

No. 18-

IN THE
Supreme Court of the United States

JOSHUA E. SHEPHERD,
Petitioner,

v.

JEFFREY E. KRUEGER, WARDEN, FCI, TERRE HAUTE,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Constitution permits a federal court to conclude that a prior conviction is “generic” for ACCA purposes based solely on another federal court’s independent interpretation of an ambiguous state statute when neither federal court has surveyed state case law to reach its conclusion.

This question is an iteration of the question presented in the pending petition for a writ of certiorari in *Malone v. United States*, No. 18-6671:

Whether the Constitution permits a federal court to conclude that a prior conviction is “generic” for ACCA purposes based on an independent interpretation of an ambiguous state statute without first surveying state case law or certifying the question to the state supreme court.

**PARTIES TO THE PROCEEDING AND RULE
29.6 STATEMENT**

The parties to the proceeding are those appearing on the caption to this petition. Neither party is a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joshua E. Shepherd respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 911 F.3d 861 and is reproduced in the appendix to this petition at Pet. App. 1a-9a. The opinion of the trial court below is unpublished and is reproduced at Pet. App. 10a-14a.

JURISDICTION

The Seventh Circuit entered judgment on December 26, 2018, Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 18 U.S.C. § 922(g), 18 U.S.C. § 924(e), Ky. Rev. Stat. Ann. § 511.010, and Ky. Rev. Stat. Ann. § 511.030, and are set forth in the appendix to this petition at Pet. App. 18a-22a.

INTRODUCTION

In the decision below, the Seventh Circuit relied entirely on the Sixth Circuit’s opinion in *United States v. Malone* to determine that an ambiguous Kentucky burglary statute is a form of “generic” burglary for purposes of the Armed Career Criminal Act (“ACCA”), even though *Malone* failed to survey Kentucky state law before independently interpreting the statute. The petition for a writ of certiorari in *Malone* is currently scheduled for conference on March 15, 2019. The Court should grant this petition concurrently with *Malone* because *Malone* is the sole authority on which the decision below is based. In the alternative, the Court should hold this petition until it disposes of *Malone*. The decisions underlying both petitions involve the same Kentucky statute, and both petitions address whether the Constitution permits federal courts to interpret ambiguous state statutes for ACCA purposes without first surveying state law.

The decision below magnifies the importance of the recurring question in *Malone*. The courts of appeal employ a wide range of approaches when confronted with an ambiguous state statute for purposes of ACCA’s “generic offense” analysis and no state supreme court decision that resolves the ambiguity. As the *Malone* petition explains, courts of appeal have sometimes looked deep into the decisions of intermediate courts and treated those decisions as binding, some have “erred on the side of caution” when presented with unsettled state law, and some have certified questions to state supreme courts. But even along this vast spectrum of approaches, the Sixth Circuit is an outlier; it employs federal canons of construction to independently interpret ambiguous state statutes

without surveying state court decisions first. This approach raises grave concerns about arbitrary sentencing and the integrity of our federal system. And with the decision below, the constitutional infirmities of *Malone* now infect the Seventh Circuit.

The decision below also compounds the problems in *Malone* by treating the Sixth Circuit as an authority on state law for ACCA purposes even though *Malone* does not focus on Kentucky state court decisions. As a result of the Seventh Circuit's blind adherence to *Malone*, Mr. Shepherd was denied the opportunity for an inquiry that could have led in a different direction according to established Seventh Circuit practice. In a case involving a similarly ambiguous state statute, the Seventh Circuit certified a question to the Wisconsin state supreme court. The same approach would have been appropriate here but the Seventh Circuit instead relied on the Sixth Circuit's *sui generis* interpretation of the Kentucky statute rather than seek certainty for itself. The result is that Kentucky was denied the opportunity to give a definitive answer to an important question of state law, with grave consequences for Mr. Shepherd and future defendants.

The decision below is an opportunity for the Court to answer the question presented in a compelling case. The Seventh Circuit did not conduct any analysis of Kentucky case law to reach its decision; it simply adopted the language of *Malone*. The decision below squarely presents the question in this petition and also emphasizes the important and recurring nature of the question presented in *Malone*.

STATEMENT OF THE CASE

Eleven years ago, Mr. Shepherd was pulled over while driving in Kentucky. Pet. App. at 3a. Police discovered marijuana and a firearm in his car. *Id.* The United States charged Mr. Shepherd with one count of possession of marijuana with intent to distribute, one count of being a felon in possession of a gun, and two counts of criminal forfeiture. *Id.* Mr. Shepherd pled guilty to all charges. *Id.*

The district court found that Mr. Shepherd was subject to an ACCA enhancement based on three prior convictions for Kentucky second-degree burglary. *Id.* at 4a. Based on this enhancement, Mr. Shepherd was sentenced to the mandatory minimum of fifteen years in prison. *Id.* Without the ACCA enhancement, Mr. Shepherd would no longer be incarcerated.

Mr. Shepherd has repeatedly and persistently challenged this enhancement over the past decade. On direct appeal, the Sixth Circuit affirmed the district court's decision. *Id.* Mr. Shepherd's subsequent collateral attacks under § 2255 before the Western District of Kentucky and the Sixth Circuit were also denied. *Id.* at 4a-5a.

In 2016, Mr. Shepherd filed a request before the Sixth Circuit to seek leave to file a successive § 2255 motion to challenge his ACCA sentence based on *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). *Id.* at 5a. In November 2016, the Sixth Circuit denied that motion finding that Mr. Shepherd's sentencing enhancement was based on the enumerated offenses clause of ACCA, not the residual clause at issue in *Johnson*. *Id.*

In 2017, Mr. Shepherd filed a petition for relief under 28 U.S.C. § 2241(c)(3) in the Southern District of

Indiana where he is currently in prison. *Id.* at 6a. Mr. Shepherd argued that Kentucky’s burglary statute was overbroad under *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016), and thus his burglary convictions did not constitute ACCA predicates. The district court dismissed the petition and Mr. Shepherd appealed to the Seventh Circuit. *Id.*

On December 15, 2017, the United States Attorneys’ Office for the Southern District of Indiana filed a stipulated motion requesting that the Seventh Circuit reverse the decision of the district court and remand to grant Mr. Shepherd’s petition. *Id.* at 84a. Most pertinently, the government—at that time—agreed, *inter alia* that Section 2241 was an “appropriate vehicle” to address Mr. Shepherd’s claim and that the Sixth Circuit’s decision in *United States v. Stitt*, 860 F.3d 854, 860, 862 (6th Cir. 2017) (en banc) suggested that Mr. Shepherd no longer qualified for an ACCA enhancement. *Id.* at 86a.

On January 12, 2018, the Seventh Circuit ordered the parties to answer legal questions regarding the controlling circuit law and the applicability of Section 2241. *Id.* at 17a. The parties each submitted memoranda to the Seventh Circuit. *Id.* at 15a. On February 21, 2018, the Seventh Circuit denied the parties’ motion to reverse and remand, but granted Petitioner’s request to file an amended brief. *Id.* at 15a-16a.

In his amended briefing filed on March 20, 2018, Petitioner argued, *inter alia*, that then-controlling Sixth Circuit precedent in *Stitt* applied such that Kentucky’s burglary statute was broader than generic burglary and thus his convictions did not constitute predicate offenses under ACCA. See *Id.* at 65a. (citing *United States v. Stitt*, 860 F.3d 854, 874 (6th Cir. 2017) (White, J. concurring) (“Kentucky’s definition of

a ‘dwelling’ includes vehicles, watercraft, and aircraft, and is thus broader than the common-law meaning of dwelling.”)).

On May 8, 2018, the Sixth Circuit decided *United States v. Malone*, 889 F.3d 310 (6th Cir. 2018), holding that Kentucky’s second-degree burglary statute constituted generic burglary and thus was a predicate offense under ACCA. Relying exclusively on the Sixth Circuit’s decision in *Malone*, on December 26, 2018, the Seventh Circuit affirmed the district court’s denial of Mr. Shepherd’s petition.

REASONS FOR GRANTING THE PETITION

I. THE PETITION ADDRESSES AN ITERATION OF THE IMPORTANT AND RECURRING QUESTION PRESENTED IN THE *MALONE* PETITION

A. The Problems With *Malone* Infect The Decision Below.

In *Malone*, the Sixth Circuit affirmed an ACCA enhancement based on its own questionable interpretation of an ambiguous Kentucky burglary statute. 889 F.3d at 311. In Kentucky, “[a] person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling.” Ky. Rev. Stat. Ann. § 511.030(1). The accompanying definitions section provides:

The following definitions apply in this chapter unless the context otherwise requires:

(1) “Building,” in addition to its ordinary meaning, means any structure, vehicle, watercraft or aircraft:

- (a) Where any person lives; or
- (b) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation.

Each unit of a building consisting of two (2) or more units separately secured or occupied is a separate building.

(2) “Dwelling” means a building which is usually occupied by a person lodging therein.

(3) “Premises” includes the term “building” as defined herein and any real property.

Ky. Rev. Stat Ann. § 511.010. The burglary statute thus refers to “dwellings,” defined to include “buildings,” which are in turn defined to include “vehicle[s], watercraft, and aircraft,” if “usually occupied by a person lodging therein.” Mr. Malone argued that the statute is therefore broader than generic burglary.¹ Petition for a Writ of Certiorari at 4-5, *Malone v. United States*, No. 18-6671 (Nov. 9, 2018) (“Malone Pet.”).

The Sixth Circuit disagreed. Using “principles of statutory construction,” the Sixth Circuit independently interpreted the Kentucky burglary statute as referring to buildings in their “ordinary sense,” and not the statutory definition. *Malone*, 889 F.3d at

¹ After the filing of Mr. Malone’s petition, this Court decided *United States v. Stitt*, 139 S. Ct. 399 (2018), which held that burglary as used in 18 U.S.C. § 924(e) includes burglary of a structure or vehicle that has been “adapted or is customarily used for overnight accommodation.” For the reasons articulated in Mr. Malone’s reply brief, *Stitt* does not foreclose the argument that Kentucky burglary is broader than federal burglary, just as it did not foreclose the possibility that Arkansas burglary is broader than federal burglary. Reply Brief for Petitioner at 3, *Malone v. United States*, No. 18-6671 (Feb. 20, 2019).

312. As the Sixth Circuit acknowledged, it referenced only snippets of Kentucky law that “corroborate[d]” its own independent interpretation and did not consider all relevant cases interpreting the statutory terms. *Malone*, 889 F.3d at 313; *Malone Pet.* at 6.

In the decision below, the Seventh Circuit merely recited the Sixth Circuit’s analysis and held that “[a] Kentucky conviction for second-degree burglary thus falls within the scope of a burglary conviction under ACCA.” *Pet. App.* at 9a. It did not consider whether the Sixth Circuit’s interpretation has any roots in the decisions of Kentucky state courts.

As explained in the *Malone* petition, the Sixth Circuit’s approach is an outlier. Numerous courts of appeal consider (with varying levels of deference) the decisions of state intermediate courts. See *Malone Pet.* at 6-9. When state law is unclear, some courts of appeal “err on the side of caution” and are unwilling to find ACCA predicate offenses, while others sometimes certify such questions to state supreme courts. *Id.* The lack of a uniform approach is constitutionally intolerable and leads to arbitrary results. Because *Malone* is the sole authority on which the Seventh Circuit relied, the constitutional problems with the Sixth Circuit’s decision also infect the decision below. See *Malone Pet.* at 14-20.

B. The Decision Below Raises Additional Constitutional Concerns.

The Seventh Circuit’s blind adherence to a sister circuit’s interpretation of an ambiguous state statute is itself constitutionally problematic in the ACCA context.

“In determining what a state crime covers for purposes of this federal sentencing enhancement, federal

courts look to, and are constrained by state courts' interpretations of state law." *Stokeling v. United States*, 139 S. Ct. 544, 556 (2019) (Sotomayor, J., dissenting). Although a federal court may sometimes be given deference when it construes the law of a state within its jurisdiction, no such deference is due if the decision "did not draw upon a deep well of state-specific expertise." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 757 (2005). When a federal court relies on modes of interpretation that "say nothing distinctive" about the law of the state, fresh consideration of the issue is warranted. *Id.* This principle must operate with full force in the ACCA context because the interpretation of state law has such grave consequences for defendants, and for the integrity of our country's federal system. Malone Pet. at 16-20. As applied here, it means that the Seventh Circuit could not look to the Sixth Circuit as the authority on Kentucky state law because the Sixth Circuit did not survey state law to reach its conclusion. See, e.g., *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 283 (2d Cir. 1981) ("A federal court in another circuit would be obliged to disregard a state law holding by the pertinent court of appeals if persuaded that . . . prior state court decisions had been inadvertently overlooked by the pertinent court of appeals."); *United States v. Maness*, 23 F.3d 1006, 1009 (6th Cir. 1994) (citing *Factors Etc.* in declining to adopt Fourth Circuit's interpretation of North Carolina state law in ACCA burglary case).

The consequences of such misplaced trust in a sister circuit can be profound in the ACCA context. Here, it led to a departure from a practice of certification that can yield more certain results.

In an ACCA case involving Wisconsin burglary, the Seventh Circuit engaged in a searching inquiry to ascertain state court law. *United States v. Franklin*, 895 F.3d 954, 961 (7th Cir. 2018) (per curiam). When it was unable to reach a definitive answer, it certified the question to the Wisconsin Supreme Court. *Id.* The court explained that it was persuaded to seek certification for two reasons: (1) the question of state law was a close one; and (2) the issue of state law was important for both the federal and state court systems. *Id.* These same factors should have compelled an identical result in the decision below but the Seventh Circuit did not even consider the possibility of certification because it erroneously treated the Sixth Circuit’s independent interpretation of Kentucky law as sufficient authority. As a result, Mr. Shepherd was denied full consideration of his arguments as to a pure question of law, and Kentucky was denied the opportunity for its courts to weigh in on this critically important question of state law.

II. THE DECISION BELOW PRESENTS A CLEAN AND COMPELLING CASE FOR DECIDING THE QUESTION PRESENTED

The decision below provided no analysis of state law. Because *Malone* is the sole authority which the Seventh Circuit relied upon to affirm Mr. Shepherd’s sentence, it presents a clean opportunity for this Court to address the questions presented.

Mr. Shepherd’s case is also a compelling illustration of how the “legendary ambiguity” of ACCA has resulted in perpetually unsettled and arbitrary law. See John Elwood, *Relist Watch: Quantity has a Quality All its Own*, SCOTUSblog (Mar. 22, 2018, 11:11 AM), <http://www.scotusblog.com/2018/03/relist-watch-quantity-quality> (ACCA “has spawned so much litiga-

tion that there are now more Armed Career Criminal Act appeals than there are armed career criminals.”).

The question of whether Kentucky burglary constitutes an ACCA predicate was answered differently by different federal courts on multiple occasions during the pendency of Mr. Shepherd’s appeal. On December 15, 2017, an Assistant United States Attorney in the Southern District of Indiana was willing to *stipulate to granting* Mr. Shepherd’s petition because then-controlling Sixth Circuit case law (*Stitt*) strongly suggested Kentucky second-degree burglary no longer constituted an ACCA predicate offense under *Mathis*. Only five months later, the law of the Sixth Circuit reversed course with *Malone* (without even a reference to Judge White’s concurrence in *Stitt*). Mr. Shepherd, then at the reply stage in his briefing, was forced to oppose an outcome-determinative *Malone* opinion that did not exist at the time his amended briefing was filed. In December 2018, the Seventh Circuit—without any consideration of Kentucky state court case law—adopted the Sixth Circuit’s independent and incorrect statutory analysis in *Malone* to deny Mr. Shepherd relief.

If the Seventh Circuit had addressed Mr. Shepherd’s petition in the narrow period after the Sixth Circuit decided *Stitt* but before it decided *Malone*, it likely would have found that Mr. Shepherd’s offenses no longer qualified as ACCA predicates (the same conclusion the United States Attorney’s Office appears to have reached in December 2017).

The flip-flopping in the federal courts during Mr. Shepherd’s case highlights the need for uniformity in the process for ascertaining ambiguous state law in the ACCA context. If the Sixth Circuit had acknowledged the uncertainty of Kentucky state law and ei-

ther erred on the side of caution or certified the question to the state supreme court, then Mr. Malone, Mr. Shepherd, and countless other defendants would have some measure of certainty, and Kentucky would have the opportunity to issue the first definitive opinion on a critical question of its own law. See *Elkins v. Moreno*, 435 U.S. 647 (1978) (certifying *sua sponte* a “question of great importance” to Maryland’s state supreme court instead of deferring to the construction of state law offered by the district court and affirmed by the court of appeal).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari or hold the petition for a decision in *Malone*.

Respectfully submitted,

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