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NOTE

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United States v. McArthur, 850 F.3d 925 (8th Cir. 2017)

*Rachel Mitchell**

I. INTRODUCTION

The Armed Career Criminal Act ("ACCA") is a federal law that imposes mandatory enhanced sentencing for offenders found to have multiple prior convictions for violent crimes.[1] What constitutes a prior violent offense, however, has been the subject of over twenty-five years of litigation.[2] The ACCA provides three paths to punish criminals based on prior violent offenses, one of which is an enumerated list of crimes that are statutorily defined by the ACCA as "violent felonies."[3] Although burglary is one of the enumerated offenses,[4] Congress failed to specifically define burglary itself for purposes of the ACCA.[5] As a result, much of the litigation surrounding enhanced sentencing under the ACCA has revolved around whether all state burglary statutes count as violent felonies, given that there is no common definition.[6]

In an attempt to solve this dilemma, the United States Supreme Court developed elements of "generic burglary" to hone in on what constitutes a prior conviction for burglary under the ACCA.[7] In *Taylor v. United States*, the Court wrote that generic burglary is "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with [the] intent to commit a crime."[8] The elements of generic burglary, however, have themselves been the subject

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1. *See* 18 U.S.C. § 924(e)(1) (2018).

2. *See, e.g.*, Johnson v. United States, 135 S. Ct. 2551 (2015); Taylor v. United States, 495 U.S. 575 (1990); United States v. Chatman, 869 F.2d 525 (9th Cir. 1989), *abrogated by* Taylor v. United States, 495 U.S. 575 (1990).

3. 18 U.S.C. § 924(e)(2)(B)(ii).

4. *Id.*

5. *Taylor*, 495 U.S. at 580.

6. *See, e.g.*, *id.*

7. *Id.* at 598.

8. *Id.*

of intensive litigation, resulting in multiple circuit splits on various aspects of the elements.[9] One element that has recently divided the circuit courts is whether the intent element of generic burglary is required to form at a particular time relative to an unlawful entry or remaining in a building or structure.[10]

This Note examines the U.S. Court of Appeals for the Eighth Circuit's decision in *United States v. McArthur*, which held that intent is required to form at the moment of unlawful entry or remaining in for the purposes of enhanced sentencing under the ACCA.[11] Part II lays out the facts and holding of the *McArthur* decision. Part III discusses the legal background relevant to the *McArthur* decision. The legal background includes an overview of the relevant portions of the ACCA, several United States Supreme Court decisions interpreting the ACCA, and the case law from the U.S. Courts of Appeal for the Fourth, Fifth, and Sixth Circuits, which created the split. Part IV details the unanimous *McArthur* opinion. Part V argues that *McArthur* is the superior opinion in the circuit split and the one that the United States Supreme Court should adopt when it resolves the issue. In the alternative, this Note makes the case that the ACCA is vague and should be ruled unconstitutional. Part VI concludes the Note.

II. FACTS AND HOLDING

William Earl Morris is a member of Native Mob, a Minnesota prison and street gang.[12] Morris and two other gang members, Wakinyan McArthur and Anthony Cree, jointly stood trial in 2013 for a multitude of crimes related to their involvement with Native Mob.[13] In early 2010, mob members determined that a former associate, Amos LaDuke, "needed to be wacked" and gave Morris a gun in case he came across LaDuke.[14] On March 4, 2010, Cree, Morris, and two other gang associates went to Cass Lake, Minnesota.[15] Upon finding

9. *See, e.g.*, United States v. McArthur, 850 F.3d 925 (8th Cir. 2017); United States v. Bonilla, 687 F.3d 188 (4th Cir. 2012).

10. *Compare McArthur*, 850 F.3d at 939 (finding that intent must form prior to or at the same time as unlawful entry or remaining in), *with Bonilla*, 687 F.3d at 193 (finding that contemporaneous intent is not required).

11. 850 F.3d 925, 939. Since *McArthur* was decided, the Eighth Circuit has also determined that several other state burglary statutes did not qualify for enhanced sentencing under the ACCA. *See, e.g.*, United States v. Sims, 854 F.3d 1037, 1040 (8th Cir. 2017) (finding that Arkansas's residential burglary statue if broader than generic burglary), *vacated and remanded sub nom.* United States v. Stitt, 139 S. Ct. 399 (2018); United States v. Kinney, 888 F.3d 360, 364 (8th Cir. 2018) (finding that North Dakota's burglary statute is broader than the elements of generic burglary).

12. *McArthur*, 850 F.3d at 931.

13. *Id.* McArthur and Cree were tried and convicted in the same trial and also appealed jointly with Morris. *Id.* Those crimes and appeals, however, are not the subject of this Note and thus will not be discussed.

14. *Id.* at 931–32.

15. *Id.* at 932.

LaDuke walking there, Morris exited the vehicle with his firearm.[16] LaDuke saw Morris and tried to run from him.[17] In response, Morris fired multiple rounds, hitting LaDuke three times.[18] The attack stopped when an ex-police officer drove his truck in-between the two men.[19] At that point, Morris abandoned the scene.[20] Authorities quickly found and arrested Morris.[21]

Morris was charged in the U.S. District Court for the District of Minnesota with six federal felonies: (1) conspiracy to participate in racketeering; (2) conspiracy to carry a firearm during and in relation to a crime of violence; (3) attempted murder in relation to racketeering; (4) assault with a dangerous weapon in aid of racketeering; (5) carrying and using a firearm during a crime of violence; and (6) felon in possession of a firearm.[22] After six weeks at trial, the jury acquitted Morris of counts one and two and convicted him of counts three through six.[23]

At sentencing, the trial judge found, over Morris' objection, that Morris' three prior convictions for third-degree burglary[24] under Minnesota state law constituted "violent felonies" for purposes of enhanced sentencing under § 924(e)[25] of the ACCA.[26] This finding meant that Morris faced a mandatory minimum sentence of fifteen years to life in prison for his conviction as a felon in possession of a firearm.[27] The judge sentenced Morris to thirty years in prison on that count alone, and he was sentenced for a total of thirty-five years for all of his convictions combined.[28]

On appeal, Morris alleged that the trial court erred when it found that his prior burglary convictions were sufficient to subject him to enhanced sentencing under the ACCA.[29] Morris argued that the Minnesota statute's elements

16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 933.
23. Special Verdict Form at 1–5, *McArthur*, 850 F.3d 925 (No. 12-26 (6)).
24. The record does not provide any factual information related to how Morris committed the prior burglaries. The fact that the trial court did not attempt to assess whether the elements of Morris' third-degree burglaries met the definition of generic burglary for the purposes of the ACCA is a point of contention in Morris' appellant brief. *See* Appellant's Brief and Addendum at 33–36, *McArthur*, 850 F.3d 925 (No. 14-3336).
25. 18 U.S.C. § 924(e) (2018).
26. *McArthur*, 850 F.3d at 933.
27. *Id.*
28. *Id.*
29. *Id.* at 937. Morris also made two other arguments on appeal: (1) that there was insufficient evidence against him to uphold the attempted murder and assault convictions and (2) that the jury instructions had constructively amended the indictment. *Id.* at 936. The Eighth Circuit did not find these claims meritorious. *Id.* at 936–37. Because these claims are not the focus of this Note, they will not be examined further.

for burglary were indivisible under *Mathis v. United States*[30] and broader than the elements the Court had established for "generic burglary" in *Taylor v. United States.*[31] Therefore, Morris argued his prior convictions were not "violent felonies" for the purposes of the ACCA.[32] The government agreed that the statute was indivisible but still contended that Minnesota's statute constituted a "violent felony."[33]

The Eighth Circuit agreed with Morris and held that Morris' prior burglary convictions were not "violent felonies" within the meaning of the ACCA because the Minnesota burglary statute at issue has a broader definition of burglary than does *Taylor*.[34] As a result, Morris' sentence was vacated and remanded for resentencing.[35]

III. LEGAL BACKGROUND

The analysis in the Eighth Circuit's decision involved two primary questions.[36] First, are the alternative phrasings in Minnesota's burglary statute elements of different crimes, or are they factual means of satisfying a single element of a single crime?[37] Second, does "generic burglary" under *Taylor* require that the element of intent to commit a crime exist at the moment of unlawful entry into a building, or may it evolve at any point during the unlawful occupation of the building in order to be a "violent felony" under the ACCA?[38] This Part begins by examining relevant portions of the ACCA and analyzing the way the United States Supreme Court has defined burglary. Then, this Part looks at how the other circuits have answered the intent question.

A. The Requirements of the Armed Career Criminal Act and the Court's Definition of Burglary

The ACCA was enacted under the Reagan Administration as part of the Comprehensive Crime Control Act of 1984.[39] The ACCA made it a crime for any person who had been "convicted in any court of [] a crime punishable by

30. 136 S. Ct. 2243 (2016).
31. 495 U.S. 575 (1990).
32. *McArthur*, 850 F.3d at 937.
33. *Id.*
34. *Id.* at 940.
35. *Id.*
36. *See id.* at 937–39.
37. *Id.* at 937.
38. *Id.* at 938–39.
39. Pub. L. No. 98-473, § 1801–03, 98 Stat. 1837, 2185 (1984).

imprisonment for a term exceeding one year"[40] to possess a firearm.[41] A violation of this law imposed a mandatory maximum sentence of ten years.[42] Furthermore, a person who violated the law and who had three or more convictions for "violent felonies" would receive an enhanced minimum sentence of fifteen years to life in prison.[43] As originally passed, punishment for the enhanced violation also precluded the offender from obtaining parole.[44] In 1994, Congress amended the law to allow offenders sentenced under § 924(e) to be considered for parole.[45] One of the ways that Congress defined a "violent felony" was as a crime that is both punishable for more than one year in prison and is a burglary.[46] This language in the ACCA soon proved problematic because burglary has no "single accepted meaning" and "the criminal codes of the [s]tates define burglary in many different ways."[47] The United States Supreme Court attempted to remedy this problem in *Taylor*.

In *Taylor*, the defendant pleaded guilty to a felon in possession of a weapon charge, and the trial court sentenced him in accordance with the enhancement violation under the ACCA because he had four prior convictions, including robbery, assault,[48] and two second-degree burglaries under Missouri law.[49] The defendant appealed and claimed that his burglaries could not be counted on the basis that they had not posed a risk to another person.[50] The defendant argued that Missouri law distinguishes violent burglary from nonviolent burglary because it sets out the crimes in varying degrees.[51] Taylor was

40. 18 U.S.C. § 922(g)(1) (2018).

41. *Id.* § 922(g).

42. *Id.* § 924(a)(2).

43. *Id.* § 924(e)(1).

44. *Id.*

45. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110510(a), 108 Stat. 1796, 2018 (1994).

46. 18 U.S.C. § 924(e)(2)(B).

47. Taylor v. United States, 495 U.S. 575, 580 (1990); *see also, e.g.*, MO. ANN. STAT. § 569.170.1 (2016) (defining burglary as knowingly entering or unlawfully remaining in a building for the purpose of committing a crime); MASS. GEN. LAWS ANN. ch. 266, § 14 (West 2018) (defining burglary as breaking and entering a dwelling at night with the intent to commit a crime); TENN. CODE ANN. § 39-14-402(a) (West 2018) (defining burglary four different ways, including entering a building without consent and then committing a felony, theft, or assault); CAL. PENAL CODE § 459 (West 2018) (describing burglary as entering a variety of places, some of which are any house, shop, mill, barn, vessel, floating home, or mine, with the intent to commit a grand or petit larceny or a felony).

48. The assault conviction could not be verified and therefore was not used by the trial judge in considering if Taylor qualified for enhanced sentencing under the ACCA. *See* Brief for the Petitioner at *4, *Taylor*, 495 U.S. 575 (No. 88-7194).

49. *Taylor*, 495 U.S. at 578.

50. *Id.* at 579.

51. Brief for the Petitioner, *supra* note 48, at *7–8.

convicted under second-degree burglary, which referenced unarmed burglary in an unoccupied building.[52]

The Court examined the legislative history of the ACCA and found that Congress likely intended burglary to have a modern definition that matched the same basic elements found in a majority of the states, regardless of what the crime was labeled.[53] The Court relied on the Model Penal Code and LaFave & Scott's Substantive Criminal Law treatise to determine the common elements of burglary are "an unlawful or unprivileged entry into, or remaining in, a building or other structure with intent to commit a crime."[54] The Court also held that when a sentencing court is looking at prior crimes to determine if they meet the "generic burglary" elements, the sentencing court need only consider the statutory definitions of the offenses and not the particular facts of the prior crimes.[55] Finally, the Court held, for purposes of the ACCA, the elements of a state statute had to be the same as or narrower than what the Court defined as "generic burglary" or the jury instructions had to show that they had to find those elements.[56]

The *Taylor* Court was silent about how to treat a state statute that provided alternative versions of the crime. In *Descamps v. United States*, the Court summarized its precedents since *Taylor* regarding the divisibility of statutes that provided for alternative ways to commit burglary.[57] The Court stated that when a statute gives multiple, divisible alternatives of a crime and not all alternatives qualify under the ACCA as "violent felonies," the sentencing court can, when it is unclear which alternative the defendant was convicted of or pleaded to, view certain other documents, such as a plea agreement, to determine if the elements the defendant was convicted on were those of generic burglary.[58]

In a subsequent case, *Mathis v. United States*, the Court revisited the alternatives question because it was unclear in that case whether the Iowa statute that presented alternatives was actually divisible.[59] The Iowa burglary statute at issue included the element of "unlawful entry" but then went on to list multiple places where an unlawful entry could occur to satisfy the element: in a building, in a structure, on land, in water, or in an air vehicle.[60] The jury could convict the defendant as long as it agreed that the unlawful entry occurred at one of these locations; the jurors did not have to agree on the actual location of the unlawful entry.[61] The Court found that Iowa's statute was indivisible because its alternatives were "various factual means of committing a single element," unlike the previous cases that dealt with statutes whose alternatives

52. *Id.* at *8.
53. *Taylor*, 495 U.S. at 581–92.
54. *Id.* at 598.
55. *Id.* at 600–01; *see also* discussion *infra* in Part V.
56. *Taylor*, 495 U.S. at 602.
57. 570 U.S. 254, 262–64 (2013).
58. *Id.*
59. 136 S. Ct. 2243, 2249 (2016).
60. *Id.* at 2250.
61. *Id.*

were actually "multiple elements [listed] disjunctively"[62] that created separate crimes.[63] Iowa's statute, therefore, was not burglary under the ACCA because its unlawful entry element, which contained vehicles, was broader than generic burglary, which only allows for buildings and structures.[64]

B. The Circuits Are Split on When Intent Must Be Formed to Qualify as Generic Burglary

The U.S. Courts of Appeal for the Fourth, Fifth, and Sixth Circuits have all heard challenges to ACCA-enhanced sentences over the intent requirement in generic burglary.[65] *Taylor* only noted that generic burglary was unlawful entry into, or remaining in, a building or structure "with the intent to commit a crime."[66] *Taylor* did not specify when intent must be formed relative to unlawful entry.[67] In 2007, the Fifth Circuit interpreted the intent element as required to exist before or at the time of unlawful entry.[68] The court explained as an example that "teenagers who unlawfully enter a house only to party, and only later decide to commit a crime, are not common burglars."[69] In 2016, *United States v. Bernel-Aveja* posed the same question and the Fifth Circuit reaffirmed its earlier holding by finding that the Ohio statute at issue was not generic burglary because it allowed intent to commit a crime to form after the unlawful entry had occurred.[70]

In contrast, the Fourth and Sixth Circuits have come to the opposite conclusion.[71] In *United States v. Bonilla*, the Fourth Circuit found that the defendant had "necessarily developed the intent" by unlawfully remaining in a building and then committing a crime.[72] The court thought that reading *Taylor* to require intent at the moment of unlawful entry was too rigid.[73] The Sixth Circuit likewise agreed that intent necessarily formed whenever a criminal committed a felony while "remaining in" a building unlawfully.[74] Because the

62. *Id.* at 2249.

63. *Id.* at 2250.

64. *Id.* at 2250–51.

65. *See* United States v. Bernel-Aveja, 844 F.3d 206 (5th Cir. 2016); United States v. Priddy, 808 F.3d 676 (6th Cir. 2015), *abrogated by* United States v. Stitt, 860 F.3d 854 (6th Cir. 2017) (en banc); United States v. Bonilla, 687 F.3d 188 (4th Cir. 2012); United States v. Herrera-Montes, 490 F.3d 390 (5th Cir. 2007).

66. Taylor v. United States, 495 U.S. 575, 598 (1990).

67. *See id.*

68. *Herrera-Montes*, 490 F.3d at 392.

69. *Id.*

70. *Bernel-Aveja*, 844 F.3d at 214.

71. *See* United States v. Priddy, 808 F.3d 676 (6th Cir. 2015), *abrogated by* United States v. Stitt, 860 F.3d 854 (6th Cir. 2017) (en banc); United States v. Bonilla, 687 F.3d 188 (4th Cir. 2012).

72. *Bonilla*, 687 F.3d at 193–94.

73. *Id.*

74. *Priddy*, 808 F.3d at 684–85.

United States Supreme Court has not yet weighed in on the split over the formation of intent, the Eighth Circuit chose its side in *United States v. McArthur*.[75]

IV. INSTANT DECISION

In the instant case, the Eighth Circuit held that Morris' prior burglary convictions could not support an enhanced conviction under the ACCA because generic burglary requires intent to commit a crime to form prior to or at the same time as an unlawful entry into a building or structure.[76] To reach this determination, the court had to first decide if the Minnesota burglary statute at issue was divisible or indivisible because it offered alternatives for conviction.[77] Then the court had to determine if generic burglary under *Taylor* encompassed burglary crimes where intent formed at any time in relation to unlawful entry or if intent was required to form at a specific moment.[78]

The Minnesota statute provides, "Whoever enters a building without consent and with intent to steal or commit any felony or gross misdemeanor while in the building, or enters a building without consent and steals or commits a felony or gross misdemeanor while in the building, either directly or as an accomplice, commits burglary . . . ."[79] The Eighth Circuit found that under *Mathis* it was required to decide "whether the listed alternatives are elements of different crimes or factual means of satisfying a single element of a single crime."[80] To do this, the Eighth Circuit examined a case decided by the Minnesota Court of Appeals, which it described as "the most helpful Minnesota court decision" to interpret the statute.[81] In *State v. Gonzales*, the Minnesota Court of Appeals described the burglary statute as allowing juries to convict if the alternative acts "occurred at the same place, involved the same victim, and took place over a short period of time" without coming to a unanimous decision about the particular acts themselves.[82] The Eighth Circuit also looked at the charging documents from Morris' burglary cases and found that they alleged both alternatives.[83] Taken together, the Eighth Circuit found that the evidence supported an interpretation that the Minnesota statute's alternative language did not create two separate crimes but rather offered different acts that could

75. *See* 850 F.3d 925 (8th Cir. 2017).
76. *Id.* at 940.
77. *Id.* at 937–38; *see* MINN. STAT. ANN. § 609.582(3) (West 2018).
78. *McArthur*, 850 F.3d at 939.
79. MINN. STAT. ANN. § 609.582(3).
80. *McArthur*, 850 F.3d at 938.
81. *Id.*
82. No. A15-0975, 2016 WL 3222795, at *2 (Minn. Ct. App. June 13, 2016).
83. *McArthur*, 850 F.3d at 938.

all satisfy a single element.[84] The statute was, therefore, indivisible under *Mathis*.[85]

Because the court found the statute to be indivisible, the court had to determine if the statute, as a whole, comported with the elements of generic burglary laid out in *Taylor*.[86] To do this, the court looked at the two alternatives in the Minnesota statute separately and compared those parts to the *Taylor* elements.[87] The first alternative of the Minnesota statute said that burglary is unlawfully entering a building with the intent to commit a crime.[88] The Eighth Circuit determined that this definition contained all the same elements as *Taylor*.[89]

The second alternative in the statute said that burglary is an unlawful entry and subsequent commission of a crime while inside the building.[90] This alternative, however, does not require "intent to commit a crime," which created a question for the court as to whether this construction was broader than *Taylor*.[91] The Eighth Circuit rejected the government's argument that because *Taylor* included "remaining in" a building as part of its definition for generic burglary, the Minnesota statute adhered to it.[92] According to the government, unlawfully entering a building and then later committing a crime meant that "[t]he offender necessarily ha[d] 'remained in' the building with intent to commit a crime."[93] In the government's view, intent to commit the crime must have formed prior to the crime but at some point while unlawfully "remaining in" the building.[94]

The Eighth Circuit did not find the government's argument persuasive. The Eighth Circuit believed that the *Taylor* Court's reliance on sources such as the Model Penal Code showed that the Court envisioned intent at the time of unlawful entry.[95] "Remaining in," the court said, was actually meant to cover situations where a person had lawfully entered with the intent to later commit a crime at a time when he had "overstay[ed] his welcome" and had remained in the building unlawfully.[96] Furthermore, the court believed that the government's interpretation of remaining in would render the "unlawful entry" element of *Taylor* "superfluous . . . because every unlawful entry . . . would become 'remaining in' with intent" at the point of entry.[97]

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84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 938–39.
88. *Id.* at 938 (citing MINN. STAT. ANN. § 609.582(3) (1986)).
89. *Id.*
90. *Id.* (citing MINN. STAT. ANN. § 609.582(3)).
91. *Id.* at 939.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*

In holding that generic burglary required intent at the moment of unlawful entry, the Eighth Circuit vacated Morris' enhanced sentence under the ACCA and remanded his case for resentencing.[98] The Eighth Circuit also acknowledged that its decision was in conflict with the Fourth and Sixth Circuits.[99]

V. COMMENT

The Eighth Circuit in *McArthur* provides the worthier answer in the circuit battle over when intent must form to count as burglary in § 924(e) of the ACCA. This is because the Eighth Circuit interpretation of burglary is more consistent with the United States Supreme Court's decision in *Taylor* and the line of cases following *Taylor* than are the decisions of the Fourth, Fifth, and Sixth Circuits. Furthermore, *McArthur* better promotes consistency and fairness in sentencing – at least as much as the confines of the ACCA will allow.

Section A of this Part first analyzes why the Eighth Circuit's decision in *McArthur* is superior to that of the other circuits to address the intent issue. Section A compares *McArthur* and competing opinions to *Taylor* and considers the rationale of the United States Supreme Court when it defined burglary for the purposes of the ACCA. Section B of this Part discusses why *McArthur* also satisfies notions of fairness better than the opinions of the other circuits and how the ACCA and the Court's interpretations of it constrict fairness in the first instance. Section B concludes that neither the ACCA nor the Court's interpretations of it fulfill the ACCA's statutory goal of consistency and fairness in sentencing because serious, violent recidivists are left out of its scheme while less culpable offenders are swept into it.

A. McArthur *Best Comports with the Court's Decision in* Taylor

The Eighth Circuit decision in *McArthur* is the opinion that most adheres to the United States Supreme Court's interpretation in *Taylor*. This is true whether one looks at the plain language of *Taylor*'s elements of generic burglary or at the Court's intent when it crafted them.

1. The Plain Language of *Taylor*

The plain language of *Taylor* says that generic burglary is "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime."[100] The Eighth Circuit itself only briefly implied that its decision in *McArthur* had a plain language view of *Taylor* when it stated that the "most natural reading" of *Taylor* reveals that intent is required either

98. *Id.* at 940.
99. *Id.* at 939.
100. Taylor v. United States, 495 U.S. 575, 598 (1990).

at the unlawful entry or when remaining in a building unlawfully.[101] The court is not wrong.

The grammatical structure of *Taylor*'s generic elements unambiguously creates two alternatives by using the coordinating conjunction "or" in-between entry and remaining in. A coordinating conjunction is a grammatical structure that joins together independent and equally important clauses.[102] Thus, generic burglary is both (a) an unlawful or unprivileged entry into a building with the intent to commit a crime and (b) an unlawful or unprivileged remaining in a building with the intent to commit a crime. Contrary to the arguments made by the Fourth and Sixth Circuits,[103] intent is part of *Taylor*'s "remaining in" language. If intent were not meant to attach to the "remaining in" portion of *Taylor*, the syntax itself would have to have been written differently because "remaining in" cannot stand alone as an independent clause – it would be a fragment and have no meaning without the rest of the sentence.

Furthermore, in subsequent cases dealing with generic burglary, the Court has strictly construed *Taylor* to conform with the plain language of the elements the Court laid out. For example, when the Court decided *Mathis*, it determined that Iowa's burglary statute was broader than generic burglary because Iowa's statute provided "vehicle" as an alternative location, while *Taylor* included only a "building or other structure."[104] *Mathis* is not the first nor the only indicator that the Court adheres to a plain language construction of its *Taylor* precedent. The Court has also implied or explicitly stated that vessels and vehicles do not count for the purposes of generic burglary because they are not buildings or structures.[105]

If the Court plainly construes one portion of the *Taylor* elements, then there is no reason to believe it would not do the same for the rest of the elements. Moreover, the Court in *Mathis* strongly reiterated that in the twenty-five years since *Taylor* it had consistently held that applying the ACCA only involved comparing elements of the state statute to the elements of generic burglary – nothing more.[106] This type of rigid comparison lends itself to the view that the Court intended the *Taylor* elements be taken at their face value

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101. *McArthur*, 850 F.3d at 939.

102. A coordinating conjunction is defined as "a conjunction (such as *and* or *or*) that joins together words or word groups of equal grammatical rank." *Coordinating Conjunction*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/coordinating%20conjunction (last visited Jan. 19, 2018).

103. *See, e.g.*, United States v. Priddy, 808 F.3d 676, 684–85 (6th Cir. 2015), *abrogated on other grounds by* United States v. Stitt, 860 F.3d 854 (6th Cir. 2017) (en banc); United States v. Bonilla, 687 F.3d 188, 192–93 (4th Cir. 2012).

104. Mathis v. United States, 136 S. Ct. 2243, 2250 (2016); *see also Taylor*, 495 U.S. at 598.

105. *See, e.g.*, Nijhawan v. Holder, 557 U.S. 29, 35 (2009) (distinguishing between breaking into a vessel and breaking into a building where only the latter satisfies generic burglary); Shepard v. United States, 544 U.S. 13, 15–16 (2005) (finding that burglary committed on a boat or in a motor vehicle is not generic burglary).

106. *Mathis*, 136 S. Ct. at 2257.

because otherwise *Taylor* would have solved nothing in the absence of further instructions to lower courts. The Fourth Circuit was therefore wrong when it concluded that a Texas burglary statute, which did not require intent for an offender who entered a building and committed a crime,[107] was substantially the same as *Taylor* such that it fell within the elements of generic burglary.[108] Because "with intent to commit a crime"[109] is plainly attached to both the entry and the remaining in portions of *Taylor*, the absence of intent in the Texas statute was no minor variation of *Taylor*, and it is not generic burglary. The Sixth Circuit used the same reasoning when it found that a section of the Tennessee burglary statute[110] was substantially the same as generic burglary under *Taylor* even though that section had no intent requirement for a person who entered a building and committed a crime.[111]

2. The United States Supreme Court's Rationale in *Taylor*

Even without the plain language argument, the Eighth Circuit's holding in *McArthur* – that generic burglary encompasses intent for both unlawful entry and unlawful remaining in[112] – is still correct when looking at the analysis the *Taylor* Court provided to support its interpretation of burglary for the ACCA. Although *Taylor* looked at legislative intent in enacting the statute,[113] the Court's development of the elements of generic burglary relied mainly upon the "modern" definition promulgated by LaFave & Scott's Substantive Criminal Law treatise.[114] Generic burglary, in fact, is explicitly modeled on the "contemporary" elements of burglary identified by LaFave & Scott.[115] And, according to LaFave & Scott, intent is requisite to committing burglary and

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107. *See* TEX. PENAL CODE ANN. § 30.02(a)(3) (West 2019) (burglary is "enter[ing] a building or habitation and commit[ting] or attempt[ing] to commit a felony, theft, or assault").

108. *See Bonilla*, 687 F.3d at 193 ("[I]n offering guidance to courts as to how to apply the definition, *Taylor* added that '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.'" (quoting *Taylor*, 495 U.S. at 599)).

109. *Taylor*, 495 U.S. at 598.

110. *See* TENN. CODE. ANN. § 39-14-402(a)(3) (West 2018) (defining burglary as "enter[ing] a building and commit[ting] . . . a felony, theft or assault").

111. 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) (en banc).

112. United States v. McArthur, 850 F.3d 925, 940 (8th Cir. 2017).

113. *Taylor*, 495 U.S. at 581–90.

114. *See id.* at 580 n.3, 593, 598.

115. *Id.* ("[M]odern statutes 'generally require that the entry be unprivileged [and] typically describe the place as a 'building' or 'structure' . . . . [T]he prevailing view in the modern codes is that an intent to commit any offense will do.'" (third alteration in original) (quoting W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 8.13(a), (c), (e) (1986)).

must be present "while fulfilling the other requirements" of burglary.[116] The Court's lengthy look at the congressional record also produced an understanding that Congress' reason for including burglary as an enumerated "violent felony" was because a person entering a building with the intent to commit a crime was likely to pose a violent threat to the persons inside.[117]

Between the Court's reliance on LaFave & Scott and its finding that Congress named burglary to protect dwellers, it is only reasonable that intent to commit a crime is an important part of the ACCA's definition of burglary. The likelihood for violence is necessarily lower if the offender has no intent to commit a crime when he enters the building because there is no indication that he anticipates a confrontation. Without this distinction, unlawful but otherwise physically harmless conduct that Congress was not worried about it when it passed the ACCA would be subject to enhanced sentencing. For example, a person could enter a mall during business hours in the winter for the purpose of hiding after it closes to stay warm overnight and only later commit a theft of opportunity while there. Surely, someone with a past conviction for a crime of this nature on his record does not deserve the same enhanced punishment as another whose past conviction included entering the mall with the intent to stay after hours for the purpose of robbing an overnight employee at gunpoint.

Taylor promulgated elements for generic burglary in part as an attempt to give effect to Congress' rationale that intentional burglaries are dangerous.[118] And the Eighth Circuit found that the *Taylor* Court's reliance on LaFave & Scott signified that the Court had meant for intent at the point of unlawful entry or remaining in to exist because that was the same reasoning of the 1986 treatise.[119] The Eighth Circuit understood that contemporaneous intent was necessary in conjunction with the unlawful entry or the moment of unlawful remaining in, which is why it defined *Taylor*'s "remaining in" element as "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."[120] Without intent at the discrete moment, the court continued, there was no generic burglary.[121]

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116. WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 21.1(e), Westlaw (database updated Oct. 2018) ("[A]t common law, one must have intended to commit a felony while fulfilling the other requirements [of burglary]. If the actor when he was breaking and entering only intended to commit a simple trespass, he was not guilty of burglary [even if] he in fact committed a felony after entering."). The treatise also finds that although most states have expanded the type of crime required as an element (e.g., not just felonies), very few have eliminated intent. *Id.*

117. *Taylor*, 495 U.S. at 588 ("Congress singled out burglary . . . because of its inherent potential for harm to persons. The fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate.").

118. *See id.*

119. United States v. McArthur, 850 F.3d 925, 939 (8th Cir. 2017).

120. *Id.*

121. *Id.*

In contrast, the Fourth Circuit explicitly rejected the argument that *Taylor* meant to distinguish between levels of risk by requiring intent to commit a crime to be the basis for an unlawful entry or remaining in.[122] In *Bonilla*, the Fourth Circuit declared that the Texas "remaining in" variant of burglary was within *Taylor*'s elements even without an explicit reference to intent because anyone who committed a crime while in the building "necessarily" formed intent prior to acting.[123] Likewise, when describing "remaining in" burglaries, the Sixth Circuit adopted the "necessarily" formed language regarding intent.[124] Neither circuit, however, offered any explanation as to why *Taylor* would explicitly invoke congressional purpose but not implement its finding that Congress enacted the statutory language including burglary in an attempt to protect potential victims from the high risk imposed by premeditated burglary.[125]

Under this faulty assumption, a legally defined burglary would occur regardless of whether the perpetrator set out to commit a crime other than trespass and without regard to whether the subsequent crime posed the level of danger Congress intended when it passed the ACCA. For example, juvenile offenses can be considered when the court is determining whether an offender has the prerequisite amount of prior offenses for enhanced sentencing.[126] Thus, any school kid entering a condemned building on a dare only to then take something found therein would be guilty of burglary and, perhaps, later in life, sentenced harshly under the ACCA because of a misguided and technically illegal stunt. Subsequently, the Fourth and Sixth Circuit reasoning is not in line with *Taylor* because *Taylor* formed the elements of generic burglary in light of Congress' goal of protecting the public from violent recidivists.[127] The Eighth Circuit in *McArthur* was right to give weight to the legislative intent of the ACCA as found by the United States Supreme Court in *Taylor* when the Eighth Circuit held that *Taylor* requires intent to commit a subsequent crime at the point of unlawful entry or remaining in.

B. McArthur*'s Interpretation Produces Fairer Results*

The *McArthur* decision produces results more consistent with the notion of fairness than does the decisions by the Fourth or Sixth Circuit because it limits who is eligible to receive enhanced sentences. The *Taylor* Court found

122. *Id.* at 194.

123. United States v. Bonilla, 687 F.3d 188, 194 (4th Cir. 2012).

124. 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) (en banc).

125. Only the dissent in *Bonilla* even bothers to discuss the treatise and the Model Penal Code cited by the United States Supreme Court when it decided *Taylor*. *Bonilla*, 687 F.3d at 198 (Traxler, C.J., dissenting).

126. *See* 18 U.S.C. § 924(e)(2)(C) (2018) (stating for the purposes of enhanced sentencing, a prior conviction also includes "juvenile delinquency involving a violent felony"). A violent felony includes burglary. *Id.* § 924(e)(2)(B)(ii).

127. *See* Taylor v. United States, 495 U.S. 575, 587–90 (1990).

that Congress intended this provision of the ACCA to protect the public from violent recidivists because intentional burglaries were at high risk for violent confrontations.[128] Thus the fairness argument is two-fold: first, it is fairer because offenders who do not pose the same risk for violence as someone committing a premeditated crime are not going to be subject to enhanced sentencing; and second, it is fairer because it further provides consistency across state lines by imposing the same standards regardless of where the prior crimes were committed.

1. The Fairer Results of *McArthur*

If it is accepted that both Congress and the *Taylor* Court respectively passed and interpreted the burglary provision of the ACCA as they did because they viewed violent recidivists as more deserving of harsh punishments, then it is fair to extrapolate that enhanced sentencing provisions must be applied only to those offenders and not to anyone of lesser culpability. For this reason, the *McArthur* interpretation of the intent element produces a fairer result because its interpretation is more likely to exclude less violent crimes from predicating a long prison term than are the interpretations of the Fourth and Sixth Circuits.

And as a practical matter, the Eighth Circuit in *McArthur*, by limiting burglary under the ACCA, ensured that Morris would not be sentenced to more than ten years for his crime as a felon in possession of a weapon.[129] While likely no one would argue that Morris, who was also convicted for attempted murder,[130] should be roaming the streets, that does not change the fact that his prior crimes did not make him eligible for enhanced sentencing under the ACCA. The ACCA only allows prior offenses to trigger an enhanced punishment if the prior convictions were *violent*.[131] Given that Morris was originally sentenced to an enhanced punishment of thirty years for merely *possessing* a weapon, and *not* for using it, as a prior criminal,[132] the difference of twenty years is staggering. The fact that Morris also only received an additional combined total of five years for his other three convictions in the same trial, which included attempted murder – in other words the actual *usage* of the firearm[133] – shows just how grave an enhanced ACCA possession conviction is. The clearly disproportionate sentences for two crimes of vastly differing severity – mere possession of a firearm versus attempted murder – demonstrate why it is

128. *Id.*

129. 18 U.S.C. § 924(a)(2) (setting a maximum of ten years for the unenhanced version of felon in possession of a weapon).

130. Special Verdict Form, *supra* note 23, at 3.

131. 18 U.S.C. § 924(e)(1) (the only offenders eligible for enhanced sentencing are those with "previous convictions by any court . . . for a violent felony or a serious drug offense").

132. United States v. McArthur, 850 F.3d 925, 937 (8th Cir. 2017).

133. *Id.* at 933.

extremely important to ensure that the underlying crimes supporting an enhanced conviction truly be violent.

Further, consider that under the definitions of the Fourth and Sixth Circuits, it is entirely possible that two offenders with markedly different criminal histories will receive a similar enhanced sentence for the crime of gun possession even if one offender is clearly far more dangerous and thus, theoretically, far more deserving than the other. There is nothing fair about an offender with a penchant for petty opportunistic theft receiving the same thirty-year sentence for gun possession as an offender with a history of committing premeditated assaults. *McArthur*'s interpretation, therefore, is more likely to ensure that only violent or potentially violent burglaries qualify for enhanced sentencing by limiting the prior burglaries to those committed with intent.

In addition to at least fairly punishing only prior *violent* offenders, the *McArthur* decision also keeps the government honest by not allowing it to rely on gun possession as a proxy to punish for relatively worse crimes, such as Morris' attempted murder. This result is consistent with the United States Supreme Court's unwillingness to deviate from precedence set by *Taylor* or its progeny, even when holding steadfast has meant that clearly dangerous repeat offenders, who are the targets of the ACCA enhanced sentencing, would not spend the time they arguably deserved behind bars. *Mathis* is the perfect example of this.

The home of Richard Mathis, the defendant, was searched pursuant to a warrant because he had lured a fifteen-year-old boy to his home through an internet website and then sexually molested him.[134] Investigations also revealed that the boy was not Mathis' first victim and that Mathis had coerced other males, who were juveniles or in their early twenties, into sexual contact.[135] Despite this, the prosecutors chose not to charge Mathis with child sex offenses and, instead, charged him solely for possession of a .22 caliber rifle that deputies found during the search of his home.[136]

Assuming, as the evidence suggests, that the multiple allegations of child sexual abuse against Mathis are true, he is surely the exact type of repeat offender that Congress had in mind when it provided for enhanced sentencing of violent recidivists under the ACCA. Yet, no matter how heinous these crimes are, an enhanced sentence for a gun crime under the ACCA cannot be a substitute for appropriately charging and prosecuting those offenses. When the Court struck down Mathis' sentence under the ACCA, it did so because the prior criminal convictions Mathis actually had under the Iowa state burglary statute were not found to be generic burglaries under *Taylor*.[137] The end result is that

134. Appellant's Brief at 2, Mathis v. United States, 136 S. Ct. 2243 (2016) (No. 14-2396), 2014 WL 4271867.

135. *Id.* at 4–6.

136. *Id.* at 2.

137. *Mathis*, 136 S. Ct. at 2251.

Mathis' fifteen-year sentence under the ACCA was vacated and remanded for resentencing.[138]

Similarly, *McArthur* follows the Court's precedent because it also limits how much the government can rely on prior convictions to impose long prison terms for gun possession in that only certain burglaries will quality for enhancement.[139] This means that a defendant's right to trial for serious crimes he may have committed, such as the alleged crimes of Mathis, will not be infringed upon as much as it otherwise might be. Conversely, the Fourth Circuit's decision in *Bonilla* meant that an unauthorized immigrant who was convicted of illegal reentry and who had a prior burglary conviction was subjected to an enhanced sentence, albeit under the Federal Sentencing Guidelines.[140] The statute under which Bonilla was convicted did not mandate intent as an element, and so the defendant argued that such a definition was inconsistent with generic burglary under *Taylor*.[141] The Fourth Circuit found that intent was not required because it would necessarily form when an offender remained in a building.[142] This decision meant that Bonilla would be treated the same, for enhancement purposes, as someone who had committed a premeditated burglary – the sort of crime that Congress believed made the offense of burglary dangerous in the first place.[143]

Such a result is not as fair or as consistent with *Taylor* as is the result achieved by the *McArthur* decision. If *Bonilla* had been decided by the Eighth Circuit, the defendant would not have been eligible for enhanced sentencing because the lack of intent is fatal and not in-line with the Court's reasoning for defining generic burglary in the way that it did.

In sum, the *McArthur* decision requiring intent at the outset promotes fairness by ensuring that enhanced sentencing can only be imposed for prior offenses that Congress envisioned as likely to include violence. The decision also serves as a limited check on the laziness or weakness of the prosecution by forcing the government to properly charge defendants with crimes they have actually committed instead of relying on an easy-to-prove gun possession charge as a way to send defendants to prison for long periods of time without pursing the serious offenses.

2. Neither the Armed Criminal Career Act nor the *Taylor* Interpretation Can Justly Punish

As fair as the outcome in *McArthur* was, the decision was necessarily constrained only to attempting to make the application of the statute fair. En-

138. United States v. Mathis, 832 F.3d 876, 876 (8th Cir. 2016).
139. *See* United States v. McArthur, 850 F.3d 925, 938–40 (8th Cir. 2017).
140. United States v. Bonilla, 687 F.3d 188, 190 (4th Cir. 2012).
141. *Id.* at 189–90.
142. *Id.* at 194.
143. *See* Taylor v. United States, 495 U.S. 575, 588 (1990).

hanced punishments, whether under the ACCA or under the Federal Sentencing Guidelines, are inherently questionable because they punish based on *prior* convictions and not strictly the crime at hand. In other words, the punishment does not fit the crime because the offender is partly sentenced for his past behavior. There are several theories for why criminal justice systems tend to punish recidivists more harshly than other offenders. The most pervasive is the idea that repeated lawbreakers deserve less leniency than a first-time offender because the first-time offender is entitled to a lesser punishment based on his otherwise good character while the repeat transgressor has already extinguished his chance.[144] But punishing based on prior offenses is problematic in a plethora of situations. For example, someone who may have been convicted of several crimes as a young person goes on to live a crime-free life for twenty years before getting caught with a hunting rifle would be sentenced to thirty years for gun possession even though the prior crimes are no longer indicative of the character of that person and the crime at hand is not violent.

Even if, as a society, we value the retributive aspect of punishing generally for *repeated offenses*, the blanket, one-size fits all solution of mandatory enhanced sentences is troubling. The ACCA is both too narrow because it does not include all prior violent offenders and too broad because it does not properly exclude less culpable people. Furthermore, the ACCA targets gun possession, and not the violent use of a gun, for enhanced sentencing.[145] Retribution, or the idea that a criminal should get what he deserves, holds considerable sway in criminal law.[146] Yet, despite this, the United States relies heavily on prior offenses to determine the sentencing outcomes of current offenses.[147] If retribution is the goal of punishment, then the punishment should be proportional to the actual crime committed, regardless of whether the offender is a repeat player or a first-timer.

The problem with the ACCA is deeper than just a fairness issue. The fact that it has been a repeated source of litigation for over twenty-five years[148] suggests that it has serious deficiencies.[149] In 2015, the Court signaled a will-

144. Mirko Bagaric, *The Punishment Should Fit the Crime – Not the Prior Convictions of the Person that Committed the Crime: An Argument for less Impact Being Accorded to Previous Convictions in Sentencing*, 51 SAN DIEGO L. REV. 343, 369–70 (2014).

145. 18 U.S.C. § 924(e) (2018).

146. *See, e.g.*, Bagaric, *supra* note 144, at 367–77 (discussing retribution as an attractive reason for punishing crime generally and recidivists in particular).

147. *See id.* at 352–53.

148. *See e.g.*, Stokeling v. United States¸139 S. Ct. 544 (2019) (holding the term "physical force" as used in the ACCA includes any force, however slight, necessary to overcome the victim's resistance); Johnson v. United States, 135 S. Ct. 2551 (2015); Taylor v. United States, 495 U.S. 575 (1990); United States v. Chatman, 869 F.2d 525 (9th Cir. 1989), *abrogated by* Taylor v. United States, 495 U.S. 575.

149. Sheldon A. Evans, *Punishing Criminals for Their Conduct: A Return to Reason for the Armed Criminal Career Act*, 70 OKLA. L. REV. 623, 676–78 (2018).

ingness to revisit the legality of the ACCA when it overruled its own precedence by holding in *Johnson v. United States* that the "residual clause" of § 924(e) was unconstitutional for vagueness.[150] The "residual clause" clause allowed courts to impose enhanced sentences for any crime that the court deemed involved violent conduct, but the clause did not provide any guidance to courts in making that determination.[151] Some of the justices have repeatedly expressed frustration with a lack of congressional action to fix the problems with the ACCA,[152] which might finally push the Court into holding the ACCA unconstitutional. Likewise, the late Senator Arlen Spector, author of the ACCA, found the Court's approach to defining and applying the ACCA unwieldy.[153]

There is also a legitimate question as to whether *Taylor* itself fully effectuates Congress' goals because, for example, the element of generic burglary limits entry to only buildings or structures, which does not fully protect the public from violent confrontations with burglars. For example, a King County judge in Seattle, Washington, recently ruled that a homeless man's truck was his home and therefore could not be sold by the city in order to recoup parking fines the man had incurred.[154] Thus, a burglary that occurs in a vehicle serving as a home is similar to a burglary occurring in a traditional home because the likelihood for confrontation is high. Prior to its decision in *United States v. Stitt*,[155] the United States Supreme Court had definitively stated that vehicles did not count for the purposes of the ACCA.[156] Excluding burglaries that occur in vehicles and other places where people often sleep, such as tents, arguably does not account for the type of violent encounters Congress envisioned when it included burglary in the enumerated offenses of the ACCA. But in *Stitt*, decided in December 2018, the Court recognized this when it found that burglary of structures or vehicles adapted for overnight accommodation, even if that accommodation is only part-time, is burglary for the purposes of the ACCA.[157] Notably, however, the Court remanded to Arkansas state courts the

150. *Johnson*, 135 S. Ct. at 2563.

151. *Id.* at 2257–59; *see also* Evans, *supra* note 149, at 677–78 (providing a more in-depth discussion of the residual clause).

152. *See, e.g.*, Mathis v. United States, 136 S. Ct. 2243, 2258 (2016) (Kennedy, J., concurring) (pointing out that parts of the Court's statutory interpretations of the ACCA are arbitrary but that continued inaction by Congress requires the Court to revisit its precedence on the matter).

153. 156 CONG. REC. S10, 516–17 (daily ed. Dec. 17, 2010) (statement of Sen. Specter).

154. Vianna Davila, *Judge Rules Seattle Homeless Man's Truck Is a Home*, SEATTLE TIMES (Mar. 3, 2018), https://www.seattletimes.com/seattle-news/homeless/judge-rules-seattle-homeless-mans-truck-is-a-home/.

155. This case is a consolidation of two lower court decisions: *United States v. Sims* from the Eighth Circuit and *United States v. Stitt* from the Sixth Circuit. 139 S. Ct. 399 (2018).

156. Shepard v. United States, 544 U.S. 13, 15–16 (2005) (finding that burglary committed in a motor vehicle is not generic burglary).

157. United States v. Stitt, 139 S. Ct. 399, 404–05 (2018).

respondent's assertion that Arkansas' state burglary statute is too broad because it could cover a vehicle "in which a homeless person occasionally sleeps."[158]

The solution, therefore, to both fixing the problems with the ACCA and effectuating Congress' goal to punish violent offenders is to rethink the way sentencing is approached. Ideally, Congress itself would revisit the ACCA and amend or replace it with clearer guidelines. At the very least, rather than statutorily impose sentences based in part on the criminal history of the offender, Congress should instead free the courts to punish the individual based on the facts of the particular crime for which he is being sentenced.

VI. CONCLUSION

The ACCA and the Federal Sentencing Guidelines were imposed because the legislature was trying to fix what it perceived as wildly unfair sentencing practices. The congressional goal of promoting fairness by providing uniformity is easily undermined by the arbitrary application of the ACCA when prosecutors and courts insist on pushing state criminal statutes to their outermost limits in order to capture as many prior offenses as possible.

Although there is no indication that the United States Supreme Court intends to resolve the circuit split over the intent element of generic burglary, when the Court eventually does, it should choose to embrace the position put forth by the Eighth Circuit in *McArthur*. The Eighth Circuit articulated sound reasoning that is in line with the Court's *Taylor* rationale and better promotes both the intent of Congress in passing the ACCA and the notion of fairness in sentencing by limiting which prior burglaries count for mandatory enhanced punishment. In the alternative, the Court should expand its own lead in *Johnson* and end its attempts to make the ACCA work by finding that the ACCA is unconstitutionally vague.

158. *Id.* at 407.