877 F.3d 720
United States Court of Appeals,
Seventh Circuit.

Michael SMITH, Petitioner-Appellant,
v.
UNITED STATES of America,
Respondent-Appellee.
United States of America, Plaintiff-Appellee,
v.
Michael J. Khoury, Defendant-Appellant.

No. 17-1730, No. 17-2090
|
Argued November 14, 2017
|
Decided December 13, 2017

Synopsis

Background: Federal inmates filed motions to vacate, set aside, or correct sentence. The United States District Court for the Northern District of Illinois, No. 16 C 6606, Robert W. Gettleman, J., 2017 WL 1321110, and the United States District Court for the Southern District of Illinois, No. 3:15-CR-30013-DRH-1, David R. Herndon, J., 2017 WL 373295, denied motions, and inmates appealed. Appeals were consolidated.

[Holding:] The Court of Appeals, Easterbrook, Circuit Judge, held that defendants' prior Illinois convictions for residential burglary were predicate "violent felonies" under Armed Career Criminal Act (ACCA).

Affirmed.

West Headnotes (2)

[1] **Common Law**
Application and operation

All common law is provisional.

Cases that cite this headnote

[2] **Sentencing and Punishment**
Particular offenses

Residential burglary in Illinois was generic burglary, and thus defendants' prior Illinois convictions for residential burglary were predicate "violent felonies" under Armed Career Criminal Act's (ACCA) enumerated offenses clause, even though Illinois' definition of "dwelling" included mobile homes and trailers; trailers were "structures" as matter of ordinary usage, and statute of conviction required that crime take place in enclosed place in which people lived. 18 U.S.C.A. § 924(e); 720 Ill. Comp. Stat. Ann. 5/2-6, 5/19-3.

1 Cases that cite this headnote

***721** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 16 C 6606—**Robert W. Gettleman**, *Judge*.
Appeal from the United States District Court for the Southern District of Illinois. No. 3:15-CR-30013-DRH-1—**David R. Herndon**, *Judge*.

Attorneys and Law Firms

Carol A. Brook, Attorney, William H. Theis, Attorney, Office of the Federal Defender Program, Chicago, IL, for Petitioner-Appellant.

Andrianna D. Kastanek, Attorney, Office of the United States Attorney, Chicago, IL, for Respondent-Appellee.

Before Bauer, Easterbrook, and Sykes, Circuit Judges.

Opinion

Easterbrook, Circuit Judge.

These appeals, which we have consolidated for decision, present the question whether a conviction for residential burglary in Illinois under 720 ILCS 5/19-3 (1982) counts as "burglary" for the purpose of the Armed Career Criminal Act, 18 U.S.C. § 924(e). *Taylor v. United States*,

495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), holds that a state's label is not dispositive and that a conviction counts only if the offense meets a federal definition of "generic burglary". We held in *United States v. Haney*, 840 F.3d 472 (7th Cir. 2016), that the pre-1982 version of Illinois law covering ordinary burglary did not satisfy the federal definition. Michael Smith and Michael Khoury (collectively "defendants") ask us to hold the same about the residential-burglary statute under which they were convicted.

The facts and procedural histories of these cases do not matter. It is enough to say that each defendant was convicted of possessing a firearm, see 18 U.S.C. § 922(g)(1), despite earlier convictions making that illegal. Each is serving 180 months' imprisonment, the statutory floor for someone convicted of this crime who has three or more earlier convictions for a violent felony or serious drug offense. Section 924(e)(2)(B)(ii) includes "burglary" in the list of violent felonies but does not define "burglary." For both defendants a 180-month sentence is proper only if a ***722** conviction for residential burglary in Illinois under the 1982 revision of 720 ILCS 5/19-3 is "generic burglary" under *Taylor*. The appeals in both defendants' cases arise from collateral attacks, but the United States waived all procedural defenses in order to facilitate appellate resolution of the question, which affects many other sentences. None of the procedural matters is jurisdictional, so the waivers are conclusive. See *Wood v. Milyard*, 566 U.S. 463, 132 S.Ct. 1826, 182 L.Ed.2d 733 (2012).

Both district judges relied on *Dawkins v. United States*, 809 F.3d 953 (7th Cir. 2016), which they read as conclusively establishing that residential burglary in Illinois satisfies *Taylor*. But the only question addressed in *Dawkins* was whether residential burglary in Illinois includes the element of breaking and entering; we answered yes. *Dawkins* did not consider whether the Illinois offense includes the element of entering a "building or other structure" (*Taylor*, 495 U.S. at 598, 110 S.Ct. 2143). That a given decision resolves one legal argument bearing on a subject does not mean that it has resolved all possible legal arguments bearing on that subject. See *Rodriguez-Contreras v. Sessions*, 873 F.3d 579, 580 (7th Cir. 2017). So defendants' argument about the building-or-structure element is open.

In Illinois, "[a] person commits residential burglary who knowingly and without authority enters the dwelling place of another with the intent to commit therein a felony or theft." 720 ILCS 5/19-3(a). (This is how that statute read between 1982 and 2001; changes since then are irrelevant for the purpose of § 924(e).) Another statute defines "dwelling":

> (a) Except as otherwise provided in subsection (b) of this Section, "dwelling" means a building or portion thereof, a tent, a vehicle, or other enclosed space which is used or intended for use as a human habitation, home or residence.
>
> (b) For the purposes of Section 19-3 of this Code, "dwelling" means a house, apartment, mobile home, trailer, or other living quarters in which at the time of the alleged offense the owners or occupants actually reside or in their absence intend within a reasonable period of time to reside.

720 ILCS 5/2-6. (This definition has been in force since 1987, before defendants' predicate crimes occurred.) Defendants maintain that "a tent, a vehicle, or other enclosed space" is not a "structure" as the Supreme Court required in *Taylor*—which adopted as the common-law definition of burglary

> 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.

495 U.S. at 599, 110 S.Ct. 2143. Subsection (a), in which the phrase "a tent, a vehicle, or other enclosed space" appears, does not apply to the crime of residential burglary. To be convicted of that offense, a person must enter "a house, apartment, mobile home, trailer, or other living quarters". And that phrase seems to come within *Taylor*'s reference to "a building or structure".

Not so, defendants insist. They contend that a "mobile home" and a "trailer" are not structures. That contention is a flop for a mobile home, which in Illinois is "a manufactured home as defined in subdivision (53) of Section 9-102 of the Uniform Commercial Code." 625 ILCS 5/1-144.03. The UCC, in turn, defines a manufactured home as a "structure, transportable in one or more sections, ... which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required ***723** utilities". A "mobile home," so defined, is a "building or structure" by anyone's understanding. It is just a prefabricated house. (There is some question whether 625 ILCS 5/1-144.03 applies to all uses of "mobile home" throughout Illinois law, but even if it does not a mobile home in common understanding remains a prefabricated house.)

Defendants are on firmer ground with "trailer," which the Illinois Vehicle Code defines as "[e]very vehicle without motive power in operation, other than a pole trailer, designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that no part of its weight rests upon the towing vehicle." 625 ILCS 5/1-209. Although only those trailers in which "the owners or occupants actually reside" (720 ILCS 5/2-6(b)) count as dwellings, trailers are still movable. Defendants insist that the possibility of hitching a trailer to a vehicle and taking it on the highway during a vacation means that it cannot be a "building or structure" as the Justices used that phrase.

Worse, defendants insist, the open-ended statutory reference to "other living quarters" might include houseboats or tents or even cars. The state judiciary has never held that it *does* include those items, but the bare possibility that it might, defendants insist, means that Illinois law does not come within *Taylor*'s definition—for *Taylor* asks what the elements of the state law include, not what a given defendant did in fact. 495 U.S. at 600–02, 110 S.Ct. 2143. (The parties agree that § 5/19-3 is indivisible for the purpose of *Mathis v. United States*, —— U.S. ——, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016), so that if any of the defined ways to commit "residential burglary" in Illinois falls outside the federal definition of "burglary," the state-law convictions do not count under the Armed Career Criminal Act. See also *Descamps v. United States*, 570 U.S. 254, 133 S.Ct. 2276, 2283, 186 L.Ed.2d 438 (2013).)

We conclude that the crime of residential burglary in Illinois does not cover the entry of vehicles (including boats) and tents. These places are listed in subsection (a) of the definition but not in subsection (b), and the Appellate Court of Illinois has held that subsection (b) excludes all vehicles other than occupied trailers. *People v. Taylor*, 345 Ill. App. 3d 286, 280 Ill.Dec. 477, 802 N.E.2d 402 (2003). That decision logically covers boats and tents as well. Entering those places with intent to steal is ordinary burglary in Illinois but not residential burglary, and both defendants were convicted of residential burglary. The proper treatment of trailers as a matter of federal law remains to be determined, however.

[1]*Taylor v. United States* set out to create a federal common-law definition of "burglary." This counsels against reading its definition as if it were a statute. All common law is provisional. The Justices did not consider in *Taylor* or any later decision whether an occupied trailer counts as a "structure"—or, if it does not, whether the definition should be modified in common-law fashion to include all of those enclosed places in which people live. The Court began the substantive discussion in *Taylor* by noting an older common-law definition of burglary: "a breaking and entering of a dwelling at night, with intent to commit a felony" (495 U.S. at 592, 110 S.Ct. 2143). They added: "Whatever else the Members of Congress might have been thinking of, they presumably had in mind at least the 'classic' common-law definition when they considered the inclusion of burglary as a predicate offense." *Id.* at 593, 110 S.Ct. 2143. The Justices adopted a broader definition—omitting mention of the time of day, the nature of the entered place as a dwelling, and the requirement ***724** that the crime to be committed be a "felony"—because by 1984 almost all states had expanded their definitions of burglary, and the Justices concluded that a statutory word enacted in 1984 should mean what most states called burglary in 1984. Yet by defendants' lights that traditional definition, if enacted by any state, would not qualify as "burglary" because it uses the word "dwelling" (which can include a tent) rather than "building or structure." Likewise, by defendants' lights, the statutes that states do have on the books are not generic burglary because they contain words such as "trailer" that exceed the scope of buildings and structures. Indeed, on defendants' view almost all states' existing burglary statutes are outside the scope of federal generic burglary.

Treating *Taylor* as if it were a statute, that is what four courts of appeals have held. *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017) (en banc) (Tennessee aggravated burglary is broader than generic burglary because it covers "mobile homes, trailers, and tents" used as dwellings); *United States v. Sims*, 854 F.3d 1037, 1039–40 (8th Cir. 2017) (Arkansas residential burglary is broader than generic burglary because it "criminalizes the burglary of vehicles where people live or that are customarily used for overnight accommodations"); *United States v. White*, 836 F.3d 437 (4th Cir. 2016) (West Virginia burglary is broader than generic burglary because it protects "dwelling house[s]," defined to include "mobile home[s]" and "house trailer [s]"); *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007) (en banc) (any state law that covers non-buildings is not generic burglary). At least one court of appeals has held the opposite. *United States v. Patterson*, 561 F.3d 1170 (10th Cir. 2009), reaffirming *United States v. Spring*, 80 F.3d 1450 (10th Cir. 1996). A panel of the Fifth Circuit agreed with the Tenth, but as it has granted rehearing en banc the rule in that circuit remains to be settled. See *United States v. Herrold*, 685 Fed.Appx. 302, rehearing en banc granted, 693 Fed.Appx. 272 (5th Cir. 2017).

[2]We think it unlikely that the Justices set out in *Taylor* to

adopt a definition of generic burglary that is satisfied by no more than a handful of states—if by any. Statutes should be read to have consequences rather than to set the stage for semantic exercises. We therefore agree with the Tenth Circuit in *Patterson* and *Spring* and with Judge Sutton's dissenting opinion (joined by Judges Clay, Gibbons, Rodgers, McKeague, and Kethledge) in *Stitt*. See 860 F.3d at 876–81. A violation of 720 ILCS 5/19-3 is generic burglary for the purpose of § 924(e) and similar federal recidivist statutes.

In reaching this conclusion we have considered not only that common-law understandings are open to modification as circumstances reveal potential weaknesses but also the Supreme Court's own explanation for its definition. The Justices told us that "Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States" (*Taylor*, 495 U.S. at 598, 110 S.Ct. 2143) and set out to produce a definition capturing that sense. Recognizing 720 ILCS 5/19-3 and similar statutes as generic burglary treats the Justices as having succeeded at that task; *Stitt* and similar decisions treat the Justices as having failed and having nullified part of a federal statute as a result.

After saying that their goal was to capture "the generic sense in which the term is now used in the criminal codes of most States," the Justices added that their "usage approximates that adopted by the drafters of the Model Penal Code" (*Taylor*, 495 U.S. at 598 n.8, 110 S.Ct. 2143), under which "[a] person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime ***725** therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter." ALI, *Model Penal Code* § 221.1 (1980). In the Model Penal Code the phrase "occupied structure" includes "any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." *Id*. at § 221.0(1). The Model Penal Code adds that, although someone cannot be convicted of burglary for entering an ordinary motor vehicle or freight car, a person may be convicted for entering a trailer home with intent to steal. *Id*. at § 221.1 Comment 3(b).

If defendants in these cases are right, then the Justices *said* that they were following the Model Penal Code's approach but *did* the opposite. We think it better to conclude that *Taylor*'s definition of generic burglary is a compact version of standards found in many states' criminal codes, including that of Illinois. We grant that, per *Shepard v. United States*, 544 U.S. 13, 15–16, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), an unoccupied boat or motor vehicle is not a "structure." But just as *Taylor* did not grapple with all enclosed spaces that people may call home, neither did *Shepard*. Certainly the Justices did not say in *Shepard* that they were restricting the coverage of the generic definition adopted in *Taylor*.

People live in trailers, which are "structures" as a matter of ordinary usage. Trailers used as dwellings are covered by the Illinois residential-burglary statute. The crime in 720 ILCS 5/19-3 therefore is "burglary" under § 924(e)(2)(B)(ii). Defendants were properly sentenced as armed career criminals.

AFFIRMED

All Citations

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United States District Court,
N.D. Illinois, Eastern Division.

UNITED STATES of America, Respondent,
v.
Michael SMITH, Petitioner.

No. 16 C 6606
|
Signed 04/03/2017

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

Robert W. Gettleman, United States District Judge

***1** Petitioner Michael Smith has filed a motion pursuant to 28 U.S.C. § 2255 to vacate his sentence.[1] The government opposes the motion. For the reasons discussed below, petitioner's motion is denied.

BACKGROUND

Petitioner pled guilty to one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) on August 7, 2007. The court found that petitioner had at least three prior convictions that qualified as "violent felonies" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1) ("ACCA"), and sentenced him to the mandatory minimum 180 months' imprisonment. Petitioner's predicate convictions were a 1993 aggravated battery, a 1997 residential burglary, a 2000 residential burglary, and a 2002 aggravated battery. All of the convictions were under Illinois law. Had the court not found that petitioner was an Armed Career Criminal, his maximum sentence under 18 U.S.C. § 922(g) would have been 120 months' imprisonment.

DISCUSSION

Petitioner filed the instant motion on June 24, 2016. In his motion, petitioner asserts that after Johnson v. United States, 135 S. Ct. 2551 (2015), and Welch v. United States, 136 S. Ct. 1257 (2016), his predicate convictions no longer qualify as violent felonies under the ACCA. According to petitioner, it follows that his 180-month sentence is unconstitutional.

I. Legal Standard

Section 2255 allows a person convicted of a federal crime to vacate, set aside, or correct his sentence. 28 U.S.C. § 2255. Relief pursuant to § 2255, however, "is appropriate only for 'an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice.' " See Harris v. United States, 366 F.3d 593, 594 (7th Cir. 2004) (quoting Borre v. United States, 940 F.2d 215, 217 (7th Cir. 1991)). When considering a § 2255 motion, the district court reviews the record and draws all reasonable inferences in favor of the government. See Carnine v. United States, 974 F.2d 924, 928 (7th Cir. 1992).

II. Analysis

A. Timeliness

Pursuant to § 2255(f), a motion to vacate, set aside, or correct a sentence must be filed within a one-year period that begins to run from the latest of the following dates: (1) the date on which the judgment of conviction becomes final; (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. 28

U.S.C. § 2255(f). Petitioner's motion is timely under the third ground.

On June 26, 2015, the Supreme Court held in Johnson that the ACCA's residual clause is unconstitutionally vague. See 135 S. Ct. 2551. Johnson announced a new substantive rule of constitutional law, which was made retroactively applicable in Welch. See 136 S. Ct. 1257. Accordingly, petitioner had until June 26, 2016, to file a Section 2255 motion. He did so on June 24, 2016. Respondent concedes that petitioner's motion is timely, but argues that it fails on the merits.

B. Petitioner's Claims

***2** According to respondent, petitioner's predicate offenses are unaffected by Johnson because the court did not resort to the ACCA's residual clause (which was invalidated by Johnson) in determining that petitioner's prior offenses were violent felonies. At the time of petitioner's sentencing, the ACCA defined violent felony as follows:

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year ... that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) 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) (emphasis added).

The italicized portion comprises the residual clause, which the Supreme Court held is unconstitutionally vague. Johnson, 135 S.Ct. 2551. Respondent argues that, because burglary is an enumerated offense in section (ii) and aggravated battery falls under section (i), which is known as the "elements clause," petitioner's offenses are beyond Johnson's reach and his motion should be denied.[2] Petitioner argues that, because the residual clause provided a fallback basis on which courts could classify prior offenses as violent felonies, and courts generally did not state which part of the ACCA they relied on in making that determination, Johnson not only opens the door to habeas claims, it invites an inquiry into whether the petitioner's prior offenses qualify as predicates under the ACCA without the residual clause. Assuming for the sake of argument that petitioner is correct,[3] his motion still fails. The Seventh Circuit has conducted that inquiry and found that three of petitioner's prior offenses qualify as predicates under the ACCA.

1. Illinois Residential Burglary

Prior to pleading guilty to being a felon in possession of a gun in 2007, petitioner had been twice convicted of residential burglary, once in 1997 and again in 2000. Doc. 1 at 5–6. Petitioner argues in his motion that convictions under the Illinois residential burglary statute do not qualify as ACCA predicates because the statute is broader than "generic" burglary as defined by the Supreme Court in Descamps v. United States, 133 S. Ct. 2276, 2283 (2013) (defining generic burglary as unlawful entry into a building or other structure with the intent to commit a crime) (citing Taylor v. United States, 110 S. Ct. 2143 (1990)). In Descamps, the Court held that a conviction under a California burglary statute did not qualify as an ACCA predicate because the statute did not require unlawful entry and was therefore broader than generic burglary. Id. at 2293. Petitioner argues that the Illinois statute suffers from the same defect. The Illinois residential burglary statute reads as follows:

> ***3** (a) A person commits residential burglary when he or she knowingly and without authority enters or knowingly and without authority remains within the dwelling place of another, or any part thereof, with the intent to commit therein a felony or theft.

720 ILCS 5/19-3.

In his motion, petitioner takes issue with the statute's "without authority" language. According to petitioner, entry "without authority" does not equate to unlawful entry, and the statute therefore criminalizes a broader swath of conduct than generic burglary. It follows, petitioner argues, that a conviction under the statute does not qualify as an ACCA predicate. Respondent points out, and petitioner acknowledges, that the Seventh Circuit, in the wake of Descamps, held that the Illinois residential burglary statute that petitioner was convicted under does qualify as an ACCA predicate. See Dawkins v. United States, 809 F.3d 953, 955 (7th Cir. 2016) (finding that "Illinois courts, like federal courts, use terms like unlawfully, unauthorized, without consent, and without

authority interchangeably"). Petitioner cites the lengthy dissent in Dawkins to support his argument that it cannot stand in light of Descamps.

Petitioner's argument changes gears in his reply brief. Instead of attacking the Illinois residential burglary statute's "without authority" language, petitioner argues that the statute is unconstitutionally broad because its definition of dwelling is not limited to buildings. The statute defines dwelling as follows:

> (b) For the purposes of Section 19-3 of this Code, "dwelling" means a house, apartment, mobile home, trailer, or other living quarters in which at the time of the alleged offense the owners or occupants actually reside or in their absence intend within a reasonable period of time to reside.

720 ILCS 5/2-6.

According to petitioner, inclusion of "trailer" in the definition of dwelling expands the definition to include non-structures. Failing that, petitioner argues, the term "other living quarters" is broad enough to include things like boats and automobiles, making the statute broader than generic burglary. The authority petitioner relies on in making this argument, Mathis v. United States, 136 S. Ct. 2243 (2016), was decided exactly one day before petitioner filed his 2255 motion on June 24, 2016. In Mathis the Supreme Court held that a conviction under an Iowa burglary statute did not qualify as a predicate offense under the ACCA because it "reaches a broader range of places: any building, structure, *or land, water or air vehicle.*" Mathis, 136 S. Ct. at 2250 (internal quotation omitted) (emphasis in original). It follows, according to petitioner, that a conviction under the Illinois residential burglary statute no longer qualifies as a predicate offense.

Petitioner further argues that Mathis invalidates the Seventh Circuit's Dawkins holding because Dawkins focused on the unlawful entry element of burglary and did not contemplate the locational element that was scrutinized in Mathis. The flaw in petitioner's argument is that the Seventh Circuit has since performed just such an analysis and declined to overturn Dawkins, or even discuss any effect that "recent case law" may have had on Dawkins' conclusion that the Illinois residential burglary statute comports with the Supreme Court's definition of generic burglary. United States v. Haney, 840 F.3d 472, 476 n.2 (7th Cir. 2016).

***4** In Haney, the Seventh Circuit held that convictions under an old Illinois burglary statute that was in effect in the 1970s do not qualify as predicates under the ACCA because "the relevant statute applied not only to buildings but also to vehicles, such as housetrailers, watercraft, aircraft, motor vehicles ... and railroad cars," making it broader than generic burglary. Id. at 475 (internal quotations omitted). In so holding, the court noted a number of burglary statutes that have been found too broad to support an ACCA enhancement. Id. at 476 (citing United States v. Edwards, 836 F.3d 831 (7th Cir. 2016) (Wisconsin statute that included railroad car, ship or vessel, locked enclosed cargo portion of a truck or trailer, motor home, or trailer home was too broad); United States v. White, 836 F.3d 437 (4th Cir. 2016) (West Virginia statute that included mobile home, house trailer, modular home, factory-built home or self-propelled motor home, or any other nonmotive vehicle primarily designed for human habitation and occupancy was too broad); United States v. Thorne, 837 F.3d 888 (8th Cir. 2016) (Florida statute that included curtilage of the structure or building was too broad)). Even still, the court found, albeit in dictum, that the Illinois residential burglary statute as it is written today (and was written when petitioner was convicted) "does not include in its definition locations that fall outside of" generic burglary. Id. at 476 n.2.

Petitioner's argument that the Illinois residential burglary statute is broader than generic burglary because its definition of dwelling includes "trailer" and "other living quarters" is well taken. The Fourth Circuit has held that a similar Maryland statute was too broad in light of Mathis. See United States v. Henriquez, 757 F.3d 144 (4th Cir. 2014). The Henriquez court found that the Maryland burglary statute was too broad because, although it did not define dwelling, the Maryland Court of Appeals had interpreted it to mean any structure that one "intends to be his abode and so uses it." Id. at 148. The Fourth Circuit found that this reasoning "expressly captured recreational vehicles and easily could cover those boats and motor vehicles that people intend to use, and do use, as their dwellings." Id. at 148–49. It therefore held that a conviction under the statute could not qualify as an ACCA predicate even though it found no evidence that any court had construed the statute so broadly.

It is fair to say that the law in this area is unsettled and unclear. A comparison of two recent opinions analyzing the statute at issue in the instant case illustrates the uncertainty. In Khoury v. United States, 2017 WL 373295 (S.D. Ill. Jan. 26, 2017), the court held that "convictions for residential burglary under Illinois law undoubtedly qualify as 'violent felonies' for purposes of the ACCA."

Id. at *2. The court relied on Dawkins and Haney in making that determination. See id. at *2, n. 4. In contrast, the court in Green v. United States, 2017 WL 568315 (E.D. Wis. Feb. 13, 2017), also citing Haney, came to the opposite conclusion and held that the Illinois residential burglary statute "like the Iowa statute in Mathis and the Wisconsin statute in Edwards—is broader than the 'generic burglary' statute" and, like the Iowa and Wisconsin statutes, does not support a predicate offense. Id. at *3. Underscoring the uncertainty in this area, in Green the government *agreed* that a conviction for Illinois residential burglary does not qualify as a predicate offense.

To the extent that the law is settled in the Seventh Circuit, the court is obliged to follow the holdings in Dawkins and Haney. Accordingly, the court finds that petitioner's convictions for Illinois residential burglary are predicate offenses under the ACCA. Consequently, if either one of petitioner's aggravated battery convictions qualifies as a predicate offense, petitioner was properly sentenced as an Armed Career Criminal.

2. Illinois Aggravated Battery

Prior to pleading guilty to being a felon in possession of a gun in 2007, petitioner had been twice convicted of aggravated battery, once in 1993 and again in 2002. Doc. 1 at 5–6. According to Illinois law, "[a] person commits battery if he or she knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3. Simple battery can be elevated to aggravated battery for a number of reasons. Relevant to the instant case, committing battery with the use of "a deadly weapon other than by the discharge of a firearm" or against a "peace officer, a person summoned and directed by a peace officer, or a correctional institution employee" constitutes aggravated battery. 720 ILCS 5/12-4(b)(1), (6). Because one can be convicted of battery under either of the two prongs, petitioner's convictions, by themselves, do not establish that he committed a violent crime. See United States v. Rodriguez-Gomez, 608 F.3d 969, 973 (7th Cir. 2010). The court must therefore determine which prong petitioner was convicted under. Id. In doing so, the court is permitted to consult limited documents, one of which is the charging document. Id. (citing Shepard v. United States, 544 U.S. 13, 16 (2005)).

***5** Petitioner argues that his 2002 aggravated battery conviction is not a crime of violence because he was charged under the second battery prong: making "insulting or provoking" physical contact with a correctional institution officer.[4] The Seventh Circuit agrees. See United States v. Hampton, 675 F.3d 720, 731 (7th Cir. 2012) (finding that "the Illinois aggravated-battery offense of making insulting or provoking contact with a peace officer does not qualify as a violent felony and is therefore not an ACCA predicate," even if analyzed under the now-invalidated residual clause). Unfortunately for petitioner, the same cannot be said for his 1993 aggravated battery conviction.

The court's review of the information under which petitioner was charged with aggravated battery in 1993 reveals that petitioner was charged under the first battery prong. The information states that petitioner, "while armed with a dangerous weapon used force or threatened the imminent use of force upon [another] in that he placed the tip of a kitchen knife against the skin of [another]'s neck threatening to kill her." Doc. 15, Ex. 2, p. 4. Petitioner argues that this conduct requires insufficient force to qualify as a predicate offence under the ACCA. The court disagrees.

As petitioner notes, the level of force necessary to constitute a violent felony under the ACCA is not one of first impression. The requisite level of force is defined as "*violent* force—that is, force capable of causing pain or injury to another person." Curtis Johnson v. United States, 559 U.S. 133, 140 (2010) (emphasis in original). Accordingly, a battery committed using a level of force as defined in common law, the "merest touching," is not a violent felony, id. at 141, nor is a squeeze of the arm that leaves a bruise. See Flores v. Ashcroft, 350 F.3d 666, 670 (7th Cir. 2003). It strains credulity, however, to suggest that holding a knife to one's throat while threatening to kill her is analogous to a squeeze of the arm, or that doing so requires no more force than the merest touching. The court rejects any such suggestion and finds that petitioner's 1993 conviction for aggravated battery qualifies as a violent felony under the ACCA. See Hill v. Werlinger, 695 F.3d 644, 649–50 (7th Cir. 2012) (holding that aggravated battery convictions based on the first prong of the Illinois battery statute constitute violent felonies for ACCA purposes) (citing cases).

Given the above analysis, the court finds that petitioner had three predicate offenses when he was sentenced under the ACCA and his sentence in constitutional. Accordingly, petitioner's motion to vacate his sentence is denied.

III. Certificate of Appealability

Under Rule 11(a) of the Rules Governing Section 2255 Proceedings, the district court must either issue or deny a certificate of appealability when it enters a final order adverse to the petitioner. Petitioner is entitled to a certificate of appealability only if he can make a substantial showing of the denial of a constitutional right. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). To make a substantial showing, petitioner must show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal quotation omitted). Given recent developments in case law relating to whether petitioner's residential burglary convictions qualify as predicate offenses under the ACCA, the court finds that such a showing has been made and will issue a certificate of appealability.

CONCLUSION

***6** For the reasons discussed above, petitioner's § 2255 motion (doc. 1) to vacate his sentence is denied on the merits and his case before this court is terminated. The court will issue a certificate of appealability.

All Citations

Slip Copy, 2017 WL 1321110

Footnotes

1 Petitioner's criminal case number was 06 CR 36-1.

2 The Seventh Circuit has held that, where a petitioner was sentenced under the ACCA for predicate offenses that were considered violent felonies without resort to the residual clause, Johnson does not affect the petitioner's sentence and, therefore, does not "reopen[ ] all questions about the proper classification of prior convictions under ... the Armed Career Criminal Act." Stanley v. United States, 827 F.3d 562 (7th Cir. 2016). It follows that, if respondent is correct that petitioner's predicate offenses are unaffected by Johnson, petitioner cannot rely on the third ground mentioned above and his motion is untimely. Respondent does not make this argument, however, but rather concedes timeliness, thereby waiving that defense. See Payne v. Illinois, 485 F.Supp.2d 952 (N.D. Ill. 2007).

3 Stanley, 827 F.3d 562, casts doubt on whether petitioner is indeed correct.

4 Petitioner's 2002 Indictment confirms that he was charged with aggravated battery after he "knowingly made physical contact of an insulting or provoking nature with ... a correctional institution employee." Doc. 15, Ex. 3, p. 3.

APPENDIX D

State Burglary Statutes at the Time of 18 U.S.C. 924(e)(2)(B)(ii)'s Enactment (Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39)

* Statutes encompassing nonpermanent or mobile structures irrespective of their purpose

† Statutes encompassing nonpermanent or mobile structures used for enumerated purposes

‡ Statutes adhering to the common-law definition of burglary

§ Statutes broader than the common-law definition that exclude or do not specifically address nonpermanent or mobile structures

Alabama†	Ala. Code §§ 13A-7-5, 13A-7-6, 13A-7-7 (1982) (defining burglary as involving a "dwelling" or "building"); *id.* § 13A-7-1(2) (Supp. 1983) (defining building as "[a]ny structure which may be entered and utilized by persons for business, public use, lodging or the storage of goods, * * * includ[ing] any vehicle, aircraft or watercraft used for the lodging of persons or carrying on business therein").

Alaska†	Alaska Stat. §§ 11.46.300, 11.46.310 (1983) (defining burglary as involving a "building"); *id.* § 11.81.900 (Supp. 1985) (defining building to include, "in addition to its usual meaning, * * * any propelled vehicle or structure adapted for overnight accommodation of persons or for carrying on business").
Arizona†	Ariz. Rev. Stat. Ann. § 13-1506 (Supp. 1981) (defining burglary as involving "a nonresidential structure"); *id.* § 13-1501(8) (1978) (defining "[s]tructure" as "any building, object, vehicle, railroad car or place with sides and a floor, separately securable from any other structure attached to it and used for lodging, business, transportation, recreation or storage").
Arkansas†	Ark. Stat. Ann. §§ 41-2001, 41-2002 (1977) (defining burglary as involving an "occupiable structure," *i.e.*, "a vehicle, building, or other structure: (a) where any person lives or carries on a business or other calling; * * * (b) where people assemble for purpose of business, government, education, religion, entertainment, or public transportation; or (c) which is customarily used for overnight accommoda-

	tion of persons").
California*	Cal. Penal Code § 459 (Deering 1985) (defining burglary as involving "any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse[,] or other building, tent, vessel, railroad car, locked or sealed cargo container * * * , trailer coach * * * , any house car * * * , inhabited camper * * * , vehicle * * * when the doors of such vehicle are locked, aircraft * * * , [or] mine").
Colorado†	Colo. Rev. Stat. §§ 18-4-101, 18-4-202, 18-4-203 (1986) (defining first- and second-degree burglary as involving a "building or occupied structure," *i.e.*, "a structure which has the capacity to contain, and is designed for the shelter of, man, animals, or property, * * * includ[ing] a ship, trailer, sleeping car, airplane, or other vehicle or place adapted for overnight accommodations of persons or animals, or for carrying on of business therein" (building) or "any area, place, facility, or enclosure which * * * is in fact occupied by a person or animal, and known

	by the defendant to be thus occupied" (occupied structure)).
Connecticut*	Conn. Gen. Stat. Ann. § 53a-103 (West 1972) (defining burglary as involving a "building"); *id.* § 53a-100(a)(1) (West Supp. 1985) (defining building to include, "in addition to its ordinary meaning, * * * any watercraft, aircraft, trailer, sleeping car, railroad car, other structure or vehicle").
Delaware*	Del. Code Ann. tit. 11, §§ 221(1), 824-825 (1979) (defining burglary as involving, *inter alia*, a "building," defined to include, "in addition to its ordinary meaning, * * * any structure, vehicle or watercraft").
District of Columbia*	D.C. Code Ann. § 22-1801(b) (1973) (defining burglary as involving "any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, * * * any steamboat, canalboat, vessel, or other watercraft, or railroad car or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade").
Florida*	Fla. Stat. chs. 810.011, 810.02(1) (1985) (defining burglary as involv-

	ing "a structure or a conveyance," *i.e.*, "a building of any kind, either temporary or permanent, which has a roof over it" (structure) or "any motor vehicle, ship, vessel, railroad car, trailer, aircraft, or sleeping car" (conveyance)).
Georgia[†]	Ga. Code Ann. § 16-7-1 (Michie 1984) (defining burglary as involving "the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another").
Hawaii[†]	Haw. Rev. Stat. §§ 708-800, 708-810 (1985) (defining burglary as involving a "building," *i.e.*, "any structure, [or] * * * any vehicle, railway car, aircraft, or watercraft used for lodging of persons therein").
Idaho[*]	Idaho Code § 18-1401 (Supp. 1981) (defining burglary as involving a "house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, closed vehicle, closed trailer, airplane or railroad car").
Illinois[*]	Ill. Rev. Stat. ch. 38, paras. 2-6, 19-1(a), 19-3(a) (1983) (defining burglary as involving a "building, house-trailer, watercraft, aircraft, motor

	vehicle[,] * * * [or] railroad car," and defining residential burglary as involving a "dwelling," *i.e.*, "a building or portion thereof, a tent, a vehicle, or other enclosed space which is used or intended for use as a human habitation").
Indiana[§]	Ind. Code Ann. § 35-43-2-1 (Burns Supp. 1984) (defining burglary as involving a "building or structure" without further defining those terms); see also *McCormick* v. *State*, 382 N.E.2d 172, 174-176 & nn.1-2 (Ind. Ct. App. 1978) (noting that, until 1976, Indiana separately criminalized burglary of any boat, railroad car, automobile, or building other than a dwelling).
Iowa[†]	Iowa Code §§ 702.12, 713.1-713.6 (1985) (defining burglary as involving an "occupied structure," *i.e.*, "any building, structure, * * * land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value," but not an "object or device * * * too small or not designed to allow a person to physically enter or oc-

	cupy it").
Kansas*	Kan. Stat. Ann. § 21-3715 (Supp. 1974) (defining burglary to involve a "building, mobile home, tent or other structure, or any motor vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property").
Kentucky†	Ky. Rev. Stat. Ann. §§ 511.010, 511.020, 511.030 (Michie 1985) (defining burglary as involving a "building" or "dwelling," defined to include, "in addition to its ordinary meaning, * * * any structure, vehicle, watercraft or aircraft (a) [w]here any person lives; or (b) [w]here people assemble for purposes of business, government, education, religion, entertainment or public transportation" (building) or "a building which is usually occupied by a person lodging therein" (dwelling)).
Louisiana*	La. Rev. Stat. Ann. § 14:62 (West 1986) (defining burglary as involving "any dwelling, vehicle, watercraft, or other structure, movable or immovable").
Maine†	Me. Rev. Stat. Ann. tit. 17-A, § 401 (West 1983 & Supp. 1986) (defining burglary as involving a

	"structure"); *id.* § 2(24) (West 1983) (defining structure as "a building or other place designed to provide protection for persons or property against weather or intrusion, but * * * not includ[ing] vehicles and other conveyances whose primary purpose is transportation of persons or property unless such vehicle or conveyance, or a section thereof, is also a dwelling place").
Maryland‡	See *Sizemore* v. *State*, 272 A.2d 824, 825-826 (Md. Ct. Spec. App.) (citing Md. Ann. Code art. 27, §§ 29-30, 32-33 (1967), and noting that Maryland "recognizes six separate and distinct crimes related to the breaking of structures," including common-law burglary, daytime housebreaking, and "storehouse breaking," which "cover[s] all buildings other than dwelling houses" but is "not burglary at all"), cert. denied, 261 Md. 728 (1971).
Massachusetts*	Mass. Gen. L. ch. 266, § 15 (1986) (defining burglary as involving "a dwelling house"); see *id.* §§ 16, 19, 20A (separately prohibiting the "break[ing] and ent[ry]" into any "building, ship, vessel or vehicle," railroad cars, or any "truck, tractor/

	trailer unit, trailer, semi-trailer or freight container").
Michigan*	Mich. Comp. Laws Ann. § 750.110 (West 1968) (defining breaking and entering to involve an "occupied dwelling," as well as a "tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat or ship, railroad car or * * * any unoccupied dwelling house").
Minnesota†	Minn. Stat. §§ 609.556, 609.582 (1986) (defining burglary as involving a "building," defined to include, "in addition to its ordinary meaning[,] * * * any tent, watercraft, structure or vehicle that is customarily used for overnight lodging of a person").
Mississippi‡	Miss. Code Ann. § 97-17-19 (1973) (defining burglary as involving "any dwelling house").
Missouri†	Mo. Rev. Stat. §§ 569.010, 569.170 (1986) (defining burglary as involving a "building" or "inhabitable structure," *i.e.*, "a ship, trailer, sleeping car, airplane, or other vehicle or structure: (a) Where any person lives or carries on business or other calling; or (b) Where people assemble for purposes of busi-

	ness, government, education, religion, entertainment or public transportation; or (c) Which is used for overnight accommodation of persons").
Montana[†]	Mont. Code Ann. §§ 45-2-101(40), 45-6-204 (1985) (defining burglary as involving an "occupied structure," *i.e.*, a "building, vehicle, or other place suitable for human occupancy or night lodging of persons or for carrying on business").
Nebraska[§]	Neb. Rev. Stat. § 28-507 (1985) (defining burglary as involving "real estate or any improvements erected thereon").
Nevada[*]	Nev. Rev. Stat. Ann. § 205.060 (Michie 1986) (defining burglary as involving "any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, vehicle, vehicle trailer, semitrailer or housetrailer, airplane, glider, boat or railroad car").
New Hampshire[†]	N.H. Rev. Stat. Ann. § 635:1 (1986) (defining burglary as involving a "building or occupied structure," *i.e.*, "any structure, vehicle, boat or place adapted for overnight accommodation of per-

	sons, or for carrying on business").
New Jersey*	N.J. Stat. Ann. §§ 2C:18-1, 2C:18-2 (West 1982) (defining burglary as involving a "structure," *i.e.*, "any building, room, ship, vessel, car, vehicle or airplane, and also * * * any place adapted for overnight accommodation of persons, or for carrying on business therein").
New Mexico*	N.M. Stat. Ann. § 30-16-3 (Michie 1978) (defining burglary as involving "any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable").
New York†	N.Y. Penal Law § 140.20 (McKinney 1975) (defining burglary as involving a "building"); *id.* § 140.00(2) (McKinney Supp. 1986) (defining building to include, "in addition to its ordinary meaning, * * * any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein, or used as an elementary or secondary school, or an inclosed motor truck, or an inclosed motor truck trailer").
North Carolina‡	*State* v. *Oakman*, 388 S.E.2d 579, 581 (N.C. Ct. App. 1990) ("North Carolina retains the common law

	definition of burglary.").
North Dakota†	N.D. Cent. Code §§ 12.1-22-02, 12.1-22-06 (1985) (defining burglary as involving a "building" or "occupied structure," *i.e.*, "a structure or vehicle: a. Where any person lives or carries on business or other calling; or b. Which is used for overnight accommodation of persons").
Ohio†	Ohio Rev. Code Ann. § 2911.12 (Anderson Supp. 1985) (defining burglary as involving an "occupied structure)"; *id.* § 2909.01 (Anderson 1982) (defining occupied structure as "any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, * * * (A) Which is maintained as a permanent or temporary dwelling * * * ; (B) Which at the time is occupied as the permanent or temporary habitation of any person * * * ; (C) Which at the time is specially adapted for the overnight accommodation of any person * * * ; [or] (D) In which at the time any person is present or likely to be present").
Oklahoma*	Okla. Stat. Ann. tit. 21, § 1435 (West Supp. 1982) (defining bur-

	glary as involving "any building, room, booth, tent, railroad car, automobile, truck, trailer, vessel or other structure or erection, in which any property is kept").
Oregon†	Or. Rev. Stat. §§ 164.205(1), 164.215(1) (1983) (defining burglary as involving a "building," defined to include, "in addition to its ordinary meaning, * * * any booth, vehicle, boat, aircraft or other structure adapted for overnight accommodation of persons or for carrying on business therein").
Pennsylvania†	18 Pa. Cons. Stat. Ann. §§ 3501, 3502 (1973) (defining burglary as involving a "building" or "occupied structure," *i.e.*, "[a]ny structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein").
Rhode Island‡	R.I. Gen. Laws § 11-8-1 (1981) (common-law definition of burglary).
South Carolina†	S.C. Code Ann. §§ 16-11-310(1), 16-11-313 (Law. Co-op. Supp. 1985) (defining burglary as involving a "building," *i.e.*, "any structure, vehicle, watercraft, or aircraft: (a) Where any person lodges or lives; or (b) Where people assem-

	ble for purposes of business, government, education, religion, entertainment, public transportation, or public use or where goods are stored").
South Dakota*	S.D. Codified Laws §§ 22-32-1, 22-32-3, 22-32-8 (1979) (defining burglary as involving a "structure"); S.D. Codified Laws Ann. § 22-1-2(46) (Supp. 1986) (defining structure as "any house, building, outbuilding, motor vehicle, watercraft, aircraft, railroad car, truck, trailer, tent, or other edifice, vehicle or shelter, or any portion thereof").
Tennessee*	Tenn. Code Ann. §§ 39-3-401, 39-3-403, 39-3-404, 39-3-406 (1982) (defining burglary as involving "a dwelling house, or any other house, building, room or rooms therein used and occupied by any person or persons as a dwelling place or lodging either permanently or temporarily" (general burglary and second-degree burglary); "a business house, outhouse, or any other house of another, other than dwelling house" (third-degree burglary); or "any freight or passenger car, automobile, truck, trailer or other motor vehicle" (breaking into vehicles)).

Texas[†]	Tex. Penal Code Ann. §§ 30.01, 30.02 (West 1974) (defining burglary as involving a "building" or "habitation," *i.e.*, "a structure or vehicle that is adapted for the overnight accommodation of persons").
Utah[†]	Utah Code Ann. §§ 76-6-201, 76-6-202 (1978) (defining burglary as involving a "building," defined to include, "in addition to its ordinary meaning, * * * any watercraft, aircraft, trailer, sleeping car, or other structure or vehicle adapted for overnight accommodation of persons or for carrying on business").
Vermont[§]	Vt. Stat. Ann. tit. 13, § 1201 (Supp. 1982) (defining burglary as involving a "building or structure" without further defining those terms beyond "their common meanings").
Virginia[†]	Va. Code Ann. § 18.2-90 (Michie Supp. 1986) (defining burglary as involving "any office, shop, storehouse, warehouse, banking house, or other house, or any ship, vessel or river craft or any railroad car, or any automobile, truck or trailer, if such automobile, truck or trailer is used as a dwelling or place of

	human habitation").
Washington†	Wash. Rev. Code. §§ 9A.52.020, 9A.52.030 (1985) (defining burglary as involving a "dwelling" or a "building"); *id.* § 9A.04.110 (Supp. 1986) (defining dwelling as "any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging" (first-degree burglary); and defining building to include, "in addition to its ordinary meaning, * * * any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods" (second-degree burglary)).
West Virginia†	W. Va. Code Ann. § 61-3-11 (Michie 1977) (defining burglary as involving a "dwelling house," which "shall include, but not be limited to, a mobile home, house trailer, modular home or self-propelled motor home, used as a dwelling regularly or only from time to time, or any other nonmotive vehicle primarily designed for human habitation and occupancy and used as a dwelling regularly or only from

	time to time").
Wisconsin*	Wisc. Stat. Ann. § 943.10 (West 1982) (defining burglary as involving "[a]ny building or dwelling; * * * enclosed railroad car; * * * enclosed portion of any ship or vessel; * * * [or] motor home or other motorized type of home or a trailer home").
Wyoming*	Wyo. Stat. Ann. § 6-3-301 (Supp. 1986) (defining burglary as involving "a building, occupied structure or vehicle, or separately secured or occupied portion thereof").