

No. 17-7517

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether burglary of a mobile structure that is adapted or used for overnight accommodation can qualify 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 opinion of the court of appeals (Pet. App. A1-A4) is reported at 877 F.3d 720. The opinion and order of the district court (Pet. App. A5-A9) is not published in the Federal Supplement but is available at 2017 WL 1321110.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 2017. 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 Northern District of Illinois, 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). He was sentenced to 180 months of imprisonment, to be followed by four years of supervised release. Judgment 2-3. Petitioner filed a notice of appeal, but subsequently withdrew it. D. Ct. Doc. 69, at 1 (May 2, 2008).

In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. The district court denied petitioner's motion, but issued a certificate of appealability (COA). Pet. App. A5-A9. The court of appeals affirmed. Id. at A1-A4.

1. In September 2005, petitioner attempted to rob a grocery store, but fled when the checkout clerk screamed. Several employees chased after petitioner, who ran to the home of a community police officer. When petitioner knocked on the door, it opened, and petitioner entered the home. Petitioner located the officer's gun, wrapped it in clothing, and left. Petitioner then hid in nearby bushes, where police officers discovered him and the weapon. Presentence Investigation Report (PSR) 2.

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 1. Petitioner pleaded guilty. Ibid.

a. 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)(1), 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." 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" (the enumerated-offense clause), or "otherwise involves conduct that presents a serious potential risk of physical inquiry to another" (the residual clause). 18 U.S.C. 924(e)(2)(B)(ii).

Although the ACCA's enumerated-offense clause 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 that 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. Ibid. 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.

b. In its presentence investigation report, the Probation Office concluded that petitioner had four prior Illinois convictions that qualified as violent felonies under the ACCA -- two convictions for residential burglary and two convictions for aggravated battery. PSR 4, 8-9. The district court agreed and sentenced petitioner to a 15-year statutory minimum sentence. Pet. App. A5.

Petitioner filed a direct appeal, but voluntarily dismissed it. D. Ct. Doc. 69, at 1.

2. 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.

Within a year of the Court’s decision in Johnson, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. See 28 U.S.C. 2255(f)(3). As relevant here, petitioner contended that

following Johnson, his Illinois convictions for residential burglary no longer qualified as predicate convictions under the ACCA, rendering him ineligible for an ACCA sentence. Pet. App. A5-A6.

The district court denied the motion. Pet. App. A6-A9. It determined that petitioner's prior residential burglary convictions qualified as "burglary" under the ACCA's enumerated-offense clause. Ibid. The court observed that Illinois's residential burglary statute prohibits the unlawful entry or remaining in "the dwelling place of another," defined to include "trailer[s]" and "other living quarters." Id. at A6-A7 (quoting 720 Ill. Comp. Stat. Ann. 5/19-3 (West 1982) and Ill. Comp. Stat. Ann. 5/2-6 (West 2016)).¹ The court further noted that other courts have disagreed as to whether the inclusion of such locations renders a statute broader than "generic" burglary. Id. at A7. Citing a prior Seventh Circuit decision, however, the court concluded that the Illinois residential burglary statute "'does not include in its definition locations that fall outside of' generic burglary." Ibid. (quoting United States v. Haney, 840 F.3d 472, 476 n.2 (7th Cir. 2016) (per curiam)). The district court therefore denied relief, but it issued a COA on the question

¹ Illinois law defines a "dwelling" as "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 Ill. Comp. Stat. Ann. 5/2-6 (West 2016).

whether petitioner's residential burglary convictions qualify as predicate offenses under the ACCA. Id. at A8-A9.²

3. The court of appeals affirmed. Pet. App. A1-A4. Like the district court, the court determined that the Illinois residential burglary statute's protection of "mobile home[s]" and residential "trailer[s]" does not disqualify it as "generic" burglary under the ACCA. Id. at A2. The court observed that many other States' burglary laws similarly encompass mobile or nonpermanent dwellings. Id. at A3. And the court found it "unlikely" that Taylor, which "set out to create a federal common-law definition of 'burglary'" that would capture "'the generic sense in which the term is now used in the criminal codes of most States,'" had "adopt[ed] a definition of generic burglary that is satisfied by no more than a handful of states -- if by any." Id. at A3-A4 (quoting Taylor, 495 U.S. at 598).

The court of appeals further observed that Taylor's generic burglary definition "approximates that adopted by the drafters of the Model Penal Code," Pet. App A4 (quoting Taylor, 495 U.S. at 598 n.8), which contemplates a burglary conviction for a person

² The district court also held that one of petitioner's aggravated-battery convictions qualified as a "violent felony" under the ACCA's "force clause," 18 U.S.C. 924(e)(2)(B), thus providing the third ACCA predicate necessary to sustain his sentence. Pet. App. A8. The court did not grant petitioner a COA on that issue, id. at A9, and he does not renew his challenge to the ACCA status of the aggravated-battery conviction in this Court, see Pet. 10-27.

caught "entering a trailer home with intent to steal," ibid. (citing Model Penal Code § 221.1 cmt. 3(b) (1980)). Accepting petitioner's claim that generic burglary does not encompass trailers, the court reasoned, would mean that "the Justices [in Taylor] said that they were following the Model Penal Code's approach but did the opposite." Ibid. Thus, the court determined that petitioner was "properly sentenced as [an] armed career criminal[]." Ibid.

DISCUSSION

Petitioner contends (Pet. 10-27) that this Court should grant certiorari to determine whether the burglary of a mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the ACCA, 18 U.S.C. 924(e)(2)(B)(ii). Although the court of appeals correctly resolved that question, its decision widens a circuit conflict warranting this Court's review, on which the government has sought certiorari. See United States v. Stitt, No. 17-765 (filed Nov. 21, 2017), and United States v. Sims, No. 17-766 (filed Nov. 21, 2017). The Court should grant the government's petition in Stitt, supra, which presents the best vehicle for considering the question, and hold this case pending its resolution of that one.

1. For the reasons explained in the government's petition in Stitt, supra, the court of appeals' holding -- that burglary of a mobile structure that is used or adapted as a dwelling

constitutes generic burglary -- is correct. See Pet. at 9-22, Stitt, supra (No. 17-765). This Court has construed "generic" burglary under the ACCA to reflect the "sense in which the term is now used in the criminal codes of most States." Taylor v. United States, 495 U.S. 575, 598 (1990). At the time of the relevant amendments to the ACCA in 1986, the vast majority of States had expanded their burglary statutes to protect nonpermanent or mobile dwellings like trailers. See Pet. at 11, 14-15, Stitt, supra (No. 17-765). The court of appeals' interpretation of the ACCA also accords with Congress's view that the invasion of a home is a violent crime, see Taylor, 495 U.S. at 581, a view that applies with full force (and perhaps with added force) to the invasion of a trailer home. See Pet. at 12-13, 14, Stitt, supra (No. 17-765).

2. As the court of appeals acknowledged, however, its decision contributes to a division in the courts of appeals regarding the scope of this very common ACCA predicate. Pet. App. A3-A4; see Pet. 23-24; Pet. at 18-19, Stitt, supra (No. 17-765).³ This Court's review is accordingly warranted. See Pet. at 20-22,

³ Petitioner counts the Eleventh Circuit among the courts to have held that burglary of a nonpermanent or mobile structure adapted or used for overnight accommodation cannot constitute generic burglary for purposes of the ACCA. As the government has explained in Stitt, however, the Eleventh Circuit's decisions address statutes reaching nonpermanent or mobile structures adapted for carrying on business as well as for overnight accommodation, and thus do not directly address the question presented here. See Pet. Reply Br. at 4 n.1, Stitt, supra (No. 17-765).

Stitt, supra (No. 17-765).⁴

Stitt provides the best available vehicle for resolving the conflict in the courts of appeals. In Stitt, the en banc Sixth Circuit held that a prior conviction under Tennessee's aggravated burglary statute, Tenn. Code Ann. § 39-14-403 (1997), does not constitute "generic burglary" because the statute criminalizes burglary of nonpermanent and mobile structures adapted for habitation. See United States v. Stitt, 860 F.3d 854, 862 (2017). In addition to the majority opinion, five judges joined one or both of two separate concurrences, and Judge Sutton authored a thorough dissent joined by five other judges. See id. at 863-871 (Boggs, J., concurring); id. at 871-876 (White, J., concurring); id. at 876-881 (Sutton, J., dissenting).

Petitioner asserts (Pet. 25-26) that Stitt would be an unsuitable vehicle to address the question because, on his view, the divisibility of Tennessee's aggravated burglary statute

⁴ The court of appeals noted (Pet. App. A3) that the Fifth Circuit had recently granted rehearing en banc to consider the question presented. See United States v. Herrold, 685 Fed. Appx. 302 (2017) (per curiam), reh'g en banc granted, 693 Fed. Appx. 272 (5th Cir. 2017); Pet. 24. After the petition in this case was filed, the Fifth Circuit issued its en banc decision, which determined that a Texas burglary statute is overbroad on other grounds, see United States v. Herrold, No. 14-11317, 2018 WL 948373, at *9-*13 (Feb. 20, 2018), and declined to decide the question presented here, see id. at *14. The court noted, however, that there are "powerful arguments on both sides of the question," and it "welcome[d] any additional guidance from th[is] Court." Id. at *14, *18; see id. at *22-*26 (Haynes, J., dissenting).

remains an open question. That is incorrect. After this Court's decision in Mathis v. United States, 136 S. Ct. 2243 (2016), the government conceded that the Tennessee statute's definition of "habitation" -- which covers "any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons," Tenn. Code Ann. § 39-14-401(1) (Supp. 2001) -- is indivisible. See Gov't C.A. Supp. Br. at 23-24, Stitt, supra (No. 14-6158). In Stitt, the en banc Sixth Circuit independently "confirm[ed] that Tennessee's aggravated burglary statute is indivisible." 860 F.3d at 862.

The Court's resolution of the question presented in Stitt will accordingly resolve the status of the defendant's ACCA eligibility in that case, as well as petitioner's ACCA eligibility in this one. This case, in contrast, might provide a less ideal vehicle for plenary review, because petitioner's continued disagreement with the court of appeals' construction of the Illinois burglary statute (compare Pet. 11-12, 26-27, with Pet. App. A3) could deprive the Court of a clear state statute to compare with the definition of generic burglary.

CONCLUSION

The petition for a writ of certiorari 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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