

No. 17-7496

IN THE SUPREME COURT OF THE UNITED STATES

SHANNON L. FERGUSON, 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 unpermitted presence in a building 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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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-4) is reported at 868 F.3d 514.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2017. A petition for rehearing was denied on October 19, 2017 (Pet. App. 1). The petition for a writ of certiorari was filed on January 17, 2018. 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 Eastern District of Tennessee, 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. 5. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. Id. at 6-7. The court of appeals affirmed. Id. at 2-4.

1. In 2013, sheriff's detectives conducted a traffic stop of petitioner's truck. Presentence Investigation Report (PSR) ¶ 5. At the time, petitioner had multiple outstanding warrants for his arrest. Ibid. Detectives accordingly arrested petitioner and placed him in the back of their vehicle. Ibid.

While preparing to advise petitioner of his Miranda rights, a detective noticed a .380 round of ammunition lying on the seat near petitioner. PSR ¶ 6. Detectives removed petitioner from the vehicle and another .380 round fell to the ground. Ibid. Detectives then searched petitioner and the area around his seat, finding two more rounds in petitioner's pocket and three rounds in the seat. Ibid. Detectives subsequently recovered .35 grams of methamphetamine from petitioner's pocket and a loaded .380 caliber pistol from the truck. Id. ¶¶ 6-7.

A federal grand jury charged petitioner with one count of unlawful possession of a firearm following a felony conviction, in

violation of 18 U.S.C. 922(g)(1). PSR ¶ 2. Petitioner pleaded guilty. Ibid.

2. 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, [or] involves use of explosives." 18 U.S.C. 924(e)(2)(B)(ii).

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

Under that approach, courts examine "the statutory definition[]" of the previous crime in order to determine whether the jury's finding of guilt, or the defendant's plea, necessarily reflects conduct that constitutes the "generic" form of burglary

referenced in the ACCA. Taylor, 495 U.S. at 600. If the statute of conviction consists of elements that are the same as, or narrower than, generic burglary, the prior offense categorically qualifies as a predicate conviction under the ACCA. But if the statute of conviction is broader than the ACCA definition, the defendant's prior conviction does not qualify as ACCA burglary unless -- under what is known as the "modified categorical approach" -- (1) the statute is "divisible" into multiple crimes with different elements, and (2) the government can show (using a limited set of record documents) that the jury necessarily found, or the defendant necessarily admitted, the elements of generic burglary. See Mathis v. United States, 136 S. Ct. 2243, 2249 (2016); Descamps v. United States, 133 S. Ct. 2276, 2284 (2013); Shepard v. United States, 544 U.S. 13, 26 (2005).

The Probation Office determined that petitioner had at least three prior convictions that qualified as "violent felon[ies]" for purposes of the ACCA. PSR ¶ 18. As relevant here, petitioner had three convictions for burglary under Tennessee Code Annotated § 39-14-402 (2006).¹ PSR ¶¶ 37-39. The Probation Office thus

¹ A person commits "burglary" when, "without the effective consent of the property owner," he (1) "[e]nters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;" (2) "[r]emains concealed, with the intent to commit a felony, theft or assault, in a building;" (3) "[e]nters a building and commits or attempts to commit a felony, theft or assault;" or (4) "[e]nters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or

determined that petitioner qualified for sentencing under the ACCA, and it calculated his guidelines range at 180 to 210 months. Id. ¶¶ 61-62.²

Petitioner objected to application of the ACCA. As relevant here, he argued that his Tennessee burglary convictions do not satisfy Taylor's intent requirement for "burglary" under the ACCA. Sent. Tr. 3. In particular, petitioner contended that one variant of Tennessee burglary -- in which the defendant "[e]nters a building and commits or attempts to commit a felony, theft or assault," Tenn. Code Ann. § 39-14-402(a)(3) (2006) -- "does not require intent at the time of entry" and, therefore, is "not a categorical burglary under the definition of Taylor." Sent. Tr. 21-22. Petitioner further asserted that state court documents, which the government had lodged, did not exclude the possibility

assault or commits or attempts to commit a felony, theft or assault." Tenn. Code Ann. § 39-14-402(a) (2006). Because the Tennessee judgments show that petitioner was convicted of Class D felonies, his burglary convictions necessarily implicated Subsections (a)(1), (2), or (3) of the statute. Pet. App. 3-4.

² The PSR reflects that petitioner also had five convictions for aggravated burglary under Tennessee Code Annotated § 39-14-403 (2014). Although the district court agreed that those convictions counted as "burglary" for purposes of the ACCA, Sent. Tr. 40, the court of appeals did not rely on them. As the court explained, its recent en banc decision in United States v. Stitt, 860 F.3d 854 (6th Cir. 2017), petition for cert. pending, No. 17-765 (filed Nov. 21, 2017), took the view that "Tennessee's aggravated burglary statute sweeps more broadly than the generic definition of burglary." Pet. App. 3.

that his Tennessee burglary convictions had rested on that subsection. Id. at 19-27.

The district court overruled petitioner's objections. Sent. Tr. 39. After reviewing the Tennessee indictments, plea transcripts, and judgment orders, the court found, applying the modified categorical approach, that petitioner's burglary convictions were for violations of Tennessee Code Annotated § 39-14-402(a)(1) (2006), which prohibits "[e]nter[ing] a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault." The court held that convictions under that subsection constitute "burglaries that qualify [under the] Armed Career Criminal Act." Sent. Tr. 39. After considering the factors in 18 U.S.C. 3553(a), the court sentenced petitioner to 180 months of imprisonment, to be followed by three years of supervised release. Sent. Tr. 44.

3. The court of appeals affirmed. Pet. App. 2-4. It concluded that petitioner's prior convictions for burglary counted as ACCA predicates under its decision in United States v. Priddy, 808 F.3d 676 (6th Cir. 2015), abrogated on other grounds by United States v. Stitt, 860 F.3d 854 (6th Cir. 2017) (en banc), petition for cert. pending, No. 17-765 (filed Nov. 21, 2017). Pet. App. 3. There, the court determined that "all Class D burglary convictions under Tennessee law -- that is, convictions under subsections (a)(1), (a)(2), or (a)(3) of the Tennessee burglary statute -- fit

within the generic definition of burglary and are therefore violent felonies for purposes of the ACCA.” Id. at 3-4 (citing Priddy, 808 F.3d at 684-685).

DISCUSSION

Petitioner contends (Pet. 17-37) that this Court should grant certiorari to determine 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 that he unlawfully enters or initially remains in a building or structure. Although the court of appeals correctly resolved that question, as the government has explained in its brief in Quarles v. United States, No. 17-778 (filed Nov. 24, 2017), 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).

Concurrent with the filing of this response, the government is filing a petition for a writ of certiorari presenting the same question in United States v. Herrold, 883 F.3d 517 (5th Cir. 2018) (en banc), petition for cert. pending (filed April 18, 2018). In Herrold, the en banc Fifth Circuit held that a Texas burglary statute is broader than “burglary” under the ACCA because it encompasses situations in which a defendant, “without the effective consent of the owner, * * * enters a building or habitation and commits or attempts to commit a felony, theft, or assault,” Tex. Penal Code Ann. § 30.02(a)(3) (West Supp. 2017),

but does not require that the defendant have the intent to commit the crime at the moment he first enters or remains in the building or habitation. Herrold, 883 F.3d at 531-536. Herrold and Quarles each provide a better vehicle for deciding the question presented than does this case. The Court should therefore grant the petition in one or both of those cases and hold this case pending their resolution. In the alternative, the Court may wish to hold the petitions in Herrold, Quarles, and this case pending its disposition of the government's petition in United States v. Stitt, No. 17-765 (filed Nov. 21, 2017), which may illuminate the proper scope of "burglary" under the ACCA.³

1. For the reasons explained in the government's brief in Quarles, supra, the court of appeals 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 encompass any "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."

³ In addition to Herrold, supra, and Quarles, supra, another pending petition for a writ of certiorari presents the same question. See Secord v. United States, No. 17-7224 (filed Dec. 19, 2017).

Taylor, 495 U.S. at 599. As relevant here, Tennessee law defines burglary as follows:

A person commits burglary who, without the effective consent of the property owner:

- (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;
- (2) Remains concealed, with the intent to commit a felony, theft or assault, in a building; [or]
- (3) Enters a building and commits or attempts to commit a felony, theft or assault.

Tenn. Code. Ann. § 39-14-402(a)(1)-(3) (2006). As the court of appeals has interpreted the statute, under any of these variants, petitioner necessarily had to form the intent to commit a felony, theft, or assault, either before he entered the building or while he was still inside. See United States v. Priddy, 808 F.3d 676, 684-685 (6th Cir. 2015), abrogated on other grounds by United States v. Stitt, 860 F.3d 854 (6th Cir. 2017) (en banc), petition for cert. pending, No. 17-765 (filed Nov. 21, 2017). Even if the intent was formed after petitioner entered, his offenses satisfied Taylor's definition of "burglary" because he entered the building without authorization and "remain[ed]" there "with intent to commit a crime." Taylor, 495 U.S. at 599.

2. As petitioner notes (Pet. 22-26), however, the courts of appeals are divided on the question presented, which concerns the proper interpretation of the common ACCA predicate of burglary.

See Gov't Br. at 10-12, Quarles, supra (No. 17-778). This Court's review is accordingly warranted in an appropriate case.

This case is not an appropriate vehicle for resolving the conflict in the courts of appeals. In this case, the district court examined the indictments associated with petitioner's prior Tennessee burglary convictions and determined that petitioner was convicted of a specific variant of Tennessee burglary, Tenn. Code Ann. § 39-14-402(a)(1) (2006), that qualifies as generic burglary under any circuit's interpretation of Taylor. Sent. Tr. 38-39; see Shepard v. United States, 544 U.S. 13, 26 (2005) (authorizing sentencing court to examine a limited set of record documents to discern whether the jury necessarily found, or the defendant necessarily admitted, the elements of generic burglary in the earlier proceeding). Although the court of appeals resolved the case on an alternative ground, the district court's determination means that petitioner would not likely benefit from a decision in his favor on the question presented. Because Herrold and Quarles each present a better vehicle for deciding the question presented, this Court should grant the petition in one or both of those cases, and hold the petition in this case pending the disposition of Herrold or Quarles. If the Court were ultimately to agree with the position of the court of appeals in Herrold or the petitioner in Quarles on the question presented, the lower courts could then

address in the first instance whether that would affect petitioner's case in any way.

3. In the alternative, this Court may wish to hold the petitions in Herrold, 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 scope of ACCA burglary and the question presented in Herrold, Quarles, and this case.

4. Petitioner separately argues (Pet. 32-34) that the Tennessee burglary statute is overbroad on the theory that the offense can be committed recklessly. That contention is incorrect and does not warrant this Court's review.

Petitioner first raised the recklessness argument in his reply brief in the court of appeals, see Pet. C.A. Reply Br. 14, and that court did not pass on it. Cf. Sanborn v. Parker, 629 F.3d 554, 579 (6th Cir. 2010) ("[A]rguments made to us for the first time in a reply brief are waived."), cert. denied, 565 U.S. 980 (2011). This Court should not address it in the first instance. See Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

In any event, petitioner's contention confuses different portions of the ACCA's definition of a "violent felony." Petitioner cites (Pet. 33) decisions of this Court and the Sixth Circuit addressing whether crimes that can be committed recklessly or accidentally qualify as violent felonies under the ACCA's now-invalidated residual clause (covering offenses that "involve[] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii)); or its force clause (covering offenses that have "as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i)). See Begay v. United States, 553 U.S. 137, 145 (2008) (reckless conduct under residual clause); United States v. McMurray, 653 F.3d 367, 374-375 (6th Cir. 2011) (reckless conduct under the force clause). But whether or not those clauses encompass reckless or accidental conduct, see Voisine v. United States, 136 S. Ct. 2272, 2276, 2278-2282 (2016) (holding that reckless conduct can constitute "use of physical force" under provision similar to the force clause) (citation omitted), they are not at issue in this case, which turns on the meaning of "burglary" in the ACCA's enumerated-felonies clause.

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 United States v. Herrold (filed April 18, 2018), or 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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