No. 22-542

In the Supreme Court of the United States

TAVARIS BETTS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior conviction for aggravated burglary, in violation of Tenn. Code Ann. §§ 39-14-402(a)(3) and 39-14-403 (2014), is a conviction for "burglary" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii).

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (6th Cir.):

United States v. *Betts*, No. 20-5006 (Sept. 13, 2022) (denying rehearing and rehearing en banc)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-6a) is not published in the Federal Reporter but is available at 2022 WL 3137710. The order of the district court (Pet. App. 7a-9a) is unreported but is available at 2021 WL 5989911.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2022. A petition for rehearing was denied on September 13, 2022 (Pet. App. 1a). The petition for a writ of certiorari was filed on December 12, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Tennessee, petitioner

was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 2a-6a.

1. On January 9, 2020, petitioner went to the apartment of his former girlfriend, C.M., and demanded money. Presentence Investigation Report (PSR) ¶ 5. When she refused, petitioner pointed a gun at her face and stated that she was "going to regret telling him where her family is," which C.M. understood as a threat. *Ibid.* C.M. later managed to sneak out of her apartment and call the police, reporting that petitioner remained armed inside the apartment. *Ibid.*

Officers arrived and surrounded the apartment. PSR ¶ 6. Petitioner initially refused to come out, but eventually surrendered. *Ibid.* Officers then searched C.M.'s apartment with her consent. PSR ¶ 7. During the search, officers found a loaded 9mm pistol with a silver slide, which matched the description of the gun C.M. had given to police. *Ibid.*

2. A federal grand jury indicted petitioner on one count of unlawfully possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924. Indictment 1. Petitioner pleaded guilty. PSR ¶ 4.

a. At the time of petitioner's offense, the default term of imprisonment for the offense of possessing a firearm as a felon was zero to 120 months. See 18 U.S.C. 924(a)(2) (2018); Bipartisan Safer Communities Act, Pub. L. No. 117-159, Div. A, Tit. II, § 12004(c), 136 Stat. 1329 (adding 18 U.S.C. 924(a)(8)) (increasing default statutory maximum to 15 years of imprisonment). The Armed Ca-

reer Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" to include, *inter alia*, any crime punishable by more than one year that "is burglary, arson, or extortion, [or] involves use of explosives." 18 U.S.C. 924(e)(2)(B)(ii).

Although the ACCA does not define "burglary," this Court in *Taylor* v. *United States*, 495 U.S. 575 (1990), construed the term to include "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599. *Taylor* instructed courts to employ a "categorical approach," examining "the statutory definition[]" of the previous crime in order to determine whether a prior conviction "substantially corresponds" to the "generic" form of burglary referenced in the ACCA. *Id.* at 600, 602.

Before sentencing in this case, the Probation Office prepared a presentence report finding that petitioner had three prior convictions under Tennessee law that qualified as "violent felon[ies]" for purposes of the ACCA: a 2012 conviction for aggravated assault; a 2017 conviction for robbery; and a 2017 conviction for aggravated burglary. PSR ¶¶ 21, 29, 32-33. The relevant Tennessee burglary statute, Tenn. Code Ann. § 39-14-402(a) (2014), provided that a person commits burglary if, "without the effective consent of the property owner," the person:

> (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.

Ibid. A person commits aggravated burglary if the structure at issue is a "habitation." *Id.* § 39-14-403(a) (2014). The charging document for petitioner's aggravated burglary conviction recited the language under Section 39-14-402(a)(3). D. Ct. Doc. 55-5, at 6 (Nov. 16, 2021).

b. Petitioner objected to the Probation Office's determination that he was subject to sentencing under the ACCA. D. Ct. Doc. 55 (Nov. 16, 2021). In particular, petitioner argued that the (a)(3) variant of Tennessee burglary lacks generic burglary's requirement of intent to commit a crime. *Id.* at 5-7.

The district court rejected petitioner's argument based on Sixth Circuit precedent "h[olding] that an aggravated burglary conviction under Tennessee law categorically counts as a burglary under [this] Court's generic definition and so may count as a predicate offense under the ACCA." Pet. App. 7a-8a (citing *Brumbach* v. *United States*, 929 F.3d 791 (6th Cir. 2019), cert denied, 140 S. Ct. 974 (2020), and *United States* v. *Nance*, 481 F.3d 882 (6th Cir.), cert. denied, 552 U.S. 1052 (2007)).

The court noted that in a statement respecting the denial of certiorari in *Gann* v. *United States*, 142 S. Ct. 1 (2021), Justice Sotomayor had stated that "the Sixth Circuit has not yet addressed the question of 'whether Tennessee aggravated burglary * * * comports with the requirement that generic burglary include the intent to commit a crime.'" Pet. App. 8a-9a (quoting *Gann*, 142 S. Ct. at 2). The court explained, however, that it was "bound by Sixth Circuit precedent." *Id.* at 9a.

The district court sentenced petitioner to 180 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 2a-3a. The court explained that its prior decision in *Brumbach* v. *United States* foreclosed petitioner's contention that the (a)(3) variant of Tennessee burglary does not constitute generic burglary. Pet. App. 3a; see *Brumbach*, 929 F.3d at 794 ("[C]onvictions under subsections (a)(1), (a)(2), or (a)(3) of the Tennessee burglary statute * * * fit within the generic definition of burglary and are therefore violent felonies for purposes of the ACCA.") (quoting *United States* v. *Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017), cert. denied, 139 S. Ct. 2712 (2019)).

Judge Donald dissented, disagreeing with the panel majority that prior Sixth Circuit case law foreclosed petitioner's objection and citing Justice Sotomayor's statement in *Gann*. Pet. App. 3a-6a.

ARGUMENT

Petitioner contends (Pet. 8-22) that his prior Tennessee conviction for aggravated burglary does not qualify as generic "burglary" under the ACCA, 18 U.S.C. 924(e)(2)(B)(ii), on the theory that the relevant variant

of Tennessee burglary lacks an intent requirement. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or of another court of appeals.

This Court has recently and repeatedly denied petitions for writs of certiorari raising various challenges to whether a Tennessee burglary conviction qualifies as generic "burglary," see, *e.g.*, *Ursery* v. *United States*, 142 S. Ct. 132 (2021) (No. 20-7943); *Morris* v. *United States*, 141 S. Ct. 1121 (2021) (No. 20-6461); *Gilliam* v. *United States*, 141 S. Ct. 1108 (2021) (No. 20-6306); *McClurg* v. *United States*, 141 S. Ct. 937 (2020) (No. 20-6220); *Bateman* v. *United States*, 140 S. Ct. 2698 (2020) (No. 19-8030); *Stitt* v. *United States*, 140 S. Ct. 2573 (2020) (No. 19-7074); *Barnett* v. *United States*, 140 S. Ct. 2548 (2020) (No. 19-7664); *Hall* v. *United States*, 140 S. Ct. 1229 (2020) (No. 19-7271); *Brumbach* v. *United States*, 140 S. Ct. 974 (2020) (No. 19-6968), including petitions specifically arguing that Section 39-14-402(a)(3) lacks a sufficient intent requirement, see *Gann* v. *United States*, 142 S. Ct. 1 (2021) (No. 20-7701); *Greer* v. *United States*, 140 S. Ct. 1234 (2020) (No. 19-7324); *Ferguson* v. *United States*, 139 S. Ct. 2712 (2019) (No. 17-7496). The Court also has repeatedly denied petitions raising an identical argument with respect to Texas's materially similar burglary statute. See pp. 11-12, *infra*. The same course is warranted here.

1. The court of appeals correctly recognized that petitioner's aggravated burglary conviction under Tenn. Code Ann. § 39-14-403(a) (2014) constitutes a conviction for "generic" burglary under *Taylor* v. *United States*, 495 U.S. 575 (1990).

a. *Taylor* held that Congress intended "burglary" in the ACCA to have a "uniform definition" that encompasses any "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." 495 U.S. at 580, 598. This Court further explained in *Quarles* v. *United States*, 139 S. Ct. 1872 (2019), that "burglary occurs for purposes of [Section] 924(e) if the defendant forms the intent to commit a crime at any time during the continuous event of unlawfully remaining in a building or structure." *Id.* at 1877 (emphasis omitted). The Tennessee Court of Criminal Appeals' construction of the (a)(3) variant of burglary substantially corresponds to that definition.

In *State* v. *Ivey*, No. E2017-2278, 2018 WL 5279375 (Oct. 23, 2018), the Tennessee Court of Criminal Appeals rejected a vagueness challenge to Section 39-14-402(a)(3). The court's decision included a thorough discussion of the burglary statute's history, in which it explained (*inter alia*) that the (a)(3) variant of burglary jettisoned the requirement that the prosecution specifically prove intent "at the time of entry," as opposed to the development of intent at a later time while the defendant remained in the structure. *Id.* at *10 (citation omitted). It cited commentary by the Tennessee Sentencing Commission in 1989, when proposing the current burglary statute, that "Subsection (a)(3) includes as burglary the conduct of one who enters without effective consent but, lacking intent to commit any crime at the time of the entry, *subsequently forms that intent* and commits or attempts a felony or theft." *Ibid.* (quoting Tenn. Sent. Comm'n, *Proposed Revised Criminal Code* 156 (1989)) (emphasis added). And the court observed that "[i]ntent generally has to be proven by circumstantial evidence," which may be difficult in cases in

which, for example, a building is generally open to the public. *Ibid.*; see *id.* at *7.

The Tennessee Court of Criminal Appeals further explained in *Ivey* that "[t]he legislature chose to enact a burglary statute containing language that was substantially similar to [S]ubsection (a)(3) of the statute enacted in Texas." 2018 WL 5279375, at *11 (emphasis omitted); see Tex. Penal Code § 30.02(a)(3) (West 1974) (defining burglary to include instances where, "without the effective consent of the owner," a person "enters a building or habitation and commits or attempts to commit a felony or theft"). The court observed that the legislative history of the Texas provision likewise illustrated that the provision "includes as burglary the conduct of one who enters without effective consent but, lacking intent to commit any crime upon his entry, *subsequently forms that intent* and commits or attempts a felony or theft." *Ivey*, 2018 WL 5279375, at *9 (emphasis added; citation omitted). And the court "presume[d]" that the Tennessee legislature was aware of legal developments in Texas, *id.* at *11, which at the time of the Tennessee statute's enactment in 1989 included judicial interpretation of the Texas burglary provision as reaching "the conduct of one who enters without effective consent but, lacking intent to commit any crime upon his entry, *subsequently forms that intent* and commits or attempts a felony or theft." *United States* v. *Herrold*, 941 F.3d 173, 179 (5th Cir. 2019) (en banc) (quoting *DeVaughn* v. *State*, 749 S.W.2d 62, 65 (Tex. Crim. App. 1988) (en banc)), cert. denied, 141 S. Ct. 273 (2020). The Texas law's function as a model for the Tennessee law thus confirms that Tenn. Code Ann. § 39-14-402(a)(3) (2014) criminalizes generic remaining-in burglary of the sort at issue in *Quarles*,

not a form of "burglary" for which intent would be wholly absent.

b. Petitioner urges (Pet. 20-22) the opposite construction of Tennessee law. But petitioner does not address the Tennessee Court of Criminal Appeals' analysis in *Ivey* construing the statute to require intent. And in each of the Tennessee burglary decisions that petitioner cites, the defendant necessarily formed the intent to commit a crime either before or after entering the burglarized structure. See *State* v. *Welch*, 595 S.W.3d 615, 619 (Tenn. 2020) (defendant informed friend "[s]econds before" entering store that she intended to steal merchandise); *State* v. *Lawson*, No. E2018-1566, 2019 WL 4955180, at *1 (Tenn. Crim. App. Oct. 8, 2019) (defendant entered store without authorization and placed merchandise into his bag); *State* v. *Bradley*, No. M2017-376, 2018 WL 934583, at *1 (Tenn. Crim. App. Feb. 15, 2018) (defendant and two accomplices "intrude[d]" into an apartment, "kicked [one victim] in the ribs," and "fir[ed] multiple gunshots at [another victim]"); *State* v. *Goolsby*, No. M2002-2985, 2006 WL 3290837, at *1 (Tenn. Crim. App. Nov. 7, 2006) (defendant unlawfully entered a business and a residence and intentionally removed valuable items from each location).

Petitioner further observes (Pet. 22) that, when defining the elements of Tennessee burglary, the Tennessee Pattern Jury Instructions advise that "the defendant [must have] acted either intentionally, knowingly, or recklessly," and that the same instructions advise in a footnote that "'intent' is not required" for burglary under Section 39-14-402(a)(3). 7 Tenn. Practice: Tenn. Pattern Jury Instructions Crim. 14.02, Pt. C. & n.4, at

536 (24th ed. 2020). But even assuming that a state burglary statute that criminalizes entry followed by commission of a reckless offense sweeps more broadly than generic burglary, the Tennessee Pattern Jury Instructions "do not have the force of law." *State* v. *Rutherford*, 876 S.W.2d 118, 120 (Tenn. Crim. App. 1993); accord *State* v. *Davis*, 266 S.W.3d 896, 901 n.2 (Tenn. 2008), cert. denied, 557 U.S. 906 (2009). They accordingly do not undermine the Tennessee Court of Criminal Appeals' definitive construction of the statute in *Ivey*.

Petitioner also relies (Pet. 21) on the Tennessee Court of Criminal Appeals' decision in *Goolsby*, *supra*. As noted above, however, *Goolsby* involved a factual circumstance—entry followed by theft—that necessarily required the formation of intent to commit a crime at some point. See *Quarles*, 139 S. Ct. at 1877 (holding that such a crime is generic burglary). And any inconsistency between *Ivey* and *Goolsby* is an issue for the Tennessee Court of Criminal Appeals, not this Court. Even on issues of federal law, "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties," *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), and this Court has even greater reason not to weigh in on the scope of the Tennessee burglary law at issue here.

Although federal courts may need to consider the interpretation of a state statute when applying the ACCA, it is fundamentally a question of state law. This Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," and no sound reason exists to depart from that practice in this case. *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988); see *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 16 (2004) (observing

that this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located"). See also pp. 12-13 n.2, *infra*.

2. Petitioner contends (Pet. 8-17) that the decision below conflicts with the Seventh Circuit's decision in *Van Cannon* v. *United States*, 890 F.3d 656 (2018). That contention lacks merit.

The Seventh Circuit in *Van Cannon* construed a Minnesota burglary statute not to "require proof of intent to commit a crime *at all*." 890 F.3d at 664. According to the Seventh Circuit, a conviction under the Minnesota statute could be premised on a mental state of "only recklessness or criminal negligence." *Ibid.*; see *Chazen* v. *Marske*, 938 F.3d 851, 860 (7th Cir. 2019) (reaffirming *Van Cannon*). For that reason, the Seventh Circuit adopted the view that a conviction under the Minnesota statute does not constitute generic burglary for purposes of the ACCA.[1]

But as explained above, the Tennessee Court of Criminal Appeals in *Ivey* read Section 39-14-403(a) to incorporate an intent-to-commit-a-crime element. See pp. 7-9, *supra*. The circumstances thus mirror *Herrold*, *supra*, in which the Fifth Circuit upheld an ACCA sentence because it construed the Texas burglary statute on which the Tennessee statute was modeled to require

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[1] Petitioner also references (Pet. 11) district court decisions reaching the same conclusion with respect to Minnesota burglary. But such decisions cannot create a conflict warranting this Court's review. See Sup. Ct. R. 10; *Camreta* v. *Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (citation omitted).

intent. The Fifth Circuit explained that "Texas law rejects [the defendant's] no-intent interpretation" of the statute. 941 F.3d at 179 (citing *DeVaughn*, 749 S.W.2d at 65).

Petitioner appears to accept (Pet. 16) that the Fifth Circuit's interpretation of the Texas burglary statute in *Herrold* does not warrant this Court's review given the statute's requirement of intent. Indeed, this Court has routinely denied petitions for writs of certiorari asserting a conflict between the Fifth Circuit's decision in *Herrold* and the Seventh Circuit's decision in *Van Cannon*. See, *e.g.*, *Stinger* v. *United States*, 142 S. Ct. 2845 (2022) (No. 21-7907); *Bell* v. *United States*, 142 S. Ct. 2662 (2022) (No. 21-7451); *Penny* v. *United States*, 142 S. Ct. 1689 (2022) (No. 21-7333); *McCall* v. *United States*, 142 S. Ct. 597 (2021) (No. 21-5501); *Adams* v. *United States*, 142 S. Ct. 147 (2021) (No. 20-8082); *Smith* v. *United States*, 141 S. Ct. 2525 (2021) (No. 20-6773); *Lister* v. *United States*, 141 S. Ct. 1727 (2021) (No. 20-7242); *Webb* v. *United States*, 141 S. Ct. 1448 (2021) (No. 20-6979); *Wallace* v. *United States*, 141 S. Ct. 910 (2020) (No. 20-5588); *Herrold* v. *United States*, 141 S. Ct. 273 (2020) (No. 19-7731).

A similar result is warranted here.[2] Because the Tennessee statute undergirding petitioner's aggravated burglary conviction was modeled after the Texas

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[2] Petitioner criticizes (Pet. 13) the court of appeals for not reexamining its prior precedent as suggested by Justice Sotomayor in her statement respecting the denial of certiorari in *Gann*, *supra*. See 142 S. Ct. at 2. "[T]his Court," however, "reviews judgments, not opinions." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). And in response to petitioner's request for rehearing en banc, not even the dissenting judge re-

statute and construed by the Tennessee courts in a similarly narrow fashion, the petition for a writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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quested a vote, which may suggest that the judges of the Sixth Circuit do not view the result as incorrect, or at least importantly so. See Pet. App. 1a; see also 6th Cir. Internal Operating P. 35(e) (Mar. 14, 2022) ("Any active judge or any member of the original hearing panel whose decision is under review may request a poll."). Because the court of appeals correctly determined that petitioner's prior conviction for aggravated burglary in Tennessee is a conviction for "burglary" under the ACCA; because this dispute turns on the proper construction of a state criminal law; and because there is no disagreement in the courts of appeals, further review is unwarranted.