

No.

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**In the Supreme Court of the United States**

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ROBERT SECORD, PETITIONER

v.

UNITED STATES OF AMERICA

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

For the purposes of the Armed Career Criminal Act, generic burglary occurs when a defendant unlawfully enters a building or unlawfully remains in the building, with the intent to commit a crime.

To resolve a split among the circuits, this Court is asked whether the requisite intent to commit a crime must exist (1) when the defendant enters or decides to remain in the building, or (2) may the intent be formed at any time while the defendant is present in the building.

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## OPINIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit, denying Robert Secord a certificate of appealability, which was rendered in his case on September 21, 2017, is unreported. A copy of that order is attached in Appendix A. The Opinion and Order of the United States District Court for the Western District of Michigan, Southern Division, denying Mr. Secord relief under 28 U.S.C. § 2255 and denying a certificate of appealability is also unreported. It is attached as Appendix B.

## JURISDICTION

The Court of Appeals entered its judgment on September 21, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

### 1. 18 U.S.C. § 922(g)(1) provides:

(g) 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 ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

### 2. 18 U.S.C. § 924(e) provides:

(e) (1) 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).

(2) As used in this subsection—

\* \* \*

(B) the 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 . . .

**3. Mich. Comp. Laws § 750.110a(2) and (3) provides:**

(2) A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who 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 is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:

(a) The person is armed with a dangerous weapon.

(b) Another person is lawfully present in the dwelling.

(3) A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who 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 is guilty of home invasion in the second degree.



## STATEMENT

In 2011, pursuant to a plea agreement, Robert Secord pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). (Appx. B, *infra* at 8a). The Presentence Investigation Report determined that Mr. Secord was subject to a 180-month mandatory minimum sentence under 18 U.S.C. § 924(e), the Armed Career Criminal Act (“ACCA”), based in part on his two prior convictions for first degree and second degree home invasion in violation of Mich. Comp. Laws § 750.110a(2) and (3). (App. B, *infra*, at 8a-9a). Mr. Secord’s guidelines range was 324 to 405 months, based on a total offense level of 36 and a criminal history category of VI. (App. B, *infra* at 9a). The district court sentenced Mr. Secord to 240 months, based on the government’s motion for a downward departure, and imposed a five-year term of supervised release. (App. B, *infra* at 9a). Mr. Secord filed a notice of appeal in the United States Court of Appeals for the Sixth Circuit, but later filed a motion to withdraw his appeal. (App. B, *infra* at 9a). Subsequently, the district court reduced Mr. Secord’s sentence two times, first to 204 months and then to 144 months, based on government motions. (App. B, *infra* at 9a).

On February 16, 2017, Mr. Secord filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. (App. B, *infra* at 9a). He argued that in light of the Supreme Court’s recent decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), his prior two convictions for home invasion were not violent felonies, and consequently he did not qualify for the enhanced penalties under the ACCA. (App. B, *infra* at 10a).

The district court denied Mr. Secord's § 2255 motion. (App. B, *infra* at 10a-12a). The district court held that Mr. Secord's prior conviction for home invasion constituted generic burglary under the ACCA. (App. B, *infra* at 10a-12a). In doing so, the district court relied on *United States v. Quarles*, 850 F.3d 836 (6th Cir. 2017), which held that Michigan home invasion constitutes generic burglary and therefore is a predicate violent felony for purposes of the ACCA. (App. B, *infra* at 10a-12a).

The district court denied Mr. Secord's motion on the merits. (App. B, *infra* at 13a-16a). The district court also indicated that Mr. Secord's motion failed because it was procedurally defaulted and because of an appeal waiver contained in his plea agreement. (App. B, *infra* at 13a-16a). The district court denied the certificate of appealability (COA). (App. B, *infra* at 16a).

Mr. Secord sought a COA from the Sixth Circuit Court of Appeals. (App. A, *infra* at 2a). The Sixth Circuit denied Mr. Secord's request for the COA, again relying on *Quarles*. (App. A, *infra* at 4a-5a). The court acknowledged that there is a circuit split regarding language in the Michigan home invasion statute that impacts its classification as an ACCA predicate. (App. A, *infra* at 5a). Despite that, the court stated that reasonable jurists could not find the issue debatable, stating that “[w]hile other circuits may interpret the language of Michigan’s home invasion statute differently, *Quarles* remains binding in this circuit.” (App. A, *infra* at 5a).

On November 24, 2017, a petition for a writ of certiorari was filed in *Quarles*, the case both the district court and the court of appeals relied on in denying Mr. Secord's § 2255 motion. Petition for a Writ of Certiorari, *Jamar Alonzo Quarles v.*

*United States*, No. 17-778 (Nov. 24, 2017). The issue in *Quarles* is the same as in this case, whether Michigan home invasion qualifies as generic burglary under the ACCA. Specifically, the question presented in *Quarles* is as follows:

Whether (as two circuits hold) *Taylor*'s definition of generic burglary requires proof that intent to commit a crime was present at the time of unlawful entry or first unlawful remaining, or whether (as the court below and three other circuits hold) it is enough that the defendant formed the intent to commit a crime at any time while "remaining in" the building or structure.

Petition for a Writ of Certiorari, *Jamar Alonzo Quarles v. United States*, No. 17-778 (Nov. 24, 2017).

Mr. Quarles' petition is currently pending in this Court.

## REASONS FOR GRANTING THE WRIT

### I. A split among the circuits

There is a split among the circuits regarding the interpretation of the elements of generic burglary, which impacts whether a particular state statute qualifies as an ACCA predicate.

The ACCA has drastic implications. It requires a mandatory minimum 15-year sentence for a defendant convicted of unlawfully possessing a firearm who has three prior convictions for any crime of violence or serious drug offenses. A crime of violence includes “burglary.” 18 U.S.C. 924(e)(2)(B)(ii). This Court held that the ACCA uses the term burglary in the generic sense. *Taylor v. United States*, 495 U.S. 575, 598, 110 S. Ct. 2143, 2158 (1990). To qualify as generic burglary, the state statute must have all of the following elements: “[1] an unlawful or unprivileged entry into, or remaining in, [2] a building or other structure, [3] *with intent to commit a crime.*” *Taylor*, 495 U.S. at 599, 110 S. Ct. at 2158 (emphasis added). The prior conviction “qualifies as an ACCA predicate only if the statute’s elements are the same as, or narrower than, those of the generic offense.” *Descamps v. United States*, 570 U.S. 254, 133 S. Ct. 2276, 2281, (2013).

Mr. Secord’s predicate offense for ACCA designation was home invasion under Mich. Comp. Laws §§ 750.110a(2) and (3). Under the Michigan statute, home invasion second degree can be committed in several ways, if a person does any of the following acts:

breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without

permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who 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...

Mich. Comp. Laws § 750.110a(3)

Home invasion first degree is the same offense with the added aggravated circumstances that a perpetrator is either armed with a dangerous weapon or that another person is lawfully present in the dwelling. Mich. Comp. Laws § 750.110a(2).

One of the ways to commit Michigan's home invasion is to break and enter a dwelling and commit a crime while inside. Mich. Comp. Laws § 750.110a(3). This variant of home invasion does not require that a perpetrator have the intent to commit a crime at the time he entered the dwelling or unlawfully remained in the dwelling. In *Quarles*, which the district court and the court of appeals relied on in denying Mr. Secord's § 2255 petition, the Sixth Circuit held that "generic burglary, as defined in *Taylor*, does not require intent at entry; rather the intent can be developed while 'remaining in.'" *United States v. Quarles*, 850 F.3d 836, 840 (6th Cir. 2017). It further held that a defendant who enters a building and while inside commits a crime will necessarily have remained in the building. *Id.* Under this ruling, a mere trespasser who commits a crime while in a building is transformed into a common burglar. A person who enters a shuttered hunting cabin to get out of the cold and decides to take something valuable while he is in the cabin is treated as a burglar, and may be subject to 15-year mandatory minimum sentence if he later illegally possesses a firearm.

*Quarles* acknowledged a circuit split over whether the intent to commit a crime

must be present at the time the defendant unlawfully enters or initially remains in a building or can be developed at any point. *Quarles*, 850 F.3d at 840. “Essentially, the circuit split hinges on whether the ‘remaining in’ language allows for the development of intent at any point or whether the intent must exist at entry.” *Quarles*, 850 F.3d at 840.

The Fifth and Eighth Circuits have held that to qualify as generic burglary, the statute must have as an element that the defendant intended to commit a crime at the time he unlawfully entered or first unlawfully remained in the building. See *United States v. Constante*, 544 F.3d 584, 585 (5th Cir. 2008); *United States v. Herrera-Montes*, 490 F.3d 390, 392 (5th Cir. 2007); *United States v. Bernel-Aveja*, 844 F.3d 206, 216 (5th Cir. 2016); *United States v. McArthur*, 850 F.3d 925 (8th Cir. 2017). However, four other circuits—the Fourth, Sixth, Ninth, and Tenth—have held that contemporaneous intent is not required. See *United States v. Bonilla*, 687 F.3d 188, 194 (4th Cir. 2012), *United States v. Quarles*, 850 F.3d 836, 840 (6th Cir. 2017); *United States v. Reina-Rodriguez*, 468 F.3d 1147, 1155 (9th Cir. 2006), overruled on other grounds by *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007); *United States v. Dunn*, 96 F. App’x 600, 605 (10th Cir. 2004). Review by this Court is necessary to resolve the circuit split.

**II. The issue raised in this case is of exceptional importance and has broad implications in achieving fairness in sentencing through the uniform application of the Armed Career Criminal Act**

The issue involved is an important one, and it has far-reaching consequences. The ACCA designation has a significant implication, requiring a 15-year mandatory

minimum sentence. Burglary is a frequently-used ACCA predicate. Gov't Pet. For Reh'g En Banc at 6, *United States v. Morris*, No. 14-3336, 836 F.3d 931 (8th Cir. Dec. 14, 2016). The circuit split results in different treatment of the same burglary offenses in different jurisdictions. For example, a defendant with a prior conviction for a Texas burglary is an armed career criminal in the Fourth and Tenth Circuits, but not in the Fifth Circuit. Compare *Bonilla*, 687 F.3d at 193, and *Dunn*, 96 F. App'x at 605, with *Constante*, 544 F.3d at 587. The inconsistent treatment of the same state burglary offenses is potentially much wider. At least 29 jurisdictions have burglary statutes that include "remaining in" language. *Bernel-Aveja*, 844 F.3d at 229-230 (Owen J., concurring). At least 14 of these do not have as an element the timing requirement. *Id.* at 237. Thus, at least 14 different state offenses may or may not be ACCA predicates, simply depending on the jurisdiction in which a defendant is sentenced under federal law. *Id.* at 219 (Higginbotham J., concurring).

A review of this Court is necessary to resolve the circuits' split and ensure consistent application of the ACCA across jurisdictions.

## CONCLUSION

This petition for writ of certiorari should be granted and consolidated with the petition in *Quarles v. United States*, No. 17-778, or in alternative, held pending this Court's decision in *Quarles*.

Respectfully submitted,

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Dated: December 19, 2017



**CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 33**

I hereby certify that this petition for writ of certiorari complies with the type-volume limitation set forth in Rule 33(2). This petition contains 11 pages, complied with 12-point Century Schoolbook proportionally spaced type.

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