NO. 17-7496

IN THE SUPREME COURT OF THE UNITED STATES

SHANNON FERGUSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

This case presents the best vehicle for evaluating whether the *Taylor* definition of generic burglary requires intent to commit a further crime at the time of initial entry or initial unlawful remaining. It addresses Tennessee's burglary statute, Tenn. Code Ann. § 39-14-402(a)(3), which is the subject of an entrenched circuit split. One circuit has held this statute *does* qualify as a "violent felony" under the ACCA, while another circuit has held it *does not* qualify. Compare *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015), and *United States v. Ferguson*, 868 F.3d 514 (6th Cir. 2017) (the instant case, relying on *Priddy*); with *United States v. Herrera-Montes*, 490 F.3d 390 (5th Cir. 2007) (evaluating the statute under the very similar crime of violence definition in the United States Sentencing Guidelines).

Thus, whether an individual will face the ACCA's mandatory minimum of 15 years – or not – depends *not* on his prior record, but upon whether he is unlucky enough to be convicted in one circuit as opposed to another. At a minimum, this case should be consolidated with other petitions for certiorari currently pending that also address the intent element of generic burglary.

The Government agrees that the question presented in this case merits review from this Court. (BIO 7.) However, the Government argues that

other petitions for certiorari (*Quarles v. United States*, No. 17-778; and *United States v. Herrold*, No. 17-1445) present better vehicles. (*Id.* at 8.) The Government also suggests that this Court's review of a somewhat related case, *United States v. Stitt*, No. 17-765, which addresses Tennessee's aggravated burglary statute, could also impact the results here. (*Id.*) But the Government has not provided compelling reasons to hold a decision in this case pending the outcome of *Quarles*, *Herrold* and/or *Stitt*.

I. ***Stitt* Does Not Control This Case.**

The Government has the relationship between this case and *Stitt* backwards. Tennessee's aggravated burglary statute, Tenn. Code Ann. § 39-14-403 (the statute at issue in *Stitt*) is defined by reference to the statute at issue here, § 39-14-402. Tennessee Code § 39-14-403(a) provides, "[a]ggravated burglary is burglary of a habitation as defined in §§ 39-14-401 and 39-14-402." The *Stitt* case deals with the definition of habitation as defined in § 39-14-401, and whether it is limited to "buildings or structures" under *Taylor's* generic burglary definition. Thus, it does not directly impact the issues here. But, because the aggravated burglary statute also incorporates § 39-14-402 (the statute at issue here), a decision in this case regarding intent directly impacts whether Tennessee aggravated burglary qualifies as a *Taylor* generic burglary.

Thus, if anything, the *Stitt* case should be held pending a resolution of the instant case, or conversely, the two should be consolidated.

II. This Case is An Equally Good Vehicle, if Not Better, Than *Quarles*.

The Government's attempt to diminish the importance of the instant case in light of *Quarles* is similarly unavailing. This case and *Quarles* address the same question – Does generic burglary require intent to commit a further crime at the time of initial entry or initial remaining unlawfully? The Government argues that "petitioner would not likely benefit from a decision in his favor," because the district court reviewed *Shepard* documents during application of the modified categorical approach. (BIO 10). Mr. Ferguson challenged the reliance on the modified categorical approach from the beginning and has preserved those arguments at every stage of his case.

The Sixth Circuit did not reach this question, however, as it found that subsection (a)(3) always qualifies as a *Taylor* generic burglary. While a decision in Mr. Ferguson's favor will still require application of the modified categorical approach by the lower courts before he may personally benefit from a favorable decision, the same is true in *Quarles*. *See* Petition for Certiorari at 6 n.2, 26-27, *Quarles v. United States*, No. 18-778.

Further, the district court's error is clear. It should not have relied solely upon indictments charging one crime (Tennessee aggravated burglary) when Mr. Ferguson pled guilty to a wholly different crime (Tennessee burglary). The district court's decision, which was issued on October 8, 2015 (see Pet. App. 05), pre-dated this Court's holding in *Mathis*. The assumptions made by the district court are not appropriate considerations under *Mathis*. 136 S. Ct. 2243, 2252 (2016) (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,"); *see also id.* at 2272 ("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'"). A favorable ruling on the burglary question is thus likely to result in a favorable ruling on remand regarding the modified categorical approach in light of *Mathis*.

Further, multiple circuits have held that a sentencing court cannot apply the ACCA (or the similar career offender enhancement found in the Guidelines) based on information in an indictment when the defendant pled guilty to a different or lesser included crime. *United States v. Panzo-Acahua*, 182 F. App'x 582, 585 (7th Cir. 2006) (unpublished) (a defendant's "conviction for a crime that is not only different but lesser than that alleged in the [charging

document] in no way shows that he admitted the [document's] version of the facts" (citations omitted)); see also *United States v. Spell*, 44 F.3d 936, 940 (11th Cir. 1995); *United States v. Turner*, 349 F.3d 833, 836 (5th Cir. 2003).

Thus, just as Mr. Quarles, and with the guidance provided by *Mathis*, Mr. Ferguson will likely show on remand that the Government did not meet its burden to prove he was convicted of a generic burglary.

III. The Recklessness Argument is Properly Before This Court, and Shows That Subsection (a)(3) Does Not Require the Defendant to *Ever* Form Intent to Commit a Further Crime.

Mr. Ferguson also argues that the burglary statute does not require an individual to *ever* develop intent to commit a further crime. (Pet. Br. 32-34.) This is because the crime after entry or unlawful remaining can be committed recklessly. (*Id.*) The Government has not presented a compelling reason why this argument should be ignored by this Court. The Government posits that this Court should avoid this argument because it was first raised in a reply brief before the Sixth Circuit, and further argues that the ACCA's enumerated offenses do not require intentional conduct. (BIO 11-12.) Neither position is availing.

First, in its own brief filed in the instant case, the Government argues that the Sixth Circuit was correct in concluding that "under any of these variants

[of Tennessee Class D burglary, *i.e.* Tenn Code Ann. § 39-14-402(a)(1)-(3)], petitioner *necessarily* had to form *the intent* to commit a felony, theft, or assault, either before he entered the building or while he was still inside." (BIO 9). Thus, the Government argues, because a crime was eventually committed, we can *assume* that he intended to commit that crime. (*Id.*) Because that crime was committed while the defendant was in a building without the effective consent of the owner, the Government argues, we should construe this as developing the necessary intent while "unlawfully remaining". (*Id.*)

The Government also argued this same point in its response brief before the Sixth Circuit, noting "a person 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 *with the intent* to commit a crime." (Gov. App. Br., 6th Cir. No. 15-6303, Doc. 32 at 30 (filed September 28, 2016) (citations omitted) (emphasis added)). Mr. Ferguson was entitled to reply to this argument. Fed. R. App. P. 28(c) ("the appellant may file a brief in reply to the appellee's brief"); Sup. Ct. R. 15.6 ("[a]ny petitioner may file a reply brief addressed to new points raised in the brief in opposition . . . ."). Mr. Ferguson's recklessness argument – that under subsection (a)(3) of Tennessee burglary the commission of a further crime does not require proof that the crime

was intentional – is a direct response to the Government's assertion that a defendant *necessarily* developed such an intent. Because subsection (a)(3) does not require that the further crime be committed intentionally, the Government's theory falls apart.

This argument was, and remains, properly raised, and preserved. It further notifies this Court, as it did the Sixth Circuit, of inaccuracies in the Government's position. Cf. Sup. Ct. R. 15.2 (noting that a brief in opposition to a petition for certiorari should address any perceived misstatements, and further noting "Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition").

In further response to Mr. Ferguson's argument that subsection (a)(3) of Tennessee's burglary statute does not require the defendant to ever develop an intent to commit a further crime, the Government apparently asserts that there is no intent requirement in the *Taylor* definition of generic burglary. (BIO 12 (asserting that Mr. Ferguson has "confuse[d] different portions of the ACCA's definition of a 'violent felony'" because he cites cases holding that recklessness is an insufficient *mens rea* under the residual and use of force clauses)). Regardless of whether recklessness is ever a sufficient *mens rea* under any

portion of the ACCA, this Court's *Taylor* definition of generic burglary explicitly requires intent to commit a further crime. A "generic burglary" is the "unlawful or unprivileged entry into, or remaining in, a building or structure, *with intent* to commit a crime." *Taylor v. United States*, 495 U.S. 575, 599 (1990) (emphasis added).

Moreover, the reason this Court concluded that crimes committed unintentionally did not qualify under the residual clause in *Begay* is because it noted that all of the *enumerated* offenses (which include burglary) "involve purposeful, 'violent,' and 'aggressive' conduct." *United States v. Begay*, 553 U.S. 137, 144-45 (2008). This Court then specifically identified crimes committed "recklessly" as failing to meet this standard. *Id.* at 146-47 ("[w]e have no reason to believe that Congress intended to bring within the statute's scope these kinds of crimes, far removed as they are from the deliberate kind of behavior associated with violent criminal use of firearms").

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 . . . ." Tennessee law specifically provides that assaults, like many felonies, can be committed recklessly. Tenn. Code Ann. § 39-13-101(a) ("a person

commits assault who: (1) Intentionally, knowingly, or *recklessly* causes bodily injury to another . . ." (emphasis added)). Unlike the other subsections of Tennessee's burglary statute, subsection (a)(3) does not add the requirement that a defendant have an intent to commit a further crime – it only requires that a crime is in fact committed.

Subsection (a)(3) of Tennessee burglary specifically encompasses the commission of the further crime with mere recklessness. See Tenn. Code Ann. § 39-11-301(c); 7 Tenn. Prac. Pattern Jury Instr. T.P.I.-Crim. 14.02. A defendant can be convicted of Tennessee burglary without ever developing an intent to commit a further crime after entry. The Government's assertion that subsection (a)(3) *necessarily* requires the defendant to develop an intent to commit a crime while he remains inside the building is legally incorrect. (BIO 9).

IV. This Court Can Request Briefing Regarding Whether the ACCA is Unconstitutionally Vague in Whole or in Part.

What Mr. Ferguson has not previously raised, but raises now in light of the continuing struggle to define and apply "generic burglary," (including this Court's recent grant of certiorari in *Stitt*) is that the statute is unconstitutionally vague. Evaluation of this issue is not required for this Court to rule in Mr. Ferguson's favor, however, and as he has not previously raised it, he concedes

it could be deemed to have been waived. However, this Court could request briefing on this issue. See Order dated January 9, 2015 in *Johnson v. United States*, No. 13-7120 (ordering briefing on the constitutionality of the residual clause).

In concluding that the residual clause of the ACCA was unconstitutionally vague, this Court explained that "[t]he Fifth Amendment provides that '[n]o person shall ... be deprived of life, liberty, or property, without due process of law,'" and that its "cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or *so standardless that it invites arbitrary enforcement*." *Johnson v. United States*, 135 S.Ct. 2551, 2556 (2015) (citation omitted) (emphasis added). Thus, "[t]he prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" *Id.* at 2556-57 (quotation omitted).

This case evidences the inability of the lower courts to consistently apply a "generic" definition of the enumerated offenses (particularly burglary) and also highlights inconsistencies in applying the modified categorical approach.

Instead of being solved by this Court's prior attempts to define what falls under the ACCA, these issues are becoming more and more pervasive. Despite this Court's best efforts, and the efforts of the lower courts, application of the ACCA continues to evade the most thoughtful legal minds, and leads to arbitrary application throughout the country.

In *Perez v. United States*, a panel of the Sixth Circuit noted that "[u]nder the categorical approach . . . we map a hypothetical test case under an oft-evolving state law onto a federal law that itself can change from time to time." *Perez v. United States*, 885 F.3d 984, 991 (6th Cir. 2018). "The [categorical] approach creates serial opportunities for uncertainty. It is no exaggeration to say that interpretive complications in this area, like a flu virus, can spread exponentially." *Id.* Thus, "it is easy to wonder whether an ordinary person knows what law applies to him," as even "the federal courts of appeals find themselves twisted in knots trying to figure out whether a crime is divisible into parts, involves physical force capable of causing injury, or sweeps more broadly than a common law analog . . . ." *Id.*

But, perhaps the most telling are the issues raised in the instant case and in *Stitt*, regarding the definition of burglary. This Court first defined burglary in 1990 in its *Taylor* decision, yet 28 years later there is still uncertainty about

what crimes comes within that definition. 495 U.S. 575. This indicates the far-reaching struggles of the courts to consistently apply the ACCA, and further evidences the absolute inability of the general public to predict what behaviors will subject them to the ACCA and what behaviors will not. The ACCA not only invites, but appears unable to escape, arbitrary enforcement. Undersigned would be happy to submit briefing on this issue, should the Court so desire.

V. Conclusion.

In consideration of the foregoing, Petitioner continues to urge the Court to grant certiorari review in order to resolve important questions regarding the intent element of *Taylor's* generic burglary definition. Petitioner also respectfully submits that this case could be consolidated with *Quarles*, No. 17-778 and/or other petitions currently pending before this Court addressing the same issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing Reply has been served upon Noel J. Francisco, Counsel of Record with the Solicitor General, Department of Justice, 10th Street and Constitution Avenue, Washington, D.C., 20530, by placing a true and exact copy of same with Federal Express, with sufficient postage thereon to carry the same to its destination, and via e-mail.

This the 3rd day of May, 2018.

_____

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