

No. 17-7224

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT EUGENE SECORD, 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

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QUESTION PRESENTED

Whether a state offense that criminalizes continued presence in a dwelling following the formation of intent to commit a crime has "the basic elements of unlawful * * * remaining in[] a building or structure, with intent to commit a crime," Taylor v. United States, 495 U.S. 575, 599 (1990), thereby qualifying as "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2) (B) (ii).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 2a-6a) is not published in the Federal Reporter. The opinion and order of the district court (Pet. App. 8a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2017. The petition for a writ of certiorari was filed on December 19, 2017. 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 Western District of Michigan, petitioner was convicted on one count of unlawful possession of a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Pet. App. 2a. He was sentenced to 240 months of imprisonment, to be followed by five years of supervised release. Id. at 3a. Petitioner filed a notice of appeal, but withdrew it. Id. at 9a. The district court subsequently granted two government motions to reduce petitioner's sentence based on substantial assistance to law enforcement and reduced the sentence to 144 months of imprisonment. Ibid.

In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. Pet. App. 3a. The district court denied petitioner's motion and his request for a certificate of appealability (COA). Id. at 8a-17a. The court of appeals also denied a COA. Id. at 2a-6a.

1. In 2011, a federal grand jury charged petitioner with six counts of unlawful possession of a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e), and six counts of possession of a stolen firearm, in violation of 18 U.S.C. 922(j) and 924(a)(2). Pet. App. 8a. The charges stemmed from petitioner's possession of six stolen firearms between August and November 2009. Presentence Investigation Report (PSR) ¶¶ 2-13. Petitioner pleaded guilty to one felon-in-possession count

pursuant to a plea agreement, and the government agreed to dismiss the remaining charges. Id. ¶¶ 14-16.

Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of unlawful possession of a firearm following a felony conviction is zero to 120 months. The Armed Career 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," 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, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). The latter part of that definition (beginning with "otherwise involves") is frequently referred to as the "residual clause."

The Probation Office determined that petitioner had four prior convictions under Michigan law that qualified as "violent felon[ies]" for purposes of the ACCA: (1) a 1996 conviction for home invasion in the first degree; (2) a 1996 conviction for unarmed robbery; (3) a 2010 conviction for home invasion in the second degree; and (4) a 2010 conviction for breaking and entering a building with intent. PSR ¶¶ 60, 75-76, 82, 84. The Probation Office calculated petitioner's Guidelines range at 324 to 405 months. PSR ¶¶ 129-130. Petitioner did not challenge the PSR's

determination that his prior convictions constituted "violent felon[ies]" for purposes of the ACCA. See generally Addendum to PSR.

At sentencing, the government moved for a downward departure under Sentencing Guidelines § 5K1.1 (2011) based on petitioner's substantial assistance to law enforcement, which the district court granted. Sent. Tr. 35-36. The court then implemented the departure to adjust petitioner's above-minimum Guidelines range to 235 to 293 months. Id. at 37. The court further stated that petitioner was properly designated as an armed career criminal under the ACCA, but noted its authority to sentence petitioner below the 15-year mandatory minimum sentence in light of the government's motion for a downward departure. Id. at 38; see 18 U.S.C. 3553(e). The court sentenced petitioner to 240 months of imprisonment, to be followed by five years of supervised release. Sent. Tr. 47. In imposing that sentence, the court remarked that petitioner's "sustained, essentially unbroken pattern" of criminal activity "present[ed] a substantially worse picture" than "other people who qualify for [the ACCA] enhancement" and that his "total number of criminal history points" was "among the highest" the court had seen. Id. at 38.

Petitioner filed a direct appeal, but voluntarily dismissed it. Pet. App. 9a.

2. In 2013 and 2014, the district court granted motions by the government to reduce petitioner's sentence based on his continued substantial assistance to law enforcement, resulting in a sentence of 144 months of imprisonment. Pet. App. 9a; see Fed. R. Crim. P. 35(b).

3. In 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551, that the ACCA's residual clause is unconstitutionally vague. Id. at 2557. In 2016, this Court held in Welch v. United States, 136 S. Ct. 1257, that Johnson's holding applies retroactively to cases on collateral review. Id. at 1268.

Following Johnson, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. He argued that application of the ACCA in his case depended on the operation of the now-invalid residual clause and that he should be resentenced without the ACCA enhancement. Pet. App. 10a. Specifically, as relevant here, petitioner contended that his Michigan convictions for home invasion no longer qualified as predicate convictions under the ACCA after Johnson. Ibid.

The district court denied the motion. Pet. App. 16a. It explained that the Sixth Circuit already had held that Michigan home-invasion offenses "qualify as generic burglary, an enumerated offense" under the ACCA. Id. at 10a; see id. at 10a-11a (citing United States v. Quarles, 850 F.3d 836 (6th Cir. 2017), petition for cert. pending, No. 17-778 (filed Nov. 24, 2017); United States

v. Gibbs, 626 F.3d 344 (6th Cir. 2010); United States v. Howard, 327 Fed. Appx. 573 (6th Cir. 2009) (per curiam)). “[B]ecause the residual clause of the ACCA is not necessary to application of the Act in this case,” the court declined to vacate petitioner’s sentence. Pet. App. 12a.¹

The district court declined to issue a COA under 28 U.S.C. 2253(c)(2) because petitioner had failed to show that “reasonable jurists would find the Court’s assessment of the claim [p]etitioner raised debatable or wrong.” Pet. App. 16a.

4. Petitioner filed an application for a COA in the court of appeals. The court denied the application, concluding that “[r]easonable jurists would not dispute the district court’s denial of [petitioner’s] Johnson claim.” Pet. App. 4a. The court cited its decision in Quarles for the proposition that “the variants of home invasion under Michigan law qualify as generic burglary and, consequently, violent felonies for ACCA purposes.” Ibid. (citing Quarles, 850 F.3d at 837; Gibbs, 626 F.3d at 353;

¹ In the alternative, the district court held that petitioner’s Johnson claim was barred by the provision in his plea agreement that “waived the right to challenge his sentence and the manner in which it was determined in any collateral attack, including a motion brought under [28 U.S.C. 2255].” Pet. App. 14a (alterations and citation omitted). The court acknowledged that the government had declined to invoke petitioner’s collateral attack waiver, but stated that the government’s decision did not prevent it from relying on that ground to deny relief. Id. at 15a.

United States v. Garcia-Serrano, 107 Fed. Appx. 495, 496 (6th Cir. 2004)).²

DISCUSSION

Petitioner contends (Pet. 6-9) that this Court should grant certiorari to address the question whether “generic” burglary, as defined by Taylor v. United States, 495 U.S. 575 (1990), requires that a defendant form the intent to commit a crime at the precise moment when he unlawfully enters or initially remains in a building or structure. For reasons explained in the government’s brief in Quarles v. United States, No. 17-778 (filed Nov. 24, 2017), although the court below has resolved that question correctly, the question has divided the courts of appeals and warrants this Court’s review. See Gov’t Br. at 10-12, Quarles, supra (No. 17-778). Because Quarles, which involves a direct appeal of a sentence, presents a better vehicle for deciding the question presented than does this case, the Court should grant the petition in Quarles and hold this case pending its resolution of that one. In the alternative, the Court may wish to hold the petitions in both Quarles and this case pending its disposition of the government’s petition in United States v. Stitt, No. 17-765 (filed

² Like the district court, see Pet. App. 11a, the court of appeals rejected petitioner’s argument that his prior conviction for Michigan unarmed robbery no longer qualified as an ACCA predicate offense after Johnson. Id. at 5a. Petitioner does not renew his challenge to the ACCA status of his unarmed robbery conviction in this Court. See Pet. 1-9.

Nov. 21, 2017), which may illuminate the proper approach to determining the scope of “burglary” under the ACCA.³

1. For the reasons explained in the government’s brief in Quarles, supra, the court of appeals here has correctly determined that “burglary” under the ACCA encompasses circumstances in which a defendant develops the intent to commit a crime after his entry or initial decision to remain in a building or structure without authorization. See Gov’t Br. at 7-10, Quarles, supra (No. 17-778). This Court has construed “burglary” in the ACCA to include any “unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” Taylor, 495 U.S. at 599. Michigan law defines first and second degree home invasion as follows:

A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the [first or second] degree [depending on the existence of aggravating factors].

Mich. Comp. Laws Ann. § 750.110a(2) and (3) (West 2004). Under these statutes, petitioner necessarily had to form the intent to commit a felony, larceny, or assault, either before he entered the

³ In addition to Quarles, supra, another pending petition for a writ of certiorari presents the same question. See Ferguson v. United States, No. 17-7496 (filed Jan. 17, 2018).

dwelling or while he was still inside. See United States v. Quarles, 850 F.3d 836, 840 (6th Cir. 2017), petition for cert. pending, No. 17-778 (filed Nov. 24, 2017). Even if the intent was formed after petitioner entered, his offenses satisfied Taylor's definition of "burglary" because he unpermittedly entered the dwelling and "remain[ed]" there "with intent to commit a crime." 495 U.S. at 599.

2. As petitioner notes (Pet. 7-8), however, the courts of appeals are divided regarding the question presented, which concerns the proper interpretation of a common ACCA predicate. See Gov't Br. at 10-12, Quarles, supra (No. 17-778). This Court's review is accordingly warranted.

Quarles provides a better vehicle than this case for resolving the conflict in the courts of appeals. In Quarles, the court of appeals considered the question presented in a published opinion on direct appeal of the imposition of a criminal sentence. 850 F.3d 836, 837, 840. By contrast, in this case, the court of appeals addressed the question presented in an unpublished order denying petitioner's application for a COA to contest the denial of a motion for collateral relief. See Pet. App. 2a-6a. This Court accordingly should grant the petition in Quarles and hold the petition in this case pending its disposition of Quarles.

3. In the alternative, this Court may wish to hold the petitions in both Quarles and this case pending its disposition of

the government's petition for a writ of certiorari in United States v. Stitt, No. 17-765 (filed Nov. 21, 2017). Stitt presents the question whether burglary of a nonpermanent or mobile structure adapted or used for overnight accommodation can qualify as "burglary" under the ACCA. If the Court grants certiorari in Stitt and resolves that question, its decision may provide guidance on the proper approach to construing ACCA burglary, and thus the question presented here and in Quarles.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of the petition for a writ of certiorari in Quarles v. United States, No. 17-778 (filed Nov. 24, 2017), and then be disposed of as appropriate. In the alternative, the petition should be held pending the Court's disposition of the petition for a writ of certiorari in United States v. Stitt, No. 17-765 (filed Nov. 21, 2017), and then be disposed of as appropriate.

Respectfully submitted.

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