NO. _____

IN THE UNITED STATES SUPREME COURT

_____ TERM

SHANNON FERGUSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

Does the *Taylor v. United States* definition of generic burglary in the Armed Career Criminal Act, 18 U.S.C. § 924(e) (the "ACCA") (*i.e.*, the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime" 495 U.S. 575, 599 (1990)) extend to burglary statutes that do not require an intent to commit a further crime at the time of entry (as held by the Fourth Circuit in *United States v. Bonilla*, 687 F.3d 188 (4th Cir. 2012), and the Sixth Circuit below in reliance upon *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015)); or does it only encompass burglary statutes that require such intent at the time of entry (as held by the Fifth Circuit in *United States v. Herrera-Montes*, 490 F.3d 390 (5th Cir. 2007), and the Eighth Circuit in *United States v. McArthur*, 850 F.3d 925 (8th Cir. 2017))?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. District Court Cases:

State Court Cases:

Federal Statutes:

State Statutes:

Rules:

United States Sentencing Guidelines:

Other Sources:

OPINIONS BELOW

1. Order, United States Court of Appeals for the Sixth Circuit, *United States of America v. Shannon Ferguson*, Court of Appeals No. 15-6303, denying Petition for En Banc Rehearing, Oct. 19, 2017.

2. Opinion, United States Court of Appeals for the Sixth Circuit, *United States of America v. Shannon L. Ferguson*, Court of Appeals No. 15-6303, affirming the district court, Aug. 22, 2017.

3. Judgment, United States District Court for the Eastern District of Tennessee at Chattanooga, *United States of America v. Shannon L. Ferguson*, District Court No. 1:14-cr-61, sentencing Mr. Ferguson as an Armed Career Criminal, Oct. 8, 2015.

JURISDICTIONAL STATEMENT

Mr. Ferguson was sentenced under the ACCA on October 8, 2015. He appealed, challenging the application of the ACCA and its 15-year mandatory minimum sentence on November 9, 2015. The United States Court of Appeals for the Sixth Circuit entered its Order affirming the judgment on August 22, 2017. The Sixth Circuit subsequently denied Mr. Ferguson's Petition for *En Banc* Rehearing on October 19, 2017. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1). Rule 13(3) of the Supreme Court allows for ninety days within which to file a Petition for a Writ of Certiorari after entry of an order denying a request for rehearing by the Appellate Court. Accordingly, this Petition is timely filed.

Pursuant to Rule 29.4(a), appropriate service is made to the Solicitor General of the United States and Assistant United States Attorney Luke A. McLaurin, who appeared in the United States Court of Appeals for the Sixth Circuit on behalf of the United States Attorneys Office, a federal office which is authorized by law to appear before this Court on its own behalf.

Petitioner Ferguson respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit. In that Opinion, the Sixth Circuit determined that Mr. Ferguson

qualified for sentencing under the ACCA because of his three prior burglary convictions under Tenn. Code Ann. § 39-14-402.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause, Fifth Amendment, United States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

18 U.S.C. § 924(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).

18 U.S.C. § 924(e)(2)(B):

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 . . .

Tenn. Code Ann. § 39-14-402(a):

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

> (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;
>
> (2) Remains concealed, with the intent to commit a felony, theft or assault, in a building;
>
> (3) Enters a building and commits or attempts to commit a felony, theft or assault; or
>
> (4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.

Tenn. Code Ann. § 39-14-402(c):

Burglary under subdivision (a)(1), (2) or (3) is a Class D felony.

Tenn. Code Ann. § 39-14-402(d):

Burglary under subdivision (a)(4) is a Class E felony.

STATEMENT OF THE CASE AND FACTS

This is an appeal from the district court's determination that Mr. Ferguson qualified for the application of a mandatory minimum sentence of fifteen years incarceration pursuant to the ACCA, 18 U.S.C. § 924(e). The Court of Appeals affirmed the district court's determination that Mr. Ferguson's three prior Tennessee burglary convictions under Tenn. Code Ann. § 39-14-402 qualified as "violent felonies," as that term is defined in 18 U.S.C. § 924(e)(2)(B). This case addresses a circuit split regarding whether this Tennessee burglary statute lacks the required element of intent, and thus cannot qualify as a generic burglary under *Taylor*, 495 U.S. 575.

Mr. Ferguson plead guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). (Report and Recomm., R. 28, Page ID# 87-88); (Minute Entry, R. 27, Page ID# 86). The United States Probation Office prepared a Presentence Investigation Report ("PSR"), which concluded that Mr. Ferguson qualified for sentencing under the ACCA. (PSR, R. 30, Page ID# 94, ¶ 18). While the PSR did not specifically identify which prior convictions it relied upon to apply the enhancement, the Government argued that all five of Mr. Ferguson's prior Tennessee aggravated burglary convictions and each of his three prior Tennessee burglary convictions

qualified as violent felonies. (Gov't Br., R. 37, Page ID# 115-16); (see also PSR, R. 30, Page ID# 95, 98, 99, ¶¶ 27, 37-39). While the district court originally concluded that Mr. Ferguson's five aggravated burglary convictions all qualified as violent felonies (Sent. Tr., R. 53, Page ID# 573-74), the Court of Appeals reversed this portion of the judgment, because it had recently held that Tennessee's aggravated burglary statute (Tenn. Code Ann. § 39-14-403) is overbroad and indivisible, and thus does not qualify as a "violent felony" under the ACCA (Opinion, App. R. 40-2, Page ID# 2 (citing *United States v. Stitt*, 860 F.3d 854, 860-61 (6th Cir. 2017) (en banc))). Accordingly, Mr. Ferguson's petition for certiorari is limited to his prior burglary convictions under Tenn. Code Ann. § 39-14-402.

At his sentencing the Government provided a true bill/indictment and judgement for each of his three burglary convictions, Case No. 273095, noted in the PSR at paragraph 37(4) (Gov't Br., Ex. B, R. 37-2, Page ID# 147, 149-50), Case No. 278191, noted in the PSR at paragraph 39(2) (*id.* at Page ID# 151-153), and Case No. 278306, noted in the PSR at paragraph 39(5) (*id.* at Page ID# 154-56). The first conviction, Case No. 273095 was also discussed in a transcript provided by the Government. (Gov't Br., Ex. C, R. 37-3). For the second and third convictions, Case Nos. 278191 and 273095, Mr. Ferguson

was indicted on a charge of aggravated burglary, but plead guilty to just burglary. (Ex. B, R. 37-2, Page ID# 151-56). The Government presented no additional *Shepard* documents related to the second and third burglary convictions. Each judgment notes an indicted charge, a charge of conviction, a sentence, a conviction date, and other miscellaneous information. (*Id.* at Page ID# 151, 154). For both the second and third burglary convictions, the judgment indicates only that the defendant was charged with "aggravated burglary," a Class C felony, but plead guilty to "burglary," a Class D felony. (*Id.* at Page ID# 151, 154). The judgement does not identify which specific subsection of the burglary statute Mr. Ferguson pled guilty to. (*Id.*)

Mr. Ferguson objected to the use of these three convictions as ACCA predicates. (Notice of Objections, R. 32, Page ID# 108); (Response, R. 43, Page ID# 189, 192-201). His objection was based on the issue of intent. (*Id.* at Page ID# 192-201). Tennessee's burglary statute, Tenn. Code Ann. § 39-14-402 includes three sections that are each classified as a Class D felony. (*Id.* at Page ID# 192-93). Each of the three sections involve entering a building. One of the three subsections requires entry "with intent to commit" a crime (subsection (a)(1)). The second subsection requires that an individual remain concealed "with the intent to commit" a crime (subsection (a)(2)). But one

subsection, (a)(3), does not require intent to commit a crime upon entry. Instead, it merely requires that after entry, a crime is later committed. Tenn. Code Ann. § 39-14-402(a)(3) ("[a] person commits burglary who, without the effective consent of the property owner . . . enters a building and commits or attempts to commit a felony, theft or assault . . . ."). Mr. Ferguson argued that this subsection, in which there is no intent to commit a crime at the time of entry, cannot be a predicate offense because it is broader than generic burglary. (Response, R. 43, Page ID# 192, 194, 202).

The district court accepted Mr. Ferguson's argument that subsection (a)(3) does not constitute a generic burglary, but ultimately concluded that the *Shepard* documents for each of the three burglary convictions indicated his guilty pleas were to subsection (a)(1). (Sent. Tr., R. 53, Page ID# 561, 573). Mr. Ferguson had argued that the judgment forms indicated only that he pled guilty to burglary, but did not provide any information that indicated which subsection of burglary his guilty pleas rested upon, and that pursuant to *United States v. Anglin*, 601 F.3d 523, 529 (6th Cir. 2010), any ambiguity should be resolved in his favor. (Response, R. 43, Page ID# 199-201).

For his second and third burglary convictions, he further argued that the indictments provided no reliable information because he was indicted for a

different crime than what he pled guilty to (Sent. Tr., R. 53, Page ID# 554). Because the record did not contain a plea colloquy, plea agreement, or any other definitive proof of the version Mr. Ferguson pled guilty to, he argued that the second and third burglary convictions could not count towards application of the ACCA. (Response, R. 43, Page ID# 200). He emphasized that the Supreme Court in *Descamps v. United States,* 133 S. Ct. 2276 (2013) had explained there are numerous reasons a defendant pleads guilty to a crime different from what was in the indictment, and thus it was essential to have additional information, beyond merely an indictment, when the guilty plea is to a different crime. (*Id.* at 200).

With respect to the first burglary conviction, Case No. 273905, he acknowledged that it was discussed in the transcript provided by the Government, but emphasized that the transcript similarly contained no information that indicated which version of burglary his guilty plea rested on. (*Id.* at 200-01). Despite these arguments, the district court concluded that "the burglary convictions qualify because of the language in the indictment." (Sent. Tr., R. 53, Page ID# 573). The Court continued, "[t]he Court also examined the judgment, the Court examined the colloquy, and the Court does

not see anything at all in there that would distract from that interpretation." (*Id.*).

Mr. Ferguson was sentenced under the ACCA on October 8, 2015 to the mandatory minimum sentence of 180 months. (Minute Entry, R. 46, Page ID# 236); (Judgment, R. 48, Page ID# 490). After Mr. Ferguson was sentenced, numerous decisions in the Courts of Appeals and this Court were issued that directly impact the relevant analysis. The Sixth Circuit Court of appeals issued its opinion in *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015) on December 15, 2015. The *Priddy* case reached a conflicting conclusion with respect to the Tennessee burglary statute, and is addressed in detail in the Argument section of this brief.

Additionally, after Mr. Ferguson was sentenced this Court issued its Opinion in *Mathis v. United States*, 136 S. Ct. 2243 (2016), which not only clarified the proper analysis to be applied when evaluating whether a prior conviction qualifies as "crime of violence," but also emphasized the importance of not applying the ACCA and its fifteen-year mandatory minimum in the absence of *Shepheard* documents that conclusively establish a predicate conviction.

On Appeal in the Sixth Circuit, Mr. Ferguson discussed the circuit split that existed between the Sixth Circuit (in *Priddy*) (coupled with the Fourth Circuit in *Bonilla*, 687 F.3d 188), and the Fifth Circuit, in *Herrera-Montes*, 490 F.3d 390. While his case was pending, on February 23, 2017, the Eighth Circuit issued its decision in *McArthur*, 850 F.3d 925, which added to this split. Specifically, *McArthur* noted the *Priddy* case, and explicitly rejected its reasoning, and thus reached a conclusion in conflict with *Priddy*. *Id.* at 939-40. Despite this split, the Sixth Circuit affirmed the district court. (Opinion, App. R. 40-2, Page ID# 2).

It held it was bound by its prior decision in *Priddy*, which concluded that subsection (a)(3) of Tennessee's burglary statute categorically qualified as a violent felony, and thus Mr. Ferguson qualified for the fifteen-year mandatory minimum of the ACCA. (*Id.*). Because it held that all three subsections of Class D burglary qualify as violent felonies, the Sixth Circuit did not address Mr. Ferguson's argument that the available *Shepard* documents failed to establish which version of burglary he pled guilty to. The Sixth Circuit agreed with Mr. Ferguson that his prior aggravated burglaries could not qualify as violent felonies, and thus Mr. Ferguson is not addressing this conclusion in the instant petition.

Mr. Ferguson filed a Petition for *En Banc* Rehearing with respect to whether the Court of Appeals correctly concluded that Tennessee's burglary statute, § 39-14-402 meets the *Taylor* generic definition of burglary. However, the Court of Appeals denied reconsideration.

REASONS FOR GRANTING OF THE WRIT

This Court has not yet defined what is required under the intent element of the *Taylor* definition of generic burglary. 495 U.S. at 599 (a "generic burglary" is the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime"). In the absence of direction from this Court, a circuit split has developed regarding whether a burglary statute that does not require an individual to have an intent to commit a further crime at the time of entry qualifies as a generic burglary. Compare *Herrera-Montes*, 490 F.3d at 392 (intent required at time of entry) and *McArthur*, 850 F.3d at 939-40 (same); with *Priddy*, 808 F.3d at 684 (intent not required at time of entry) and *Bonilla*, 687 F.3d 188, 196-98 (same).

Not only is there a split regarding intent generally, but the split exists with respect to the specific statute at issue in this case, as the Fifth Circuit has held subsection (a)(3) of Tenn. Code Ann. § 39-14-402 does not have the requisite intent requirement (and thus is not a violent felony under the ACCA), while the Sixth Circuit has held that the exact same subsection does qualify as a generic burglary. Compare *Herrera-Montes*, 490 F.3d at 392, with *Priddy*, 808 F.3d at 684. Moreover, the circuit split continues to expand, as the Eighth Circuit's *McArthur* case was decided after *Priddy*, but rejected the legal

conclusions of *Priddy* and aligned itself with the Fifth Circuit's decision in *Herrera-Montes*. *McArthur*, 850 F.3d at 939-40 (8th Cir. 2017) (addressing a Minnesota burglary statute). Four Circuits have now addressed the intent element of generic burglary – and they are equally divided on what it requires.

This split is leading to inconsistent application of the ACCA, and thus arbitrary application of the 15-year mandatory minimum. An individual with prior Tennessee convictions for burglary would get a minimum sentence of 15 years if he was unlucky enough to be indicted in the Sixth Circuit, yet, that same individual would have a statutory maximum of 10 years if indicted in the Fifth. This arbitrary application of a substantial difference in the applicable sentence is not tolerable, and violates due process. This case presents this Court with a good vehicle to address this split, as it provides the Court with an opportunity to define what constitutes the intent element of generic burglary.

The *Priddy* decision, relied upon by the Sixth Circuit in the instant case, incorrectly applies this Court's definition of generic burglary to a statute that does not require an individual to have an *intent* to commit another crime upon entry into or unlawfully remaining in a structure. *Taylor*, 495 U.S. at 599. Not only does at least one portion of Tennessee's burglary statute lack the necessary intent element, but the underlying crime can be committed

recklessly. The rapidly changing law – and the resulting circuit split – surrounding which crimes do and do not continue to constitute violent felonies under the ACCA compels revisiting the meaning of the intent element of generic burglary.

Accordingly, Mr. Ferguson's case provides this Court with the opportunity to address the meaning of intent in the *Taylor* definition of generic burglary, and to settle the divergent conclusions of the United States Courts of Appeals.

ARGUMENT

Pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Mathis*, 136 S. Ct. 2243, Mr. Ferguson was incorrectly sentenced under the ACCA. In *Johnson*, the Supreme Court declared that the ACCA's residual clause was "unconstitutionally vague." The holding substantially narrows the type of prior convictions that trigger application of the ACCA. 135 S. Ct. at 2557. Under the ACCA, a prior offense qualifies as a "violent felony" if it satisfies the following definition:

> (B) The term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . 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.

18 U.S.C. § 924(e)(2)(B).

The final clause of § 924(e)(2)(B)(ii)—"otherwise involves conduct that presents a serious potential risk of physical injury to another"—is the "residual clause" addressed by *Johnson*. See *In re Watkins*, 810 F.3d 375, 378 (6th Cir. 2015). The Court concluded that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and

invites arbitrary enforcement by judges." *Johnson*, 135 S. Ct. at 2557. It therefore held that "imposing an increased sentence under the residual clause . . . violates the Constitution's guarantee of due process." *Id.* at 2563. Tennessee's burglary statute is implicated by the decision, because while some portions of the statute may have previously qualified under the enumerated offense clause, other portions of the statute would have only amounted to a violent felony under the residual clause.

In evaluating whether a conviction under a criminal statute qualifies as a predicate offense under the enumerated offense clause of the ACCA, a court must apply the "categorical approach." *Mathis*, 136 S. Ct. at 2248. Under that approach, a court compares the elements of the statute the defendant was convicted under (here, the Tennessee burglary statute) with the "generic elements" of the offense enumerated in the ACCA (here, burglary as defined by this Court in *Taylor*). *Descamps*, 133 S. Ct. at 2281. If the burglary statute the defendant was convicted under covers activities beyond those covered by generic burglary, then the statute of conviction is overbroad. *Id.* at 2282. When the state statute is indivisible, the analysis ends here, and the prior conviction will never count as a violent felony under the enumerated offense clause of the ACCA. *Id.* at 2283.

By contrast, when a criminal statute is divisible, the courts are permitted to review a limited class of documents (usually referred to as *Shepard* documents) in order to evaluate which of the alternative elements the defendant was in fact found guilty or pled guilty under. *Id.* at 2281. In the case of a guilty plea the court can look to the terms of the plea agreement, findings of fact or the transcript of colloquy between judge and defendant. *Id.* at 2284. However, when reviewing such documents a court cannot look to the underlying facts of what the defendant actually did, but can only evaluate whether the defendant pled guilty to the version of the statute that matches the generic definition of burglary. *Id.* Moreover, in order to count as a violent felony under the ACCA, the available *Shepard* documents must conclusively show that "the plea had 'necessarily' rested on the fact identifying the burglary as generic." *Shepard v. United States*, 125 S. Ct. 1254, 1260 (2005) (citation omitted); *Mathis*, 136 S. Ct. at 2256 n.6 (noting that "a judge could impose a 15-year sentence based only on a legal 'certainty,'" that the prior conviction met the generic definition of the crime).

If it is unclear from these documents exactly which subsection Mr. Ferguson pled guilty to, then his prior convictions cannot count as "violent felonies" under the ACCA. *Mathis*, 136 S. Ct. at 2257 ("record materials will

not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy '*Taylor's* demand for certainty'"); see also *Prater*, 766 F.3d at 511-13; *United States v. Lara*, 590 F. App'x 574, 586 (6th Cir. 2014) (unpublished). Importantly, any ambiguity regarding which version of a statute a defendant pleads guilty to must be resolved in favor of the defendant. *United States v. Carr*, 659 F. Supp. 2d 962, 965 (E.D. TN 2009) ("if the result is a 'tie,' the Court must rule in favor of the defendant and the prior conviction cannot be used as a predicate offense." (*citing United States v. Ford*, 560 F.3d 420, 425 (6th Cir. 2009))).

Indeed, it is the Government's burden to prove, through *Shepard* documents alone, that a prior conviction constitutes a violent felony, and where the *Shepard* documents are inconclusive, the prior conviction cannot be counted as a violent felony under the ACCA. *Anglin*, 601 F.3d at 529; see also *United States v. Prater*, 766 F.3d 501, 512 (6th Cir. 2014) ("[i]t is the '*government* [that] bears the burden of proof with regard to the various penalties it seeks to have imposed under the sentencing guidelines.'").

I. Subsection (a)(3) of Tenn. Code Ann. § 39-14-402 Does Not Constitute a Violent Felony After *Johnson* Because it Lacks the Intent Element of *Taylor's* Generic Burglary.

After *Johnson*, at least one subsection of Tennessee's regular burglary statute, Tenn. Code Ann. § 39-14-402(a)(3) does not qualify as a generic burglary under the ACCA's enumerated offense clause. This Court has defined 'generic burglary' as 'an unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.'" (Panel Opinion, App. R. 40-2, Page ID# 2 (citing *Taylor*, 495 U.S. at 598)). Tennessee Code § 39-14-402 provides that a person commits burglary when, "without, the effective consent of the property owner," he:

> (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony or theft;
>
> (2) Remains concealed, with the intent to commit a felony or theft, in a building;
>
> (3) Enters a building and commits or attempts to commit a felony or theft; or
>
> (4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony or theft.

Tenn. Code Ann. § 39–14–402(a) (1990). The first three subsections of this statute are punished as Class D felonies, while the fourth is a Class E felony.

Tenn. Code Ann. § 39-14-402(c)-(d). The fourth subsection, which addresses burglary of cars and other motor vehicles, has been considered outside the Supreme Court's *Taylor* definition of burglary, and thus has not been counted as a predicate offense under the ACCA. *United States v. Moore*, 578 Fed. App'x 550, 554 (6th Cir., Sept. 2, 2014) (unreported). By contrast, the Sixth Circuit has traditionally counted each of the other three subsections as violent felonies. *Id.*

The courts in the Sixth Circuit have previously avoided any difficulties with the "categorical approach," because most often, the available *Shepard* documents identify whether the conviction is for a D or an E felony. See *Moore*, 578 F. App'x at 554. Because the Sixth Circuit had concluded that each of the three versions of burglary that constitute D felonies were "violent felonies" under the ACCA, courts generally went no further than to determine which class of felony was the basis of the defendant's burglary conviction. *Id.*

This simplified analysis previously used by the Sixth Circuit is no longer sufficient, however, because prior to *Johnson*, the Sixth Circuit had traditionally counted the third subsection of Tennessee's burglary statute as a violent felony under the *residual clause*. *Moore,* 578 F. App'x at 554-55, n.3 (concluding that Tenn. Code Ann. § 39-14-402(a)(3) "qualifies as a violent

felony under the residual clause of the ACCA," and further noting that the Court "express[ed] no view on whether it would also satisfy the enumerated-offense clause."); *United States v. Brown*, 516 F. App'x 461, 464-65, n.1 (6th Cir. Feb. 26, 2013) (unpublished) (concluding that Tenn. Code Ann. § 39-14-402(a)(3) qualifies as a violent felony under the ACCA residual clause, and refraining from analyzing it under the enumerated offense clause); *but see Priddy*, 808 F.3d 676. Moreover, the Fifth Circuit has previously held that this subsection does not qualify as an enumerated burglary under the Supreme Court's *Taylor* decision. *Herrera-Montes*, 490 F.3d at 392;[1] see also *McArthur*, 2017 WL 744032, *8 (addressing a Minnesota statute); but see *United States v. Bonilla*, 687 F.3d 188, 196-98 (4th Cir. 2012) (addressing a Texas statute).

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[1] The court in *Herrera-Montes*, 490 F.3d 390, was applying the definition of "crime of violence" applicable to Section 2L1.2 of the United States Sentencing Commission Guidelines Manual (the "Guidelines"). 490 F.3d at 391. However, at the time of the *Herrera-Montes* decision, that section of the Guidelines applies essentially the same definition as "crime of violence" as the career offender guideline (§ 4B1.2), with the exception that § 2L1.2 does not contain a "residual clause." *See United States v. Lara*, 590 Fed. App'x 574, 576-77 (6th Cir. 2014). Accordingly, when it comes to analysis of the enumerated offenses or the "use of force" clause, Sections 2L1.2 and 4B1.2 are interpreted identically. *See id.* Moreover, "[w]hether a conviction is a 'violent felony' under the ACCA is analyzed in the same way as whether a conviction is a 'crime of violence' under the [Guidelines]." *United States v. Moore*, 578 Fed. App'x 550, 552 (6th Cir. 2014).

The Fifth Circuit is correct. Tenn. Code Ann. § 39-14-402(a)(3) does not qualify as violent felony under the enumerated offense clause, because it does not amount to a "generic burglary." *Taylor*, 495 U.S. at 599 (*i.e.*, the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime"). Subsection (a)(3) of the Tennessee burglary statute lacks the requirement that a defendant enter the structure, or unlawfully remain within the structure, *with intent* to commit a crime. Specifically, subsection (a)(3) provides only that a defendant "[e]nters a building and commits or attempts to commit a felony, theft or assault." Tenn. Code Ann. § 39-14-402(a)(3).

Indeed, the Eighth Circuit recently addressed a Minnesota statute that defined burglary as occurring when a person "enters a building without consent and steals or commits a felony or gross misdemeanor while in the building." *McArthur*, 850 F.3d at 937. The Eighth Circuit concluded that this was outside the *Taylor* definition of "generic" burglary because it lacked the intent element. *Id.* at 940. Specifically, the *McArthur* court noted "*Taylor* provides that a burglary occurs when an offender enters or remains in a building or structure '*with intent* to commit a crime'". *Id.* at 939. The court explained that "[t]he act of 'remaining in' a building, for purposes of generic burglary, is

not a continuous undertaking. Rather, it is a discrete event that occurs at the moment when a perpetrator, who at one point was lawfully present, exceeds his license and overstays his welcome." *Id.*

The *McArthur* court rejected the idea that anytime a defendant develops an intent to commit a crime while inside a building, he necessarily "remained in" the building "because he must have developed the requisite intent at some point while 'remaining in' the building". *Id.* The court explained, "[such a] reading of *Taylor* would render the 'unlawful entry' element of generic burglary superfluous, because every unlawful entry with intent would become 'remaining in' with intent as soon as the perpetrator enters." *Id.* Thus, the court concluded, "[b]ecause a conviction under the second alternative of [the statute] does not require that the defendant have formed the 'intent to commit a crime' at the time of the nonconsensual entry or remaining in, it does not satisfy the generic definition of burglary in *Taylor*." *Id.* at 940. As a result, the statute is broader than generic burglary. *Id.*

As noted in *Herrera-Montes*, a Tennessee court has recognized that "[t]he plain text of § 39-14-402(a)(3) does not require such intent." 490 F.3d at 392, n.2 (*quoting State v. Wesemann*, 1995 WL 605442 at *2 (Tenn. Crim. App. Oct. 16, 1995) (unreported) (holding § 39-14-402(a)(3) "requires only

that a [crime] be committed or attempted once the perpetrator enters the building . . . Criminal intent does not have to occur either prior to or simultaneous with the entry . . . ."). Because this subsection lacks the requisite intent at the time of entry it is broader than the Supreme Court's "generic burglary" and no longer counts as a "violent felony" under the ACCA. *See United States v. Constante, III*, 544 F.3d 584, 566 (5th Cir. 2008), *Herrera-Montes*, 490 F.3d at 392 (noting that in addition to *Taylor's* definition of "generic burglary," the Model Penal Code § 221.1 and Black's Law Dictionary also require the defendant to have intent to commit a crime at the time of entry).

The fact that the prefatory language at the beginning of Tenn. Code Ann. § 39-14-402(a) incorporates the requirement that any entry be "without the effective consent of the property owner," is not sufficient to overcome the lacking intent requirement. *See McArthur*, 850 F.3d at 939. At the outset, "unprivileged entry" is a separate element under the *Taylor* definition than the "with intent to commit a crime" element. *See Herrera-Montes*, 490 F.3d at 392, n.1, 2, 3; *Taylor*, 495 U.S. at 599. Fulfilling one element is not sufficient to fulfill the other. Moreover, as noted by the Fifth Circuit, "teenagers who unlawfully enter a house only to party, and only later decide to commit a crime, are not common burglars." *Herrera-Montes*, 490 F.3d at 392.

The language of the statute is also broad enough to encompass individuals who accidentally enter property without the effective consent of the property owner, such as where only a portion of a building is open to the public, and the rest is a private office or residence. An individual guest who accidentally crosses the dividing line, and only later develops the intent to commit a crime (or recklessly commits a crime) is similarly not a common burglar, but merely a thief, for example, or a vandal. Accordingly, subsection (a)(3) of the Tennessee burglary statute does not meet the *Taylor* definition of "generic burglary," and does not count as a "violent felony" under the ACCA.

II. The Conclusions in *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015) Have Been Undermined and Should Be Rejected.

After the Supreme Court's *Johnson* decision, this Court issued an opinion that concludes a conviction under Tenn. Code Ann. § 39-14-402(a)(3) constitutes a "generic burglary" under *Taylor*. *Priddy*, 808 F.3d at 684-85. In reaching this conclusion, the *Priddy* Court noted that the *Taylor* definition includes both unprivileged entry and unprivileged remaining in variants. *Id.* at 684. Specifically, the *Priddy* Court found that subsection (a)(3) constitutes "a 'remaining-in' variant of generic burglary because someone who enters a building or structure and, while inside, commits or attempts to commit a felony

will necessarily have remained inside the building or structure to do so." *Id.* at 685 (*citing Taylor*, 495 U.S. at 602).

The *Priddy* Court notes that subsection (a)(3) constitutes a "remaining-in" variant of generic burglary, however such conclusion directly contradicts the language of the statute itself. Indeed, the Court first notes that subsection (a)(1) "involves the 'entry-into' variant of generic burglary" and that subsection (a)(2) "tracks the language of the 'remaining-in" variant of generic burglary." *Id.* at 684-85. These statements make sense, because subsection (a)(1) applies to a defendant who "*[e]nters* a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony or theft." Tenn. Code Ann. § 39-14-402(a)(1) (emphasis added). Thus, it is of the "entry-into" variety. Similarly, subsection (a)(2) applies to a defendant who *"[r]emains concealed*, with the intent to commit a felony or theft, in a building." Tenn. Code Ann. § 39-14-402(a)(2) (emphasis added). Thus, it is of the "remaining-in" variety.

However, subsection (a)(3), by its explicit terms only applies to a defendant who "*[e]nters* a building and commits or attempts to commit a felony or theft." It makes no mention of a defendant who unlawfully remains within a building. The state legislature clearly chose to use the phrase "remains

concealed" in one subsection, and it easily could have included the phrase in subsection (a)(3) – had it so desired. The legislature did not make that choice, however, and the courts should not read-in such language when no ambiguity suggests it was meant to be included. *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989) (where the statute's language is plain, "the sole function of the courts is to enforce it according to its terms").

Moreover, if the *Priddy* opinion is suggesting that the minute an individual develops an intent to commit a felony, his presence immediately becomes an "unlawful remaining" within – such conclusion would lead to the absurd result of rendering subdivisions (a)(2) and (a)(3) duplicative. *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669 (2007) ("we have cautioned against reading a text in a way that makes part of it redundant"); see also *McArthur*, 2017 WL 744032 at *8 ("[t]he act of 'remaining in' a building, for purposes of generic burglary, is not a continuous undertaking").

Finally, the *Priddy* Court, without providing any explanation or analysis, noted "an offense constitutes 'burglary' for purposes of [the ACCA] if either its statutory definition substantially corresponds to 'generic' burglary, or the charging paper and jury instructions actually required the jury to find all the

elements of generic burglary in order to convict the defendant." *Priddy*, 808 F.3d at 685 (*quoting Taylor*, 495 U.S. at 602). If this suggests that the *Priddy* Court concluded that Tenn. Code Ann. § 39-14-402(a)(3) constitutes a generic burglary because it "substantially corresponds" to generic burglary, this conclusion is also unavailing.

Indeed, by concluding that Tenn. Code Ann. § 39-14-402(a)(3) "substantially corresponds" to the *Taylor* definition of generic burglary, the Court applies the enumerated offense clause of the ACCA in an overly expansive way. Doing so allows the "violent felony" label to be applied to a statute that does not, in fact, meet the elements of the *Taylor* definition. In the absence of requiring that a defendant have a specific intent to commit another crime at the time of entry, subsection (a)(3) of the Tennessee burglary statute encompasses activities that amount to basic theft, vandalism, and/or trespassing.

Thus, the *Priddy* court is not merely applying the "violent felony" definition to a statute that criminalizes traditional burglary, but titles the statute something different (such as "aggravated burglary"). Nor is it merely applying the "violent felony" definition to a statute that lists the elements of generic burglary, but in a different order. Instead, it is applying the "violent

felony" definition to a statute that is substantively different from the *Taylor* definition. *Taylor*, 495 U.S. at 599 ("if the defendant was convicted of burglary in a State where the generic definition has been adopted, with *minor variations in terminology*, then the trial court need find only that the state statute *corresponds in substance* to the generic meaning of burglary" (emphasis added)). Subsection (a)(3) does not merely involve "minor variations in terminology." Instead it applies to activities that, in substance, fall outside the generic definition of burglary.

While an expansive application of the definition of "violent felony" may have been reasonable in 2012, such an application is not appropriate today in light of current case law. Indeed, the *Johnson* decision eliminated the residual clause, precisely because "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." *Johnson,* 135 S. Ct. at 2557. Concluding that subdivision (a)(3) "substantially corresponds" to the definition of generic burglary allows a similarly vague approach to the enumerated offense clause. Given the concerns raised in the *Johnson* decision, the enumerated offense clause should be narrowly applied to only those statutes that clearly fit the "generic definition" of an enumerated offense.

Moreover, any ambiguity in a criminal statute, such as the ACCA, or Tennessee's burglary statute, should be resolved in favor of the defendant. *United States v. Bass*, 404 U.S. 336, 348 (1971) (noting that "because of the seriousness of criminal penalties [amongst additional reasons] where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant"). Doubts regarding whether a state statute meets the definition of "violent felony" under the ACCA should be resolved in the defendant's favor. The Fifth Circuit is correct, Tenn. Code Ann. § 39-14-402(a)(3) does not constitute a "violent felony" under the ACCA, because it lacks the *Taylor* requirement that a defendant have an intent to commit a crime at the time of his unprivileged entry into a building. *Herrera-Montes*, 490 F.3d at 392; *McArthur*, 850 F.3d at 939.

III. Subsection (a)(3) of Tenn. Code Ann. § 39-14-402 Does Not Constitute a Generic Burglary Because It Can Be Committed Recklessly.

The *Taylor* definition of "generic" burglary requires that a defendant have *intent* to commit a crime while within the building. 495 U.S. at 599 (a "generic burglary" is the "unlawful or unprivileged entry into, or remaining in, a building or structure, *with intent* to commit a crime" (emphasis added)). Further, in order for a prior conviction to count as a violent felony under the

enumerated offense clause it must be for conduct that was knowing or intentional. *United States v. Begay*, 553 U.S. 137, 144-45, 146-47 (2008) (noting that all of the enumerated offenses "involve purposeful, 'violent,' and 'aggressive' conduct," and identifying crimes committed "recklessly" as failing to meet this standard); see also *United States v. McMurray*, 653 F.3d 367, 374-75 (6th Cir. 2011) ("the 'use of physical force' clause of the ACCA, § 924(e)(2)(B)(i), requires more than reckless conduct"). A person can be convicted of burglary under subsection (a)(3) for merely reckless conduct – and thus there is no requirement that an individual *ever* develop an intent to commit another crime. As such, for this additional reason this version of Tennessee burglary does not amount to a violent felony.

As noted above, Tenn. Code Ann. § 39-14-402(a)(3) provides that an individual is guilty of burglary when he, without the effective consent of the property owner, "[e]nters a building and commits or attempts to commit a felony, theft or assault . . . ." This subsection does not include an intent requirement related to either the entry into the building or with respect to the commission of the underlying felony, theft or assault. *See* Tenn. Code Ann. § 39-14-402(a)(3); *State v. Snipes*, No. W2011-02161-CCA-R3-CD, 2013 WL 1557367, *9 (Tenn. Crim. App. April 12, 2013) ("burglary statute is silent

regarding the required mens rea"); *see also* Tenn. Pattern Jury Instr., Criminal 14.01 (Burglary), n.4.

Tennessee Code § 39-11-301(c) provides that "[i]f the definition of an offense within this title does not plainly dispense with a mental element, intent, knowledge or recklessness suffices to establish the culpable mental state." Indeed, the Tennessee Pattern Jury Instructions for burglary specifically note that when charging Part C, which charges section 39-14-402(a)(3) – the subsection at issue here – the element of entering with 'intent' is not required, and thus can be committed recklessly. Tenn. Pattern Jury Instr., Criminal 14.01 (Burglary), n. 4. Accordingly, because subsection (a)(3) of Tennessee burglary can be committed recklessly, both with respect to the initial entry and with respect to the underlying crime, it does not constitute a violent felony.

Mr. Ferguson respectfully suggests that the *Priddy* case is an incorrect and an overly-broad application of *Taylor's* "generic burglary" definition. The decision is contrary to the conclusion of two other Circuit Courts of Appeals, leads to absurd results, and should be reversed by this Court.

IV. The District Court Erred by Concluding The Indictments Evidenced that Mr. Ferguson Pled Guilty to Subsection (a)(1).

Because the Sixth Circuit relied upon *Priddy* to conclude that all versions of Tennessee Class D burglary constitute a violent felony, it did not reach the

district court's determination that Mr. Ferguson's guilty pleas were to subsection (a)(1) of the statute. However, Mr. Ferguson continues to assert this conclusion by the district court was in error.

A district court cannot enhance a defendant's sentence under the ACCA unless the *Shepard* documents provide certainty that a prior conviction meets the definition of a violent felony. *Mathis*, 136 S. Ct. at 2251 n.6, 2257. Here, that means the documents must clearly establish that Mr. Ferguson's guilty pleas were to either subsection (a)(1) or (a)(2) of Tennessee's burglary statute. The district court erred by concluding that it could rely solely upon the indictments, which charged the crime of aggravated burglary, to conclude which version of burglary Mr. Ferguson pled guilty to. (Sent. Tr., R. 53, Page ID# 573). While the indictments alleged Mr. Ferguson entered a habitation "with intent to commit theft of property," this gives no indication as to what version of burglary he pled guilty to – because he did not, in fact, plead guilty to the indictment. The district court's conclusion to the contrary not only fails to account for the presumption that any ambiguity is resolved in favor of the defendant, but it also fails to meet this Court's requirement of certainty. See *Lara*, 590 F. App'x at 586; *Carr*, 659 F. Supp. 2d at 965 (citing *Ford*, 560 F.3d at 425); *Anglin*, 601 F.3d at 529; *Mathis*, 136 S. Ct. at 2251 n.6, 2257.

If only one of Mr. Ferguson's burglary convictions no longer counts, then the ACCA cannot enhance his sentence. His second and third burglary convictions, Case Nos. 278191 and 273095 present the clearest case. The only *Shepard* documents provided by the Government for these two convictions were the respective indictments and judgments. (Ex. C, R. 37-2, Page ID# 151-56). The judgments state only that he pled guilty to a Class D "burglary," and do not identify which subsection the plea rested on. (Ex. B, R. 37-2, Page ID# 151, 154). The indictments each charge Mr. Ferguson with aggravated burglary, and accordingly charge an entirely different crime than what Mr. Ferguson pled guilty to. (*Id.* at 153, 156).

Nothing in the indictment can indicate what version of burglary his guilty plea rested on, because he did not plead guilty to the information in the indictment. We cannot assume that anything in the indictment continued to be a basis for his guilty plea, because by definition he plead to a distinct crime. Assumptions about the basis of a guilty plea are prohibited. *Mathis*, 136 S. Ct. at 2252. (a sentencing court is "barred from making a disputed determination about "what the defendant and state judge must have understood as the factual basis of the prior plea" (citations omitted)); see also *Descamps*, 133 S. Ct. at 2288-89 (discussing the various strategic, and legitimate, reasons

a defendant may plead guilty to a crime different from that charged in the indictment); *Mathis*, 136 S. Ct. at 2253 (noting that "[s]uch inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence").

This single assumption is not sufficient to establish the requisite level of certainty that Mr. Ferguson's guilty pleas necessarily rested on a version of Tennessee burglary that is a violent felony. *Mathis*, 136 S. Ct. at 2257 (record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy '*Taylor's* demand for certainty' when determining whether a defendant was convicted of a generic offense"); see also *Lara*, 590 F. App'x at 585 (refusing to count the defendant's prior conviction for Tennessee aggravated burglary as a predicate offense where "the state-court information and the state-court judgment" failed to indicate the defendant plead guilty to a generic version of the statute).

Accordingly, neither of these two prior burglary convictions can be counted as a "violent felony." Mr. Ferguson therefore no longer has a sufficient number of predicate offenses, and cannot be subjected to the ACCA's 15-year mandatory minimum.

CONCLUSION

The Courts of Appeals are divided regarding the general issue of what is required by the intent element in *Taylor's* definition of generic burglary. The Courts of Appeals are also divided regarding whether the specific statute at issue here, Tenn. Code Ann. § 39-14-402(a)(3) meets that definition, and thus whether it qualifies as a violent felony under the ACCA. This means that some individuals will qualify for the ACCA's fifteen-year mandatory minimum depending not on their prior record – but on which district one is indicted in. Such arbitrary application of the ACCA should not be tolerated.

In consideration of the foregoing, Petitioner urges the Court to grant certiorari review in order to resolve this important question. Petitioner respectfully submits that the Petition for Certiorari should be granted, the judgment of the Sixth Circuit Court of Appeals vacated, and the case remanded for further consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing has been served upon the Solicitor General, Department of Justice, 10th Street and Constitution Avenue, Washington, D.C., 20530, and to Luke McLaurin, Assistant United States Attorney, 800 Market Street, Knoxville, Tennessee, 37902, by placing a true and exact copy of same in the United States Mail, with sufficient postage thereon to carry the same to its destination.

This the 17th day of January, 2018.

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