CRIMINAL LAW — ARMED CAREER CRIMINAL ACT — EIGHTH CIRCUIT HOLDS THAT GENERIC BURGLARY REQUIRES INTENT AT FIRST MOMENT OF TRESPASS. — *United States v. McArthur*, 850 F.3d 925 (8th Cir. 2017).

The Armed Career Criminal Act of 1984[1] (ACCA) mandates an enhanced sentence of fifteen years to life for a defendant convicted of possessing a firearm as a felon under 18 U.S.C. § 922(g) if the defendant has three prior convictions for a "violent felony,"[2] including burglary.[3] Because a definition of burglary was deleted in an amendment to the ACCA,[4] the Supreme Court held in *Taylor v. United States*[5] that Congress had intended burglary to have a uniform definition, informed by the various states' definitions of burglary.[6] "[G]eneric" burglary, the *Taylor* Court determined, was "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime."[7] *Taylor* also provided lower courts with the method they must use when determining whether prior convictions qualify as ACCA predicates: under the so-called "categorical approach," courts "look only to the fact of conviction and the statutory definition of the prior offense" to determine whether the state statute "substantially corresponds to 'generic' burglary."[8] A state statute qualifies as an ACCA predicate when it is "narrower than the generic view," that is, when being convicted under that state statute "necessarily implies that the defendant has been found guilty of all the elements of generic burglary."[9] But a state statute that "define[s] burglary more broadly,"[10] for example by including lawful entries, cannot be an ACCA predicate.[11]

Recently, in *United States v. McArthur*,[12] the Eighth Circuit took its place in a circuit split over whether generic burglary requires intent to commit a crime by the first moment of trespass, and thus whether state statutes that lack such a requirement are broader than generic burglary. Answering these questions in the affirmative, *McArthur* found that a

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1 18 U.S.C. § 924(e) (2012).

2 *Id.* § 924(e)(1). Without the ACCA enhancement, the maximum sentence for a defendant convicted under § 922(g) is ten years. *Id.* § 924(a)(2).

3 *Id.* § 924(e)(2)(B).

4 *See* Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207, 3207-39 (codified at 18 U.S.C. § 924(e)) (amending the ACCA and deleting the preexisting definition of burglary).

5 495 U.S. 575 (1990).

6 *Id.* at 592, 598.

7 *Id.* at 598.

8 *Id.* at 602.

9 *Id.* at 599.

10 *Id.*

11 *See id.*

12 850 F.3d 925 (8th Cir. 2017).

Minnesota statute that criminalized entering a building *without* intent to commit a crime — and later committing a crime therein — was broader than generic burglary and thus that convictions under that statute were ineligible to be ACCA predicates.[13] In taking this position, *McArthur*, unlike opinions on the other side of the split, (1) properly identified the correct interpretation of *Taylor*'s definition of generic burglary; and (2) properly applied the categorical approach in the settled and rigid manner required by *Taylor* and its progeny. Ultimately, *McArthur*'s position is not only the one best supported by Supreme Court precedent but also the one that best accords with broader principles of fairness in sentencing.

After a trial in early 2012, a jury found Anthony Cree, William Morris, and Wakinyan McArthur guilty of charges relating to their activity in the Native Mob, a Minnesota gang.[14] Morris was convicted of, among other things, violating § 922(g) by possessing a firearm as a convicted felon.[15] The district court denied all defendants' motions for acquittal and new trials.[16] On appeal, all defendants challenged the sufficiency of the evidence.[17] McArthur further argued that the trial court's imposition of consecutive sentences for firearms that were part of the same crime violated the Double Jeopardy Clause[18] and that the jury instructions on another charge did not comply with Supreme Court precedent.[19] Morris, in addition to arguing that the jury instructions for two of his charges had constructively amended the indictment,[20] argued that the trial court had incorrectly found that his prior Minnesota third-degree burglary convictions were ACCA predicates.[21] The state statute penalizes "[w]hoever enters [or remains in] a building without consent

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[13] *Id.* at 939–40. The Eighth Circuit previously published an opinion in this case in September 2016 with a similar position as to the ACCA burglary question. *See* United States v. McArthur, 836 F.3d 931, 942–44 (8th Cir. 2016), *amended and superseded by McArthur*, 850 F.3d 925. The Eighth Circuit published an amended, superseding opinion after one of the defendants, William Morris, revised his position in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016). *See McArthur*, 850 F.3d at 937.

[14] *McArthur*, 850 F.3d at 932.

[15] *Id.* at 933. Morris was also convicted of "attempted murder in aid of racketeering, assault with a dangerous weapon in aid of racketeering, [and] use and carrying of a firearm during and in relation to a crime of violence." *Id.* Cree was convicted of "attempted murder in aid of racketeering, assault with a dangerous weapon in aid of racketeering, and use and carrying of a firearm during and in relation to a crime of violence," in addition to three conspiracy charges. *Id.* (citations omitted). McArthur was convicted of "distribution of a controlled substance," "two counts of use and carrying of a firearm during and in relation to a crime of violence," and three conspiracy charges. *Id.*

[16] *Id.* at 932.

[17] *Id.* at 931, 933, 936, 942.

[18] *Id.* at 940.

[19] *Id.* at 941.

[20] *Id.* at 936.

[21] *Id.* at 937.

and with intent to steal or commit any felony or gross misdemeanor while in the building, *or enters* [*or remains in*] *a building without consent and steals or commits a felony or gross misdemeanor while in the building*."[22] Morris and the government agreed that the statute was indivisible,[23] meaning that if either of those two alternatives was categorically broader than generic burglary, a conviction under the statute could not be an ACCA predicate.[24] But the parties disagreed as to whether the second alternative, emphasized above, qualified as generic burglary for ACCA purposes.[25]

The Eighth Circuit vacated Morris's sentence and remanded his case.[26] After reviewing Morris's position, the text of the Minnesota third-degree burglary statute, and the Supreme Court's ACCA jurisprudence, the Eighth Circuit agreed with the parties that the two alternatives in the Minnesota statute merely described two means of committing the same crime, and thus that the categorical approach could be applied to the entire statute to determine whether either part of that statute was broader than generic burglary.[27] The court quickly determined that the first alternative of the Minnesota statute easily qualified as ACCA burglary.[28] But the second of the two means in the Minnesota

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[22] MINN. STAT. § 609.582, subdiv. 3 (2017) (emphasis added). As the court noted, Minnesota statutory law defines the phrase "enters a building without consent," *id.*, as including "either entering or remaining in a building without the owner's consent." *McArthur*, 850 F.3d at 937 (citing MINN. STAT. § 609.581, subdiv. 4).

[23] *McArthur*, 850 F.3d at 937.

[24] Morris's argument on this point was a revised position in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016). *McArthur*, 850 F.3d at 937. *Mathis*, the most recent Supreme Court ACCA case, made clear the distinction between alternative means, which make a statute indivisible, and alternative elements, which make a statute divisible, requiring a variation on the categorical approach. *See* 136 S. Ct. at 2249–50, 2253–57.

[25] *McArthur*, 850 F.3d at 937.

[26] *Id.* at 940. The court also rejected all defendants' sufficiency-of-the-evidence claims, pointing to the wealth of evidence supporting each conviction. *See id.* at 933–36, 942. It further rejected Morris's claim that some of the jury instructions had constructively amended his indictment, finding that Morris had specifically requested those jury instructions, *id.* at 936–37, and rejected McArthur's claim that some jury instructions had not complied with Supreme Court precedent, finding on plain error review that the instructions were adequate, *id.* at 941–42. The court did grant the government's (and McArthur's) request to vacate McArthur's sentence. *Id.* at 940–41. The government had "evidently charged McArthur in violation of [a] Department policy," informed by double jeopardy principles, to not file multiple charges for multiple weapons in a single offense. *Id.* at 940. The court, finding the situation analogous to a Supreme Court case in which the government had made a similar request, granted the government's request to vacate McArthur's sentence as to one of his firearms charges. *Id.* at 940–41. Having decided this, the court applied the "'sentencing package' doctrine" over McArthur's objection, *id.* at 942, vacating his entire sentence so that the district court could ensure that a new sentence adequately reflected the seriousness of McArthur's remaining convictions. *Id.* at 942–43.

[27] *Id.* at 937–38. For a detailed discussion of the distinction between statutory alternatives that are means, like those in the Minnesota statute, and those that are elements, which then require a different version of the categorical approach, see *Mathis*, 136 S. Ct. at 2249–50, 2253–57.

[28] *McArthur*, 850 F.3d at 938.

statute — "enter[ing] a building without consent and steal[ing] or commit[ting] a felony or gross misdemeanor while in the building"[29] — was not so easy. This definition did not require intent at the time of the unlawful entry or remaining.[30] In other words, a person who trespassed without any intent to commit a crime could be found guilty of burglary so long as he eventually committed a crime in the building. The question was thus whether generic burglary encompassed such a defendant; if it did not, the second alternative in the Minnesota statute would be broader than generic burglary, and thus convictions under any part of that statute could not qualify as ACCA predicates.[31]

The court found that generic burglary did not cover such a defendant.[32] The court rejected the government's argument that, because remaining somewhere is a continuous activity, a defendant convicted of the second alternative necessarily formed the intent at some time during that remaining.[33] Favoring instead a "natural reading of *Taylor* and the sources on which it relied," the court found that "'remaining in' a building, for purposes of generic burglary, . . . 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."[34] An individual convicted under the Minnesota statute, on the other hand, could have entered or remained in a building unlawfully but without intent to commit a crime inside, so long as he did eventually commit a crime while there.[35] Accordingly, Minnesota third-degree burglary was "broader than generic burglary, and Morris's third-degree burglary convictions [did] not qualify as violent felonies."[36]

*McArthur* also briefly acknowledged the circuit split on this question by means of a string citation.[37] The Fourth and Sixth Circuits have held that generic burglary does not require intent to commit a crime by the first moment of trespass,[38] while the Fifth and now Eighth Circuits have

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[29] MINN. STAT. § 609.582, subdiv. 3 (2017).

[30] *McArthur*, 850 F.3d at 938–39 (citing State v. Benedict, No. A13-1324, 2014 WL 2921869, at *2 (Minn. Ct. App. June 30, 2014)).

[31] *See id.* at 939.

[32] *Id.* at 940.

[33] *Id.* at 939.

[34] *Id.* (quoting Taylor v. United States, 495 U.S. 575, 598 (1990)).

[35] *Id.* at 938–39.

[36] *Id.* at 940.

[37] *See id.* at 939.

[38] *See* United States v. Priddy, 808 F.3d 676, 684–85 (6th Cir. 2015); United States v. Bonilla, 687 F.3d 188, 192–94 (4th Cir. 2012) (addressing the definition of generic burglary in the context of the U.S. Sentencing Guidelines (Guidelines), rather than the ACCA). The Ninth Circuit, discussing a different type of state burglary statute, indicated that it may also fall into this camp. *See* United States v. Reina-Rodriguez, 468 F.3d 1147, 1151–56 (9th Cir. 2006) ("*Taylor* allows for burglary convictions so long as the defendant formed the intent to commit a crime while unlawfully remaining on the premises . . . ." *Id.* at 1155.), *overruled on other grounds by* United States v. Grisel, 488 F.3d 844 (9th Cir. 2007) (en banc).

found the opposite.[39] The Fifth Circuit recently readdressed the issue, creating no new law on the question but producing a pair of battling concurrences.[40] Like the government in *McArthur*, all of the opinions finding no such contemporaneous intent requirement in generic burglary have reasoned, if implicitly, that because remaining is a continuous activity, the requisite intent can be formed at any time during that remaining.[41]

*McArthur* correctly interpreted *Taylor*'s generic burglary definition and properly applied *Taylor*'s categorical approach. First, *McArthur*'s reading of *Taylor*'s generic burglary definition is the one best supported by the language of that definition and by the sources that informed it. Second, unlike opinions on the other side of the split, *McArthur* correctly understood the categorical approach to be a settled and rigid method of comparing statutes of conviction to generic burglary. Ultimately, *McArthur*'s position is the one best supported by not only ACCA precedent but also broader fairness-based principles.

First, *McArthur* properly interpreted *Taylor*'s generic burglary definition: the court's reading is consistent with both a textual interpretation of *Taylor*'s definition and with the sources *Taylor* consulted to come to this definition. *Taylor*'s formulation itself — "entry into, or remaining in, . . . *with intent* to commit a crime"[42] — suggests that intent must accompany the entry or remaining.[43] In fact, unlike the state statutes at issue, generic burglary requires trespass coupled with *only* intent and not an actual crime.[44] If generic burglary does not require intent at the first moment of trespass, it essentially criminalizes trespass alone: a defendant who trespassed without any intent to commit a crime, and who in fact did not commit a crime, could be convicted of burglary if he even momentarily intended to commit a crime at any time after the trespass. Moreover, as *McArthur* explained, accepting the government's contention that "remaining in . . . with intent to commit a crime" is a continuous activity throughout the time a burglar is inside the building, any moment of which could be the time he formed the intent to commit a

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[39] *See McArthur*, 850 F.3d at 937–40; United States v. Herrera-Montes, 490 F.3d 390, 391–92 (5th Cir. 2007) (addressing the definition of generic burglary in the context of the Guidelines, rather than the ACCA).

[40] *See* United States v. Bernel-Aveja, 844 F.3d 206, 207–14 (5th Cir. 2016); *id.* at 214–19 (Higginbotham, J., concurring in the judgment); *id.* at 219–45 (Owen, J., concurring).

[41] *See id.* at 228–31 (Owen, J., concurring); *Priddy*, 808 F.3d at 685; *Bonilla*, 687 F.3d at 193–94.

[42] Taylor v. United States, 495 U.S. 575, 599 (1990) (emphasis added).

[43] As *McArthur* notes, 850 F.3d at 939, the Model Penal Code — cited by *Taylor* in developing its generic burglary definition, 495 U.S. at 598 (citing MODEL PENAL CODE § 221.1 (AM. LAW INST. 1980)) — lends support to this reading by referring to "[t]he purpose that must accompany the intrusion." MODEL PENAL CODE § 221.1 cmt. 3 (AM. LAW INST. 1980).

[44] *See Taylor*, 495 U.S. at 599.

crime, would transform every "entry" into a "remaining" as soon as it happened, "render[ing] the 'unlawful entry' element . . . superfluous."[45]

*McArthur*'s interpretation of generic burglary also comports with the academic and legislative sources cited by *Taylor*. Professors Wayne LaFave and Austin Scott's *Substantive Criminal Law*, cited by both *Taylor*[46] and *McArthur*,[47] notes that statutory language like that at issue in *McArthur* may have been developed "to obviate the problems of proof concerning whether the defendant's intent was formed before or after the unlawful entry or remaining."[48] Moreover, in describing the legislative reasons for including burglary as an enumerated crime, *Taylor* stated: "The fact that an offender enters a building *to commit a crime* often creates the possibility of a violent confrontation . . . ."[49] Thus, *Taylor* itself recognized that the kind of burglary Congress targeted was that in which a burglar commits trespass for the purpose of committing a crime and so necessarily has the requisite intent at the first moment of trespass.[50]

Second, *McArthur* properly construed *Taylor* by recognizing the categorical approach as both the accepted method of comparison, contrary to Fifth Circuit Judge Owen's concurring opinion in *United States v. Bernel-Aveja*,[51] and as a rigid and truly categorical test, contrary to the Fourth Circuit in *United States v. Bonilla*.[52] Judge Owen's claim that *Taylor* promulgated a "generic approach" to determining the elements of burglary, in which a court "takes account of the elements of the offense shared in common among a majority of States' formulations,"[53] does not

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[45] *McArthur*, 850 F.3d at 939. On the rule against surplusage, see generally Clark v. Rameker, 134 S. Ct. 2242, 2248–49 (2014); and ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174–79 (2012). The use of an interpretive tool normally used in statutory interpretation is quite sensible here, given that the *Taylor* Court's definition of generic burglary was filling a gap in the ACCA's text. *See Taylor*, 495 U.S. at 582. Indeed, Justice Scalia and Professor Bryan Garner discuss the rule against surplusage within a broader section entitled "Principles Applicable to All Texts." SCALIA & GARNER, *supra*, at xi; *see also id.* at 174–79. The opinions coming out the other way fail to wrestle with the surplusage implication of their reading of generic burglary. *See Bernel-Aveja*, 844 F.3d at 229–30 (Owen, J., concurring); *Priddy*, 808 F.3d at 685; *Bonilla*, 687 F.3d at 193.

[46] *Taylor*, 495 U.S. at 598 (citing 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 8.13(a), (c), (e), at 466, 471, 474 (1986)).

[47] *McArthur*, 850 F.3d at 939 (citing 2 LAFAVE & SCOTT, *supra* note 46, § 8.13(b), (e), at 467, 473).

[48] 2 LAFAVE & SCOTT, *supra* note 46, § 8.13(e), at 475.

[49] *Taylor*, 495 U.S. at 588 (emphasis added).

[50] Interestingly, two opinions on the opposite side of the circuit split quoted this text from *Taylor* in support of their positions. *Bernel-Aveja*, 844 F.3d at 225 (Owen, J., concurring); *Bonilla*, 687 F.3d at 191.

[51] 844 F.3d 206.

[52] 687 F.3d 188.

[53] *Bernel-Aveja*, 844 F.3d at 220 (Owen, J., concurring); *see also id.* at 220 n.10.

hold up under scrutiny. In deciding on the generic formulation of burglary, *Taylor* did state that "Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States,"[54] as Judge Owen notes.[55] But *Taylor* itself rejected elements that were common to most states and neither relied exclusively on the status of state burglary statutes nor made any suggestion that lower courts should perform such a survey of state burglary statutes each time they apply the categorical approach.[56] For the proposition that the Supreme Court's "subsequent opinions" have "confirmed" this approach, Judge Owen cited to a 2007 case in which the Court used that approach to develop a generic definition of theft.[57] But the generic meaning of *burglary* has been settled since *Taylor*: later Supreme Court cases quote *Taylor*'s generic definition without repeating its methodology.[58] Moreover, it is unlikely that the Court intended to promulgate such an unadministrable approach. *Taylor* rejected a factual investigation into a defendant's prior offenses in part because such an approach would present "practical difficulties" for the sentencing court.[59] And Judge Owen's own execution of such a survey, which occupies nearly ten pages of the *Federal Reporter* and includes sixty explanatory footnotes,[60] demonstrates its impracticality. Thus, *McArthur* properly identified the settled meaning of *Taylor* by simply stating *Taylor*'s definition.[61]

*McArthur* also correctly recognized, where *Bonilla* did not, the rigidity of the categorical approach. *Bonilla* stated that the "critical question" of an ACCA inquiry was whether a state statute "corresponds in substance to the generic meaning of burglary"[62] and denounced a contrary reading of *Taylor* as "too rigid."[63] But rigidity is exactly what *Taylor* and its progeny demand: only if the state crime's definition necessarily includes generic burglary can that crime count as an ACCA predicate. *Taylor* developed the categorical approach for the express purpose of determining whether the state statute "necessarily implie[d] that the defendant ha[d] been found guilty of all the elements of generic

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

55 *Bernel-Aveja*, 844 F.3d at 220 n.10 (Owen, J., concurring).

56 *See Taylor*, 495 U.S. at 592–99. *Taylor* also relied on academic sources and on the ACCA's legislative history in formulating its definition, *see id.*, and it rejected requirements that generic burglary be at night or be of a dwelling, even after noting that "[a]lmost all States" included those requirements "among their definitions of burglary," *id.* at 592–93.

57 *Bernel-Aveja*, 844 F.3d at 220 & n.11 (Owen, J., concurring) (citing Gonzales v. Duenas-Alvarez, 549 U.S. 183, 190, 195–96 (2007)).

58 *See, e.g.*, Mathis v. United States, 136 S. Ct. 2243, 2248 (2016); Descamps v. United States, 133 S. Ct. 2276, 2283 (2013); Shepard v. United States, 544 U.S. 13, 16–17 (2005).

59 495 U.S. at 601.

60 *See Bernel-Aveja*, 844 F.3d at 231–40 & nn. 89–148 (Owen, J., concurring).

61 *McArthur*, 850 F.3d at 938 (quoting *Taylor*, 495 U.S. at 598).

62 United States v. Bonilla, 687 F.3d 188, 194 (4th Cir. 2012) (quoting *Taylor*, 495 U.S. at 599).

63 *Id.*

burglary" or instead "define[d] burglary more broadly."[64] The Court confirmed this rigidity in 2005 by describing the categorical approach as a test of whether the prior conviction "necessarily admit[s]" elements of the generic offense.[65] *Bonilla*'s exclusive focus on *Taylor*'s substantial correspondence language thus misconstrued the nature of the categorical approach. *McArthur* correctly recognized that, far from being a lax comparison of substantial correspondence, the categorical approach is, indeed, categorical: "*Only* when the statute has the same or narrower elements as the generic crime does the prior conviction count as a violent felony."[66]

*McArthur*'s position in the circuit split accords not only with Supreme Court precedent but also with broader principles of fairness in sentencing. Fastidious application of the categorical approach can help minimize overinclusion in a sentencing law with harsh effects.[67] In defendant Morris's case alone, the court's ruling will result in at least twenty fewer years in prison.[68] Moreover, the wisdom of continuing to include burglary as an ACCA predicate is not manifest: the United States Sentencing Commission recently removed burglary from the list of predicate crimes in the United States Sentencing Guidelines' equivalent recidivism enhancement, in part because "several recent studies demonstrate[d] that most burglaries do not involve physical violence."[69]

Ultimately, "[o]nly the Supreme Court can resolve the split among the Circuit Courts as to when formation of intent for purposes of generic burglary must occur."[70] If the Court does take up this issue, both precedent and fairness favor *McArthur*'s stance.

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[64] *Taylor*, 495 U.S. at 599.

[65] Shepard v. United States, 544 U.S. 13, 26 (2005).

[66] *McArthur*, 850 F.3d at 937 (emphasis added) (citing Descamps v. United States, 133 S. Ct. 2276, 2283 (2013)). The Supreme Court has confirmed the rigidity of the categorical approach since *Bonilla*. *See, e.g.*, Mathis v. United States, 136 S. Ct. 2243, 2247 (2016) ("[T]he prior crime qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense.").

[67] *See* Rebecca Sharpless, *Finally, a True Elements Test:* Mathis v. United States *and the Categorical Approach*, 82 BROOK. L. REV. 1275, 1276 (2017) ("In taking great care to delimit the circumstances in which federal sentencing judges can lengthen sentences based on recidivism, the Court has softened the edges of harsh federal sentencing practices.").

[68] Morris was sentenced to thirty years under the ACCA enhancement, *McArthur*, 850 F.3d at 933, but can receive only ten (or fewer) years without it, 18 U.S.C. § 924(a)(2) (2012).

[69] SUPPLEMENT TO THE 2015 GUIDELINES MANUAL 11 (U.S. SENTENCING COMM'N 2016), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMSupplement.pdf [https://perma.cc/BN4Z-DAAB]. The Guidelines, for the purposes of a recidivism enhancement, formerly defined "crime of violence" nearly identically to the ACCA's "violent felony." *Compare* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (U.S. SENTENCING COMM'N 2015), *with* 18 U.S.C. § 924(e)(2)(B).

[70] United States v. Bernel-Aveja, 844 F.3d 206, 245 (5th Cir. 2016) (Owen, J., concurring).