

1. Time and again, this Court has affirmed that generic burglary under ACCA requires proof of specific intent to commit a crime. *See Quarles v. United States*, 139 S. Ct. 1872, 1878 (2019); *Taylor v. United States*, 495 U.S. 575, 598 (1990). The Seventh Circuit faithfully applies those precedents to hold that Minnesota's no-intent burglary statute does not qualify as generic burglary. *Chazen v. Marske*, 938 F.3d 851, 860 (7th Cir. 2019); *Van Cannon v. United States*, 890 F.3d 656, 664 (7th Cir. 2018). District courts in the Eighth Circuit unanimously have reached the same conclusion. *United States v. Bugh*, 459 F. Supp. 3d 1184, 1202 (D. Minn. 2020) ("[G]eneric burglary requires that the perpetrator intend to commit a crime; Minnesota burglary does not."); *see* Pet. 11.[1]

In contrast, the Sixth Circuit holds that Tenn. Code Ann. § 39-14-402(a)(3) qualifies as an ACCA predicate. Pet. 12-13; Pet.App.3a. This despite Tennessee's statute being nearly identical to Minnesota's. Pet. 11. Critically, neither statute requires intent. Yet the Sixth Circuit maintains that Tennessee's (a)(3) burglary variant qualifies as generic burglary. That holding is irreconcilable

[1] The government (at 11 n.1) observes that district court decisions "cannot create a conflict warranting this Court's review." But it is the government that has ensured the absence of Eighth Circuit precedent by declining to appeal adverse decisions. Pet. 11. The government thus has tacitly accepted that Minnesota's no-intent burglary statute does not qualify as generic burglary in the Eighth Circuit. Regardless, the unanimity across district courts magnifies the sharp divide between the Sixth and Seventh Circuits.

with the law in the Seventh and Eighth Circuits and this Court's decisions.

2. The government does not defend the position that a no-intent burglary statute constitutes generic burglary. And the government (at 11) admits that the Seventh Circuit has concluded that Minnesota's no-intent burglary statute does not qualify as generic burglary under ACCA. But rather than concede the existence of a circuit split, the government (at 6, 9) contends that Tennessee's burglary statute implicitly includes an intent element. That position runs counter to all indicia of statutory meaning.

Start with statutory text, which the government all but ignores. 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." Unlike the other three burglary variants in Tenn. Code Ann. § 39-14-402, the (a)(3) variant omits any mention of intent. "[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). The Tennessee Supreme Court also has emphasized that subsection (a)(3) "is clear and unambiguous on its face," and that courts "need not look beyond the plain language of the statute to ascertain its meaning." *State v. Welch*, 595 S.W.3d 615, 623 (Tenn. 2020). Thus, under authoritative state law, subsection (a)(3) must be read not to require proof of intent.

What is more, the Tennessee Court of Criminal Appeals has affirmed the statute's plain meaning. That court has stated, in no uncertain terms, that "[t]he culpable mental state for burglary under subsection (a)(3) can be intentional, knowing *or reckless*," *State v. Lawson*, 2019

WL 4955180, at *8 (Tenn. Crim. App. Oct. 8, 2019) (emphasis added); upheld an (a)(3) conviction based on "*reckless* aggravated assault," *State v. Bradley*, 2018 WL 934583, at *6 (Tenn. Crim. App. Feb. 15, 2018) (emphasis added); and rejected the argument that a "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*," *State v. Goolsby*, 2006 WL 3290837, at * 2 (Tenn. Crim. App. Nov. 7, 2006) (emphasis added).

Tennessee's pattern jury instructions are consistent with these holdings: 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.'" Tenn. Pattern Jury Instr.–Crim. 14.02, pt. C & n.4 (24th ed. 2020). Although the pattern jury instructions do not have the force of law, *see* Br. in Opp. 10, they reinforce the statute's plain meaning.

3. Against the weight of this authority, the government (at 7-8) argues that the Tennessee Court of Criminal Appeals actually has construed the (a)(3) variant of burglary to include an intent element. That argument rests entirely on dicta stretched to the breaking point.

The government contends that the Tennessee Court of Criminal Appeals "definitive[ly] construed" subsection (a)(3) to require proof of intent in *State v. Ivey*, 2018 WL 5279375 (Tenn. Crim. App. Oct. 13, 2018). But *Ivey* has nothing to do with the question presented. There, the defendant "entered a building owned by Walmart, knowing that Walmart had revoked its consent for him to enter onto its property, and committed theft." *Id.* at *6. The defendant argued that he lacked "fair warning that entering a building open to the public without the consent of the owner and committing a theft could amount to burglary." *Id.* The court rejected that vagueness argument. At no

point did the court address the separate issue of whether subsection (a)(3) implicitly requires proof of specific intent.

The government's contrary claim (at 7) relies on language from the Tennessee Sentencing Commission included in the legislative history of Tenn. Code Ann. § 39-14-402, which the court block-quoted in *Ivey*. Specifically, the government cites the following comment: "Subsection (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." *Id.* at *10.

The government (at 7, 10) characterizes this language as a "definitive construction" that "substantially corresponds" to the definition of generic burglary. It plainly is not. After quoting the legislative history, the Tennessee Court of Criminal Appeals immediately pivoted back to the dispositive issue: "[t]he comment says nothing about the structure being or not being open to the public and therefore supports our conclusion that the legislature did not intend to define 'building' in section -404(a)(3) as a building that is not open to the public." *Ivey*, 2018 WL 5279375, at *10. The court never addressed the issue of whether subsection (a)(3) requires proof of specific intent.

The government's legislative-history argument also confuses the sufficient for the necessary: the Sentencing Commission stated only that subsection (a)(3) "*includes as burglary* the conduct of one who enters without effective consent but . . . subsequently forms that intent," *id.* (emphasis added) (citation omitted). That statement of inclusion does not mean that the statute *requires* the formation of such intent. To the contrary, as the Tennessee Court of Criminal Appeals has held on multiple

occasions, 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; *see also Lawson*, 2019 WL 4955180, at *8 ("The culpable mental state for burglary under subsection (a)(3) can be intentional, knowing, or reckless."); *Bradley*, 2018 WL 934583, at *6 (upholding subsection (a)(3) burglary conviction based on "reckless aggravated assault").

Even if the quoted legislative history had some precedential value and said what the government claims it says, the Tennessee Supreme Court has since held that the text of subsection (a)(3) "is clear and unambiguous," and "'no matter how illuminating' the legislative history is, it 'cannot provide a basis for departing from clear codified statutory provisions.'" *Welch*, 595 S.W.3d at 623-24 (citation omitted). This Court need only apply subsection (a)(3)'s plain text, definitively construed by the Tennessee Court of Criminal Appeals multiple times, to resolve this case. No "inconsistency" exists in the Tennessee cases. *Contra* Br. in Opp. 10.

The government's argument (at 9) that the subsection (a)(3) convictions mentioned above involve intentional conduct is unavailing. This Court employs the familiar "categorical approach" when evaluating whether a prior conviction qualifies as a "violent felony." *Taylor*, 495 U.S. at 600. Under that approach, 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) (emphasis added). "[T]he particular facts underlying [a] conviction[]" are irrelevant. *Taylor*, 495 U.S. at 600. Because subsection (a)(3) does not require proof of specific

intent—both by its plain text and as authoritatively interpreted by state courts—its elements are broader than those of generic burglary.

4. The government (at 8) also attempts to equate Tennessee's burglary statute with Texas's, which some courts have interpreted as including a requirement that the defendant form specific intent to commit a felony or theft at some point. Even if Tennessee's law was modeled on Texas's, Tennessee's courts have interpreted subsection (a)(3) to encompass "intentional, knowing, or reckless" conduct. *Lawson*, 2019 WL 4955180, at *8; *see* Pet. 21-22. Those decisions stand in stark contrast to Texas's interpretation of its own law. *See, e.g.*, *United States v. Herrold*, 941 F.3d 173, 179 (5th Cir. 2019) (en banc) (citing *DeVaughn v. State*, 749 S.W.2d 62, 65 (Tex. Crim. App. 1988) (en banc)). *But see 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).

5. The government lastly invokes this Court's "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law." Br. in Opp. 10 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 908 (1988)).

The Sixth Circuit, however, has never analyzed whether subsection (a)(3) includes an implicit intent requirement. Pet. 12. Instead, "panel after panel has mistakenly treated this issue as foreclosed without providing a reasoned basis for doing so." Pet.App.5a. Justice Sotomayor recently recognized this problem and wrote that she "expect[ed] the Sixth Circuit to give the argument full and fair consideration in a future case." *Gann*, 142 S. Ct. 1 (Sotomayor, J., concurring in denial of certiorari).

This is that future case. Yet the Sixth Circuit again walked the "faulty path of foreclosure" and "kick[ed] the can down the road." Pet.App.4a. The government (at 12 n.2) observes that no Sixth Circuit judge has called for en banc review to reexamine its precedents. But that only reinforces why this Court's involvement is necessary. The Sixth Circuit will not change course absent this Court's intervention. Only this Court can restore uniformity in ACCA sentencing.

II. No Barriers Impede Review of This Important Issue

The weighty consequences of the Sixth Circuit's approach call out for this Court's review. The armed career criminal designation comes with a mandatory minimum sentence of 15 years and endangers reintegration into society thereafter. Individuals should not be subjected to these consequences solely on the basis of where they were indicted. But that is the current state of play. Such differential treatment of ACCA defendants is the antithesis of the fair administration of justice.

This case presents the ideal vehicle to correct this wrong. Betts's classification as an armed career criminal hinges on the determination that his prior conviction under section 39-14-402(a)(3) constitutes a "violent felony" under ACCA. The question presented is thus outcome-determinative—a point the government does not contest.

The government (at 6) observes that this Court has denied several petitions for writs of certiorari raising various ACCA challenges to Tennessee's burglary statute. But, as the government recognizes, only three petitions actually raised the question presented. Of those, one petitioner waived the issue below, *Ferguson v. United States*, 139 S. Ct. 2712 (2019) (No. 17-7496), and another failed to identify the relevant circuit split, *Greer v. United*

States, 140 S. Ct. 1234 (2020) (No. 19-7324). The last petition generated Justice Sotomayor's concern that the Sixth Circuit has given short shrift to the question presented. *Gann*, 142 S. Ct. 1 (Sotomayor, J., concurring in denial of certiorari). This case validates that concern and warrants this Court's consideration.

The government's other cited petitions (at 12) each challenged the Fifth Circuit's construction of state law. Because Tennessee's courts have interpreted section 39-14-402(a)(3) to not require proof of intent, *supra* pp. 4, 6-7; Pet. 21-22, that is not an issue here and presents no obstacle to review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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