No. 18-6097

IN THE SUPREME COURT OF THE UNITED STATES

LEONARD G. MARQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in denying petitioner's request for a certificate of appealability on the question whether residential burglary, in violation of N.M. Stat. Ann. § 30-16-3(A) (1984), qualifies as generic "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

2. Whether the court of appeals erred in denying petitioner's request for a certificate of appealability on the question whether aggravated assault with a deadly weapon, in violation of N.M. Stat. Ann. § 30-3-2(A) (1984), "has 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).

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OPINIONS BELOW

The order of the court of appeals denying a certificate of appealability (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted at 728 Fed. Appx. 884. The order of the district court (Pet. App. 4a-15a) is not published in the Federal Supplement but is available at 2017 WL 4863075.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2018. The petition for a writ of certiorari was filed on September 21, 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 District of New Mexico, petitioner was convicted on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Pet. App. 4a. The district court sentenced petitioner to 180 months of imprisonment, to be followed by three years of supervised release. Id. at 5a; Sent. Tr. 3-4. Petitioner did not appeal. Pet. App. 5a. In 2016, petitioner moved to vacate his sentence pursuant to 28 U.S.C. 2255. D. Ct. Doc. 59 (June 23, 2016). The district court denied the motion and denied a certificate of appealability (COA). Pet. App. 4a-15a; D. Ct. Doc. 82 (Oct. 27, 2017). The court of appeals likewise denied a COA. Pet. App. 1a-3a.

1. On November 28, 2006, a deputy sheriff with the Bernalillo County Sheriff's Department pulled over a car in which petitioner was traveling as a passenger for various traffic violations. Presentence Investigation Report (PSR) ¶ 9. Petitioner initially provided a different name, but an officer who arrived on the scene recognized petitioner and knew that he had outstanding warrants for his arrest, as petitioner had eluded law enforcement eight days earlier. PSR ¶¶ 9-10. The officers told petitioner that he was under arrest, but petitioner "refused to comply with orders and was actively fighting with [the officers]." PSR ¶ 11. When the officers were able to take petitioner into

custody, they found a loaded .22 caliber revolver in his front pants pocket. Ibid.

2. A federal grand jury charged petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Indictment 1. Petitioner and the government entered into a plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). Plea Agreement 2. Petitioner agreed to plead guilty to the possession offense and stipulated to a 180-month sentence. Ibid. He further acknowledged that, at the time of the possession offense, he had several prior New Mexico felony convictions, including one conviction for aggravated assault with a deadly weapon; two separate convictions for residential burglary; one conviction for shoplifting over $2500; and four convictions (in one case) for unlawfully taking a motor vehicle. Id. at 3.

Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of possession of a firearm by a felon is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), however, 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" committed on different occasions. The ACCA defines a "violent felony" to include any crime punishable by more than one year that "has as an element the use, attempted use, or threatened use of physical force

against the person of another" (the "elements clause"); "is burglary, arson, * * * extortion [or] involves use of explosives" (the "enumerated felonies clause"); "or otherwise involves conduct that presents a serious potential risk of physical injury to another" (the "residual clause"). 18 U.S.C. 924(e)(2)(B); see Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

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. In United States v. Stitt, No. 17-765 (Dec. 10, 2018), slip op. 1, the Court explained that "the [ACCA] term 'burglary' includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation." Ibid.

Taylor instructed courts generally to employ a "categorical approach" to determine whether a prior conviction qualifies as ACCA burglary. 495 U.S. at 600. Under the categorical approach, courts examine "the statutory definition[]" of the previous crime in order to determine whether the prior conviction reflects conduct that constitutes the "generic" form of burglary referenced in the ACCA. Ibid. If the statute of conviction encompasses a range of conduct that "substantially corresponds" to, or is narrower than,

generic burglary, the prior offense categorically qualifies as a predicate conviction under the ACCA. Id. at 602. 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 found, or the defendant admitted, the elements of generic burglary. Mathis v. United States, 136 S. Ct. 2243, 2249 (2016) (citations omitted); Descamps v. United States, 570 U.S. 254, 257 (2013); see Shepard v. United States, 544 U.S. 13, 26 (2005). Courts apply a similar analysis to determine whether a defendant's prior conviction qualifies as a violent felony under the ACCA's elements clause. See, e.g., Johnson v. United States, 559 U.S. 133, 138-145 (2010).

The Probation Office determined that petitioner had four prior convictions that qualified as "violent felon[ies]" for purposes of the ACCA: two for residential burglary under N.M. Stat. Ann. § 30-16-3(A) (1984), one for assault with a deadly weapon under N.M. Stat. Ann. § 30-3-2(A) (1984), and one for attempted robbery under N.M. Stat. Ann. §§ 30-16-2, 30-28-1 (1994). PSR ¶ 27; see Pet. App. 5a. The Probation Office accordingly determined that petitioner qualified for sentencing under the ACCA. PSR ¶ 94. It calculated petitioner's advisory Guidelines

range at 180 to 210 months, PSR ¶ 95, and noted that the parties had stipulated to a 180-month sentence under Federal Rule of Criminal Procedure 11(c)(1)(C), PSR ¶ 96.

The district court accepted the Rule 11(c)(1)(C) plea and sentenced petitioner to 180 months of imprisonment, to be followed by three years of supervised release. Sent. Tr. 3-4. Petitioner did not file a direct appeal. Pet. App. 5a.

3. a. 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. The Court subsequently held that Johnson applies retroactively to cases on collateral review. Welch, 136 S. Ct. at 1264-1265. Shortly thereafter, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence. Petitioner contended that his prior convictions qualified as violent felonies only under the now-invalidated residual clause. Pet. App. 5a-6a.

The magistrate judge recommended that the Section 2255 motion be denied. D. Ct. Doc. 74 (May 5, 2017). The magistrate judge determined that petitioner's prior convictions for residential burglary and aggravated assault with a deadly weapon continued to "qualify as violent felonies" under the ACCA, id. at 1, because the two residential burglary convictions were for ACCA "burglary," and the conviction for aggravated assault with a deadly weapon satisfied the elements clause. See generally id. at 10-23.

b. After reviewing de novo the portions of the proposed findings and recommended disposition to which petitioner had objected, see D. Ct. Doc. 79 (July 24, 2017), the district court agreed with the magistrate judge's proposed disposition and denied petitioner's motion. Pet. App. 4a-15a.

The district court first determined that petitioner's two New Mexico residential burglary convictions qualified as "burglary" under the ACCA's enumerated felonies clause. Pet. App. 9a-13a. The court observed that petitioner was convicted under N.M. Stat. Ann. § 30-16-3(A) (1984), which prohibits the unauthorized "entry of a dwelling house with the intent to commit any felony or theft therein." Pet. App. 9a. The court rejected petitioner's argument that New Mexico's residential-burglary statute is broader than generic "burglary" under Taylor, which was premised on the contentions that New Mexico defines "dwelling house" to include structures like vehicles when used as residences and that generic burglary is limited to permanent, immovable structures. Id. at 10a; see D. Ct. Doc. 59, at 19-21. The court explained that petitioner "offered no case law to support his interpretation of § 30-16-3(A)," but instead relied on cases "evaluating convictions under subsection B of the statute," Pet. App. 10a, which criminalizes the unauthorized "ent[ry of] any vehicle, watercraft, aircraft, or other structure, movable or immovable, with intent to commit a felony or theft," N.M. Stat. Ann. § 30-16-3(B) (1984).

The court further explained that petitioner's citations to New Mexico cases evaluating convictions under its separate aggravated burglary statute, id. § 30-16-4, "shed little or no light on the interpretation of the statutory elements in § 30-16-3(A)." Pet. App. 11a. And the court found petitioner's reliance on New Mexico jury instructions to be similarly unpersuasive. Ibid.

The district court separately determined that aggravated assault with a deadly weapon, in violation of N.M. Stat. Ann. § 30-3-2(A) (1984), qualifies as a violent felony under the ACCA's elements clause. Pet. App. 13a-14a. The court explained that the Tenth Circuit's decisions in United States v. Ramon Silva, 608 F.3d 663 (2010), cert. denied, 562 U.S. 1244 (2011), and United States v. Maldonado-Palma, 839 F.3d 1244 (2016), cert. denied, 137 S. Ct. 1214 (2017) -- which determined that aggravated assault with a deadly weapon under Section 30-3-2(A) qualifies as a "violent felony" under the ACCA's elements clause and a "crime of violence" under the similarly worded elements clause in Sentencing Guidelines § 2L1.2 (2014) -- "controlled the outcome" here. Pet. App. 13a. The court rejected petitioner's argument that a New Mexico intermediate appellate court decision, State v. Branch, 387 P.3d 250 (N.M. Ct. App. 2016), "undercuts the holdings of Maldonado-Palma and Ramon Silva." Pet. App. 13a. In particular, the court noted that Branch was decided before Maldonado-Palma,

and thus "does not undermine the precedential value" of that decision. Id. at 14a & n.7.

The district court declined to issue a COA. D. Ct. Doc. 82 (Oct. 27, 2017).

4. The court of appeals likewise denied petitioner's request for a COA. Pet. App. 1a-3a. The court observed that petitioner had "acknowledge[d] that his claims are contrary to circuit precedent" -- the court's decisions in United States v. Turrieta, 875 F.3d 1340 (10th Cir. 2017), cert. denied, 139 S. Ct. 100 (2018), which "held that New Mexico residential burglary fits within the ACCA's enumerated crime of burglary," and Ramon Silva, supra, which held "that New Mexico's crime of aggravated assault is a violent offense under the [force] clause of the ACCA." Pet. App. 2a-3a; see id. at 3a (citing Maldonado-Palma, 839 F.3d at 1249-1250). Although petitioner argued that those decisions were incorrect, the panel reasoned that it could not "overturn [its] precedents" and that, "[a]ccordingly, no reasonable jurist could debate the correctness of the district court's denial of relief." Id. at 3a.

ARGUMENT

Petitioner contends (Pet. 7-29) that New Mexico residential burglary sweeps more broadly than generic ACCA burglary, and that New Mexico aggravated assault does not qualify as a violent felony under the ACCA's elements clause. Those contentions do not warrant

review. Petitioner's argument on the first question presented is incorrect as a matter of state law, and is in any event foreclosed by this Court's recent decision in United States v. Stitt, No. 17-765 (Dec. 10, 2018), slip op. 8, which rejected the argument that "coverage of vehicles designed or adapted for overnight use takes [a state] statute outside the generic burglary definition." Ibid. With respect to the second question presented, the court of appeals' determination that New Mexico aggravated assault with a dangerous weapon is a "violent felony" is correct and does not conflict with any decision of this Court or of another court of appeals. The petition for a writ of certiorari should be denied.

1. A federal prisoner seeking to appeal the denial of a motion to vacate his sentence under Section 2255 must obtain a COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) -- that is, a "showing that reasonable jurists could debate whether" a constitutional claim "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) (citation omitted).

The court of appeals did not err in denying a COA on petitioner's claim that he lacks three prior convictions for violent felonies under the ACCA. Although "[t]he COA inquiry * * * is not coextensive with a merits analysis," Buck v. Davis,

137 S. Ct. 759, 773 (2017), the Court has made clear that a prisoner seeking a COA must still show that jurists of reason "could conclude [that] the issues presented are adequate to deserve encouragement to proceed further," ibid. (citation omitted). Petitioner's argument that his prior convictions for residential burglary and assault with a deadly weapon could not qualify as violent felonies without resort to the now-invalidated residual clause did not meet that standard, particularly given that at the time the court of appeals issued its decision, circuit precedent foreclosed his claim with respect to each conviction, see Pet. App. 2a-3a; United States v. Turrieta, 875 F.3d 1340, 1346-1347 (10th Cir. 2017) (determining that New Mexico residential burglary is ACCA "burglary"), cert. denied, 139 S. Ct. 100 (2018); United States v. Ramon Silva, 608 F.3d 663, 671 (10th Cir. 2010) (determining that New Mexico assault with a deadly weapon satisfies the ACCA's elements clause), cert. denied, 562 U.S. 1224 (2011), and petitioner's argument on the first question presented is now additionally foreclosed by this Court's decision in Stitt, supra.

2. Petitioner's argument that his residential burglary convictions do not qualify as ACCA "burglary" rests on the combination of two contentions: (1) that the phrase "dwelling house" in N.M. Stat. Ann. § 30-16-3(A) (1984) "includes places, such as vehicles" that are used as residences, and (2) that such places are "outside the bounds of generic burglary." Pet. 11.

Those contentions are foreclosed by decisions of this Court and the court of appeals. In Stitt, this Court rejected petitioner's premise regarding the scope of ACCA burglary, holding that "the [ACCA] term 'burglary' includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation." Slip op. 1. And the court of appeals has rejected petitioner's state-law premise, determining that "New Mexico's crime of residential burglary does not cover entry into an occupied vehicle, watercraft, or aircraft." Turrieta, 875 F.3d at 1347.

3. Petitioner separately contends (Pet. 21-29) that aggravated assault with a deadly weapon, in violation of N.M. Stat. Ann. § 30-3-2(A) (1984), does not qualify as a violent felony under the ACCA's elements clause. Petitioner's argument lacks merit, and contrary to his suggestion (Pet. 26-28), the decision below does not conflict with any decision of this Court or of another court of appeals.

a. Section 30-3-2(A) makes it a crime to "unlawfully assault[] or strik[e] at another with a deadly weapon." N.M. Stat. Ann. § 30-3-2(A) (1984). An "assault," in turn, may consist of "any unlawful act, threat or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery." Id. § 30-3-1(B); see Pet. 23.

In rejecting petitioner's claim in this case, the court of appeals relied on its prior decisions in Ramon Silva, 608 F.3d at

671, and United States v. Maldonado-Palma, 839 F.3d 1244 (2016), cert. denied, 137 S. Ct. 1214 (2017), which held that aggravated assault with a deadly weapon in violation of Section 30-3-2(A) qualifies as a "violent felony" under the ACCA's eleemnts clause and a "crime of violence" under the Sentencing Guidelines, respectively. See Pet. App. 2a-3a. Ramon Silva and Maldonado-Palma explain that the New Mexico crime of aggravated assault with a deadly weapon requires the "'actual use'" of a deadly weapon "capable of producing death or great bodily harm or inflicting dangerous wounds in an assault." Maldonado-Palma, 839 F.3d at 1250 (citation omitted); see Ramon Silva, 608 F.3d at 670-671. "The use of such a weapon in an assault," the Tenth Circuit has reasoned, "necessarily threatens the use of physical force, i.e., 'force capable of causing physical pain or injury to another person.'" United States v. Sanchez, No. 17-2200, 2018 WL 4214236, at *2 (Sept. 5, 2018) (citation omitted); see Ramon Silva, 608 F.3d at 670-671.

Petitioner contends (Pet. 21) that Ramon Silva and Maldonado-Palma were wrongly decided on the theory that Section 30-3-2(A) "is missing the 'against the person of another' component essential to the force clause." Petitioner notes (ibid.) that to prove aggravated assault premised on the causation of reasonable fear, "[t]he State [i]s not required to prove that [the defendant] intended to assault [the particular victim], but only that he did

an unlawful act which caused [the victim] to reasonably believe that she was in danger of receiving immediate battery, that the act was done with a deadly weapon, and that it was done with a general criminal intent." State v. Manus, 597 P.2d 280, 284 (N.M. 1979), overruled on other grounds by Sells v. State, 653 P.2d 162, 164 (N.M. 1982). New Mexico defines general criminal intent to require that the defendant engage in "conscious wrongdoing or the purposeful doing of an act the law declares to be a crime." Ramon Silva, 608 F.3d at 670 (quoting State v. Campos, 921 P.2d 1266, 1277 n.5 (N.M. 1996)).

The court of appeals correctly rejected that state-law focused argument in Ramon Silva. The court explained that "[t]he presence or absence of an element of specific intent does not dispositively determine whether a prior conviction qualifies as a violent felony under the ACCA." Ramon Silva, 608 F.3d at 673. Instead, it is sufficient that the defendant "intentionally" "engag[ed] in conduct constituting the threatened use of physical force," ibid., which the victim "reasonably believe[d]" put him in "danger of receiving an immediate battery," N.M. Stat. Ann. § 30-3-1 (1984). Other courts of appeals have similarly held that general intent crimes may constitute violent felonies under the elements clause. See United States v. Deiter, 890 F.3d 1203, 1212-1214 (10th Cir. 2018) (rejecting argument that federal bank robbery, in violation of 18 U.S.C. 2113(a), does not quality as a

violent felony under the elements clause because it is a "general intent crime," and noting that every circuit to address the issue had reached the same conclusion), cert. denied, No. 18-6424 (Dec. 10, 2018); United States v. Campbell, 865 F.3d 853, 857 (7th Cir.) (same for federal bank robbery under Sentencing Guidelines § 4B1.2(a) (2015)), cert. denied, 138 S. Ct. 377 (2017); United States v. White, 723 Fed. Appx. 844, 840 (11th Cir. 2018) (per curiam) (rejecting argument that resisting-an-officer offense requiring general intent does not qualify as a violent felony under the elements clause); United States v. Laurico-Yeno, 590 F.3d 818, 823 n.4 (9th Cir.) ("A general intent crime can satisfy the generic definition of a 'crime of violence'" in Sentencing Guidelines § 2L1.2, cmt. n.1(B)(iii) (2009)), cert. denied, 562 U.S. 886 (2010); United States v. Jackson, 355 Fed. Appx. 297, 299 n.1 (11th Cir. 2009) (per curiam) (whether proof of a crime requires specific intent "is irrelevant to the violent felony inquiry"), vacated on other grounds, 562 U.S. 1128 (2011).

Petitioner contends (Pet. 28-29) that the court of appeals should have revisited its classification of New Mexico aggravated assault as an ACCA "violent felony" based on the intermediate state appellate court's decision in State v. Branch, 417 P.3d 1141, 1147-1149 (N.M. Ct. App. 2018). According to petitioner (Pet. 23), Branch made clear that assault with a deadly weapon under New Mexico law does not require a "mens rea nexus" to the particular

victim. But as the Tenth Circuit recently explained, "Branch did not alter the state of [New Mexico] law." Sanchez, 2018 WL 4214236, at *2. Rather, aggravated assault with a deadly weapon under Section 30-3-2(A) remains "a violent felony because it requires 'unlawfully assaulting or striking at another,' [and] employing a deadly weapon with general criminal intent, all of which * * * at least threatens the use of physical force against the person of another." Ibid. (citations omitted).

b. Contrary to petitioner's suggestion (Pet. 26-28), the decision below does not conflict with any decision of this Court or of another court of appeals. Petitioner cites (Pet. 26) Leocal v. Ashcroft, 543 U.S. 1, 9 (2004), in which this Court concluded that merely accidental conduct could not qualify as a crime of violence under 18 U.S.C. 16. But because a defendant must possess general criminal intent to violate Section 30-3-2(A), a conviction under that statute cannot be based on merely accidental conduct.

Petitioner's suggestion of a conflict with decisions of other courts of appeals is likewise misplaced. Petitioner identifies no decision holding that aggravated assault with a deadly weapon under Section 30-3-2(A) does not qualify as a "violent felony" under the elements clause. See Pet. 23-29. Instead, petitioner cites (Pet. 26-28) cases concerning materially different statutes criminalizing discharging a firearm (or throwing a hard object) into a vehicle or other structure. None of those statutes includes

a "reasonable fear" requirement like Section 30-3-2(A)'s, which ensures that force is used or threatened to be used "against the person of another," 18 U.S.C. 924(e)(2)(B)(i). See United States v. Parral-Dominguez, 794 F.3d 440, 445 (4th Cir. 2015) (North Carolina offense of discharging firearm into occupied building that does not require "proving that an occupant is targeted or threatened"); United States v. Alfaro, 408 F.3d 204, 209 (5th Cir.) (Virginia offense that permits conviction "for discharging a firearm within an unoccupied school building"), cert. denied, 546 U.S. 911 (2005); United States v. Jaimes-Jaimes, 406 F.3d 845, 850 (7th Cir. 2005) (Wisconsin offense of discharging firearm into vehicle or building under which "the state need not prove that another person was present in the vehicle or building, or even anywhere near the targeted object"); United States v. Narvaez-Gomez, 489 F.3d 970, 977 (9th Cir. 2007) (California offense of discharging firearm into certain occupied structures, where "purely reckless conduct" "need[] only be directed toward [a] dwelling or building"); United States v. Estrella, 758 F.3d 1239, 1252 (11th Cir. 2014) (Florida offense of wantonly or maliciously throwing, hurling, or projecting a missile, stone, or other hard substance at an occupied vehicle, which lacks any "requirement that force be directed against" the vehicle's occupant as opposed to the vehicle itself).

In fact, the Tenth Circuit has itself determined -- in line with the cases petitioner cites -- that a Kansas conviction for criminal discharge of a firearm at an occupied building or dwelling does not constitute a violent felony. See United States v. Ford, 613 F.3d 1263, 1271-1272 (2010). The distinction between that type of state statute and the aggravated-assault statute at issue in this case demonstrates that no relevant division exists in the courts of appeals on the second question presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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