No. 17-778

IN THE

Supreme Court of the United States

JAMAR ALONZO QUARLES,

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

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

INTRODUCTION AND SUMMARY OF ARGUMENT

Imagine that a homeless person breaks into a building to seek shelter from a winter storm. While inside the building, he finds a jacket and puts it on to keep warm. The next day, when he goes to leave, he decides to keep the jacket. *See People v. Gaines*, 546

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[1] Counsel of record for the parties have received timely notice of the intent to file this brief and have consented to this filing. No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae and its counsel has made any monetary contribution to the preparation or submission of this brief.

N.E.2d 913, 914 (N.Y. 1989). Has that person committed the offense of generic burglary?

It depends who you ask. The Fifth and Eighth Circuits would say no. They would observe that the homeless person did not intend to steal the jacket when he entered the building; he simply sought shelter from the storm. Under this approach, if there is no intent to commit a crime at the *outset* of the trespass, there is no generic burglary. The Fourth, Sixth, Ninth, and Tenth Circuits, on the other hand, would say yes. They would assert that it does not matter whether the individual intended to steal the jacket when he broke into the building as long as he developed that intent at some point *while* trespassing. Under this approach, every crime committed while trespassing is transformed into burglary, no matter the intent at the outset.

What is the cause of this dispute? Generic burglary, everyone agrees, is "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990). The difficult question is *when* the intent to commit a crime must manifest itself. This turns on the interpretation of *Taylor*'s pronouncement that "unprivileged entry into, or remaining in … a building … with intent to commit a crime" constitutes burglary. *Id.* Does "remaining in," like entry, reflect a discrete moment in time—the first moment that one's presence becomes unauthorized after an initially lawful entry? If yes, this interpretation leads to the Fifth and Eighth Circuits' conclusion. Or, instead, does "remaining in" embody a continuous period of time that incorporates the

entire duration of a trespass? The latter view leads to the Fourth, Sixth, Ninth, and Tenth Circuits' position.

The importance of resolving the circuit split on this issue is underscored by the existence of numerous state burglary statutes that characterize any crime committed while trespassing as burglary. Any of these state statutes could become an ACCA predicate in the Circuits that have misinterpreted the "remaining in" language in *Taylor*, and consequently the elements of generic burglary.

Clarity is urgently needed on this point because the issue is so consequential: Hundreds of defendants face harsh mandatory minimums under the Armed Career Criminal Act (ACCA) every year, and many of those mandatory minimums are predicated on state burglary offenses. Under the categorical approach that this Court has mandated, courts must compare the elements of a particular state burglary offense to those of generic burglary. Properly articulating the elements of generic burglary is thus crucial to the inquiry. The approach taken by the Fourth, Sixth, Ninth, and Tenth Circuits is wrong and threatens to dramatically expand the kind of conduct triggering ACCA's mandatory minimums.

This case is an ideal vehicle to resolve the dispute. The Michigan home invasion statute that served as a predicate for Petitioner's ACCA enhancement requires only that one enter a dwelling without authorization and subsequently commit a crime. *See* Mich. Comp. Laws § 750.110a(4)(a). The interpretation of

the intent element of generic burglary—whether intent to commit a crime must be present at the outset of a trespass—is thus dispositive. The issue was preserved and the Sixth Circuit squarely addressed it. Pet. App. 7a-8a. This Court should grant the petition.

ARGUMENT

I. This Case Presents A Threshold Question Under The Categorical Approach: What Are The Elements Of Generic Burglary?

The question presented in this case asks which set of circuits has correctly defined the elements of generic burglary. Resolution of this dispute is critical because the definition of generic burglary underlies the entire categorical approach analysis in any case where burglary is a predicate offense under ACCA's enhanced sentencing regime.

As this Court explained in *Mathis v. United States*, the categorical approach compares the elements of the state predicate offense at issue to the elements of the generic offense. 136 S. Ct. 2243, 2248 (2016) ("The court … lines up that crime's elements alongside those of the generic offense and sees if they match."); *id.* at 2249 ("The court can then compare that crime, as the categorical approach commands, with the relevant generic offense."). It is thus impossible to conduct this analysis without first properly defining the elements of the generic offense.

A. Petitioner's Case Involves An Entrenched Circuit Split On Whether Criminal Intent Must Exist When A Trespass *Begins*.

Petitioner's mandatory minimum sentence under ACCA was predicated, in critical part, on his conviction for home invasion in the third degree under Michigan law. Pet. App. 1a. The "least of the acts criminalized" under that statute, *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010) (brackets and internal quotation marks omitted)), is "break[ing] and enter[ing] a dwelling or enter[ing] a dwelling without permission and, at any time while … entering, present in, or exiting the dwelling, commit[ting] a misdemeanor." Mich. Comp. Laws § 750.110a(4)(a). Petitioner argued below that violating this statute could not serve as an ACCA predicate because it "allow[ed] for the development of intent at any point," Pet. App. 7a—in other words, the statute did not require that unlawful entry be accompanied by criminal intent *at the time the trespass began*.

In considering this argument, the Sixth Circuit invoked this Court's observation in *Taylor* that burglary can consist of "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." Pet. App. 8a (quoting *Taylor*, 495 U.S. at 598). Noting that "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," Pet. App. 8a (quoting *United States v. Priddy*, 808 F.3d 676, 685 (6th Cir. 2015),

abrogated on other grounds by United States v. Stitt, 860 F.3d 854 (6th Cir. 2017)), the Sixth Circuit held that "generic burglary, as defined in *Taylor*, does not require intent at entry; rather the intent under generic burglary can be developed while 'remaining in.'" Pet. App. 8a. As a result, the Sixth Circuit held that Michigan home invasion in the third degree was a generic burglary offense. *Id.*

Other circuits have used the same reasoning to reach the same conclusion about similar statutes. In *United States v. Bonilla*, 687 F.3d 188 (4th Cir. 2012), the Fourth Circuit held that someone who commits a crime after an unauthorized entry "necessarily developed the intent to commit the crime while remaining in the building, if he did not have it at the moment he entered." *Id.* at 194; *see also id.* at 193 ("[B]ecause the Texas statute applies only where a defendant's entry or remaining in a building is unlawful, proof of a completed or attempted felony necessarily requires proof that the defendant formulated the intent to commit a crime either prior to his unlawful entry or while unlawfully remaining in the building."). In *United States v. Reina-Rodriguez*, the Ninth Circuit likewise held that *Taylor*, like the Utah statute at issue in that case, "allows for burglary convictions so long as the defendant formed the intent to commit a crime while unlawfully remaining on the premises." 468 F.3d 1147, 1155 (9th Cir. 2006), *overruled on other grounds by United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007). Finally, the Tenth Circuit, albeit with little analysis, has held as well that a state statute requiring only unauthorized entry and subsequent commission of an offense nevertheless qualified as generic burglary. *See United States v. Spring*, 80 F.3d 1450,

1462 (10th Cir. 1996). In these circuits, then, generic burglary consists of any crime committed while trespassing.

These holdings are in clear conflict with the Fifth and Eighth Circuits' decisions. Although the Fifth and Eighth Circuits acknowledge *Taylor*'s "remaining in" language, these courts disagree that this language "necessarily," Pet. App. 8a (quoting *Priddy*, 808 F.3d at 685), transforms every crime committed while trespassing into burglary. Instead, as the Eighth Circuit explained, "[t]he most natural reading of *Taylor* and the sources on which it relied show that a generic burglary requires intent to commit a crime at the time of the unlawful or unprivileged entry or the *initial* 'remaining in' without consent." *United States v. McArthur*, 850 F.3d 925, 939 (8th Cir. 2017) (emphasis added). Under this interpretation, "[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.* (citing 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § § 8.13(b), (e), at 467-68 & n.47, at 473-75 (1986)); *see also United States v. Herrera-Montes*, 490 F.3d 390, 392 (5th Cir. 2007) ("*Taylor* requires that the defendant intend to commit a crime at the time of unlawful entry or remaining in."). In these circuits, generic burglary does not broadly encompass any crime committed while trespassing. Instead, "when a conviction is for burglary committed by unlawful entry, the intent to commit a crime on the premises must be formed by the time of entry." *United States v. Bernel-Aveja*, 844 F.3d 206, 212 (5th Cir.

2016). Similarly, if the conviction involves lawful entry but subsequent unlawful remaining, intent to commit a crime must exist by the time of the initial unlawful remaining. *McArthur*, 850 F.3d at 939.

This circuit split extends to *identical* state statutes. The Fifth Circuit has determined that Tennessee's burglary statute, Tenn. Code § 39-14-402(a), does *not* qualify as generic burglary and thus does not trigger ACCA mandatory minimums. *Herrera-Montes*, 490 F.3d at 391. The Sixth Circuit has reached the opposite conclusion with respect to the exact same statute. *Priddy*, 808 F.3d at 685. Similarly, the Fifth Circuit has determined that Texas's burglary statute, Tex. Penal Code § 30.02(a), does not qualify as generic burglary and thus does not trigger ACCA penalties. *United States v. Constante*, 544 F.3d 584, 587 (5th Cir. 2008). The Fourth Circuit has reached the opposite conclusion with respect to that very provision. *Bonilla*, 687 F.3d at 194.

The conflict is clear. On the one hand, the Fifth and Eighth Circuits interpret generic burglary under *Taylor* as requiring criminal intent at the outset of the trespass, when the would-be burglar first enters or first unlawfully remains on the premises. On the other hand, the Fourth, Sixth, Ninth, and Tenth Circuits interpret generic burglary under *Taylor* as permitting criminal intent to develop at any point during the trespass even if it is absent at the time of unlawful entry or first unlawful remaining. Which conception governs is dispositive here, as the Michigan statute requires only that a defendant enter without authorization and subsequently commit a crime; there is no

intent-at-entry (or intent-at-first-remaining) requirement.

B. The Circuit Split Implicates Numerous State Burglary Statutes.

A wide range of state statutes potentially trigger ACCA's mandatory minimum sentences, highlighting the urgent need for this Court to resolve the disagreement among the circuits on the meaning of *Taylor*'s "remaining in" language.

Even apart from the particular provisions referenced above, various state burglary statutes across the country contain provisions under which "a defendant may form the purpose to commit a criminal offense at any point during the course of a trespass." *State v. Fontes*, 721 N.E.2d 1037, 1040 (Ohio 2000) (construing Ohio Rev. Code § 2911.11). Under these statutes, "[t]he intent necessary for commission of burglary … 'need not be formed at the precise moment of entry, but can be formed thereafter.'" *Williams v. State*, 601 S.E.2d 833, 836 (Ga. Ct. App. 2004) (construing Ga. Code Ann. § 16-7-1); *see also, e.g., Gratton v. State*, 456 So. 2d 865, 872 (Ala. Crim. App. 1984) ("[T]he intent to commit a crime [under Ala. Code § 13A-7-5, -6, and -7] may be concurrent with the unlawful entry or it may be formed after the entry…."); *Braddy v. State*, 111 So. 3d 810, 844 (Fla. 2012) (holding that defendant may be convicted of burglary under Fla. Stat. Ann. § 810.02(1) if intent to commit some further crime developed "at some point" during trespass); *State v. Rudolph*, 970 P.2d 1221, 1229 (Utah 1998) ("[W]e hold that a person is guilty of burglary under [Utah Code Ann. §] 76-6-202(1) if he

forms the intent to commit a felony, theft, or assault at the time he unlawfully enters a building or at any time thereafter….."); *State v. Allen*, 110 P.3d 849, 853 (Wash. Ct. App. 2005) (holding that a defendant may be convicted of burglary under Wash. Rev. Code Ann. § 9A.52.030(1) "[r]egardless of whether [he] possessed an intent to commit a crime at the time of the unlawful entry").

The number of states with broad burglary statutes potentially triggering the ACCA enhancement for any crime following a trespass underscores the importance of the issue and the need for its resolution.

II. The Sixth Circuit's Approach To Generic Burglary Has Widespread And Serious Practical Consequences.

A. Interpretation Of The "Remaining In" Element Of Generic Burglary Affects All State Burglary ACCA Predicates.

The Michigan home invasion statute at issue here squarely implicates the circuit split over contemporaneous intent, and is illustrative of the larger problem. *See* Mich. Comp. Laws § 750.110a(4)(a) (making it a crime to "enter[] a dwelling without permission and, at any time while … entering, *present in*, or exiting the dwelling, commit[] a misdemeanor" (emphasis added)).

As shown above, the Fourth, Sixth, Ninth, and Tenth Circuits have held, based on the "remaining in" language in *Taylor*, that generic burglary does not have an "intent-at-entry" requirement *at all*. *See, e.g.,*

Pet. App. 8a. Instead, generic burglary, through the "remaining in" language, transforms any crime committed while trespassing into burglary under the theory that "someone who enters a building … and, while inside, commits … a felony will necessarily have remained inside … to do so." Pet. App. 8a (quoting *Priddy*, 808 F.3d at 685). Thus, the Sixth Circuit held in this case that the Michigan statute's requirements of unauthorized entry plus subsequent commission of a crime while "present in" the structure correspond to the elements of generic burglary as set out in *Taylor*. This provision and the decision below reconfirm that the issue here pertains to a wide swath of state burglary laws involving "remaining in" or equivalent language.

B. ACCA Mandatory Minimums Are Common And Are Frequently Predicated On State Burglary Offenses.

The question presented arises in a substantial number of criminal prosecutions involving prior burglary convictions.

ACCA's 15-year mandatory minimum sentence for career criminals is applied in hundreds of cases each year; in recent years, approximately 15% of defendants convicted of a firearm offense carrying a mandatory minimum have qualified as an Armed Career Criminal under 18 U.S.C. § 924(e). *See* U.S. Sentencing Comm'n, *Quick Facts: Mandatory Minimum Penalties* 2 (2015), https://tinyurl.com/y7z5w9dj (sentencing data for 2015); U.S. Sentencing Comm'n, *Quick Facts: Mandatory Minimum Penalties* 2 (2016),

https://tinyurl.com/ybpwlwnn (sentencing data for 2016).

And as the government has explained elsewhere, "[b]urglary is … a frequently-used ACCA predicate." Gov't Pet. for Reh'g En Banc at 6, *United States v. Morris*, 836 F.3d 931 (8th Cir. 2016) (No. 14-3336). Indeed, many of this Court's most substantial ACCA opinions in recent years have involved burglary predicates. *See Mathis*, 136 S. Ct. at 2246 (addressing Iowa burglary convictions); *Descamps v. United States*, 133 S. Ct. 2276, 2282 (2013) (addressing California burglary convictions); *Johnson*, 559 U.S. at 136 (noting Florida burglary conviction, although it was not the predicate in dispute); *James v. United States*, 550 U.S. 192, 196 (2007) (addressing Florida burglary convictions).

Because of the frequency with which the government seeks mandatory minimums under ACCA and the frequency with which burglary offenses serve as ACCA predicates, the government itself has recently urged that the question of "when the formation of criminal intent must occur for purposes of generic burglary" is a "substantial" one. Gov't Mot. to Stay Mandate Pending Filing of Pet. for Writ of Cert. at 4, *United States v. Morris*, 850 F.3d 925 (8th Cir. 2017) (No. 14-3336). The government's assessment is plainly correct, and further highlights the need for this Court's review.

C. The Sixth Circuit's Approach Greatly Expands The Scope Of Conduct That Will Trigger Mandatory Minimum Sentences Under ACCA.

The question presented is important for another reason: The Sixth Circuit's interpretation of the "remaining in" element of generic burglary, shared by the Fourth, Ninth, and Tenth Circuits, improperly and very substantially broadens the scope of conduct triggering ACCA mandatory minimums.

The Sixth Circuit has candidly acknowledged the scope of its ruling: Anyone "who enters a building … and, while inside, commits or attempts to commit a felony will necessarily have remained inside the building … to do so." Pet. App. 8a (quoting *Priddy*, 808 F.3d at 685). In other words, any crime committed while trespassing is generic burglary.

The practical consequence of this position, in terms of the scope of conduct triggering ACCA mandatory minimum sentences, is staggering. Consider Petitioner's example of "a hiker who enters an unoccupied cabin for protection from the cold and only later opportunistically decides to take food or supplies," Pet. 23, or the Fifth Circuit's example of "teenagers who unlawfully enter a house only to party, and only later decide to commit a crime," *Herrera-Montes*, 490 F.3d at 392. In neither example is there any intent to commit a further crime at the time of the initial trespass, but under the Sixth Circuit's approach, these acts nonetheless constitute generic burglary because such intent developed at some later point *during* the trespass. Similarly, the Fourth Circuit has

recognized that its conception of generic burglary would reach "a homeless person who unlawfully enters a home only to seek warmth, but while inside, forms an intent to steal property." *Bonilla*, 687 F.3d at 193.

These examples are not mere hypotheticals. In *People v. Gaines*, 546 N.E.2d 913 (N.Y. 1989), the defendant testified at trial that he had "left the homeless shelter where he had been staying, because he had inadequate funds to remain there, …. walked … until he reached [a] building supply company, pushed in a window and entered the building for refuge from the cold and heavy snow that fell that night." *Id.* at 914. While in the building, the defendant "put on [a] jacket and coveralls to keep warm." *Id.* He was arrested after leaving the building, still wearing the jacket and overalls he had taken from inside the building. *Id.*

Luckily for the defendant in *Gaines*, the New York Court of Appeals overturned his burglary conviction, adopting the same interpretation of the "remaining in" language in the New York burglary statute, N.Y. Penal Law § 140.20, as the Fifth and Eighth Circuits have adopted with respect to the "remaining in" language in *Taylor*. *Id.* at 915-16. But in a state whose burglary statute has been interpreted differently, along the lines of the Sixth Circuit's decision here, the conviction would stand. And in the Sixth Circuit (and the Fourth, Ninth, and Tenth Circuits), that conviction could be deployed as an ACCA predicate to trigger a 15-year mandatory minimum sentence. Such a

result is profoundly unjust and, in light of the entrenched circuit split, the question calls for this Court's intervention.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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December 28, 2017