APPENDIX A

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United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Darren L. **LEE**, Defendant-Appellant.

No. 18-12082
|
(June 11, 2019)

Attorneys and Law Firms

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Appeal from the United States District Court for the Northern District of Florida, D.C. Docket No. 3:17-cr-00063-MCR-1

Before MARCUS and HULL, Circuit Judges, and WRIGHT, * District Judge.

Opinion

PER CURIAM:

***1** After pleading guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g), **Darren Lee** appeals his 180-month sentence. At sentencing, the district court found that Lee was an armed career criminal under the Armed Career Criminal Act ("ACCA") due, in part, to his prior Florida convictions for aggravated battery and felony battery. On appeal, Lee argues that the district court erred in determining that his Florida convictions based on nolo contendere pleas qualified as violent felonies under the ACCA. After review, and with the benefit of oral argument, we affirm Lee's sentence.

I. BACKGROUND FACTS

A. Offense Conduct and Guilty Plea

In October 2016, law enforcement officers responded to a hotel room in Pensacola, Florida, because the occupants refused to vacate the room. The hotel room was registered to Lee. After the officers removed Lee and others from the hotel room, officers found a .22 caliber pistol in the hotel room microwave. The pistol was swabbed for DNA and the major contributor of DNA on the pistol was consistent with Lee's DNA.

In June 2017, a federal grand jury indicted Lee on one count of being a felon in possession of a firearm. The indictment listed several prior Florida felony convictions, including one for delivery or sale of a controlled substance, one aggravated battery conviction, and two felony battery convictions. In August 2017, Lee pled guilty to the charge pursuant to a written plea agreement.

B. Presentence Investigation Report

The probation officer's presentence investigation report ("PSI") assigned Lee a base offense level of 24, pursuant to U.S.S.G. § 2K2.1(a)(2), because Lee possessed a firearm after sustaining at least two felony convictions for crimes of violence or controlled substance offenses.[1] The probation officer designated Lee as an armed career criminal under the ACCA based on his Florida convictions for: (1) delivery or sale of a controlled substance in 2001; (2) aggravated battery in 2001; and (3) felony battery in 2015.[2]

As a result of Lee's ACCA status, the PSI increased Lee's offense level to 33, pursuant to U.S.S.G. § 4B1.4(b)(3)(B). The PSI then applied a three-level reduction for acceptance of responsibility, pursuant to U.S.S.G. § 3E.1.1(a) and (b), making Lee's total offense level 30.

Regardless of his ACCA status, Lee's criminal history category was VI based on his criminal history score of 20 points. With a total offense level of 30 and a criminal history category of VI, Lee's initial advisory guidelines range was 168 to 210 months' imprisonment. However, because Lee was subject to the ACCA's fifteen-year mandatory minimum, the low-end of the advisory guidelines range increased from 168 to 180, yielding a final advisory guidelines range of 180 to 210 months.

C. ACCA Predicate Offenses

*2 The government provided certified copies of the state court judgments, informations, sentence recommendations, and arrest reports as to Lee's prior Florida convictions for aggravated battery in 2001 and felony battery in 2015.

As to Lee's prior Florida conviction for aggravated battery, the state court judgment stated that Lee pled nolo contendere to aggravated battery by battery on a pregnant person on May 8, 2001. The charges in the information for this aggravated battery conviction stated that "Lee, on or about February 21, 2001, at and in Escambia County, Florida, did unlawfully commit a battery upon [the victim] by actually and intentionally touching or striking [the victim] against her will, or by intentionally causing bodily harm to the [victim]," and at the time of the battery "[the victim] was pregnant and **Darren Lee** knew or should have known that [the victim] was pregnant," in violation of Fla. Stat. § 784.045(1)(b).

The sentence recommendation for Lee's aggravated battery conviction was signed by both Lee and his attorney and stated that: (1) Lee pled guilty as charged; (2) Lee's arrest report was "incorporated by reference and agreed to by the defendant as a factual basis for the plea"; and (3) Lee certified that he understood that "the sentencing court is incorporating by reference this complete plea agreement as part of the sentencing order imposed by the court."

The arrest report for Lee's aggravated battery conviction included an offense narrative from the responding law enforcement officer. The arrest report stated that, when the officer was on vehicle patrol, he observed the victim "lying on the ground" at a road intersection. He then approached the victim, who was vomiting. The victim advised the officer that "she was six months pregnant and that her boyfriend had beat her up. [The victim] said that she and her boyfriend were arguing in the hotel room when Lee pushed her off the bed, onto the floor. Lee then struck and pushed on [the victim] several more times in the room." The altercation then moved outside into the hotel's parking lot where Lee "continued to strike and cuss at [the victim]." The victim advised the officer that Lee was the father of the child she was carrying. The victim was taken to the hospital. Lee had left the area on foot and was later arrested.

As to Lee's prior Florida conviction for felony battery in 2015, the state court judgment stated that Lee pled nolo contendere to felony battery, under Fla. Stat. § 784.03(2), on December 11, 2015. The charges in the information for this felony battery conviction stated that "Lee, on or about August 3, 2015, at and in Escambia County, Florida, having been previously convicted of battery ..., did unlawfully commit battery upon [the victim], by actually and intentionally touching or striking [the victim] against her will, or by intentionally causing bodily harm to [the victim], in violation of Sections 784.03(1) and (2), Florida Statutes."

The sentence recommendation for Lee's felony battery conviction was signed by both Lee and his attorney and stated that: (1) Lee pled nolo contendere; (2) Lee's arrest report was

"incorporated by reference and agreed to by the defendant as a factual basis for this plea"; and (3) Lee certified that he understood that "the sentencing [c]ourt is incorporating by reference this complete [s]entence [r]ecommendation as part of the judgment imposed by the [c]ourt."

*3 The arrest report for Lee's felony battery conviction included an offense narrative from the responding law enforcement officer. The report stated that the officer arrived at the victim's apartment and the victim was crying and upset. The victim told the officer that, earlier that morning, she was sitting on her couch and Lee, with whom she has two children, came into the room and asked her for his money, and they began to argue. The victim stated that Lee got on top of her while she was on the couch and began pulling her hair. The victim began screaming for help. After the victim began to scream, "Lee pried open the side of her mouth with his fingers and told her to be quiet." The victim stated that "while [ ]Lee pried her mouth, it cause[d] small tears in the corner of her lips." Lee and the victim rolled onto the living room floor and then the victim ran to the bathroom. The victim advised the officer that "Lee got on top of her from behind and started hitting her in the back and once in the head." The victim fled to her bedroom and told Lee she was contacting the police. Lee then fled the residence. The victim also stated that her two-year-old son woke up during the incident and saw the altercation taking place.

When speaking with the victim, the officer "observed small cuts on the corner portion on the inside of her lips." The officer also observed blood on the victim's shirt and the couch cushions. Lee was arrested three days later.

D. Objections

Lee objected to the PSI's application of the ACCA, arguing that his prior Florida convictions for aggravated battery and felony battery did not qualify as violent felonies under the ACCA. Assuming the Florida battery statute, Fla. Stat. § 784.03(1)(a), is divisible, Lee contended that: (1) the government's Shepard[3] documents, particularly the arrest reports, did not show that he was convicted of a violent felony; (2) in contrast to a guilty plea, a nolo contendere plea under Florida law does not constitute an admission to the facts offered as the factual basis of the plea, even if incorporated into the sentence recommendation; and (3) Shepard applies only to guilty pleas, not to nolo contendere pleas, to establish whether a prior conviction is a qualifying offense. He also questioned whether the arrest reports were valid Shepard documents.

The government responded that the Shepard documents showed that Lee's prior Florida convictions for aggravated battery and felony battery qualified as violent felonies, and that

the arrest reports were valid Shepard documents because they were incorporated into the sentence recommendations.

E. Sentencing

At Lee's June 2018 sentencing, the district court overruled Lee's objections, concluding that he qualified as an armed career criminal under the ACCA. The district court stated that it would address the ACCA issue in further detail in a written order following Lee's sentencing. The district court noted that Lee had a prior Florida conviction for the delivery or sale of a controlled substance, which constituted a serious drug offense.

The district court stated that Lee's prior Florida aggravated battery and felony battery convictions were both predicated on the underlying substantive offense of simple battery under Fla. Stat. § 784.03. The district court explained that under the Supreme Court's decision in Curtis Johnson v. United States ("Curtis Johnson"), 559 U.S. 133, 130 S. Ct. 1265, 176 L.Ed.2d 1 (2010), Florida's battery statute, Fla. Stat. § 784.03, does not categorically qualify as a violent felony, and thus, the district court had to determine whether Fla. Stat. § 784.03 is divisible. The district court found that Fla. Stat. § 784.03 was divisible into two elements: "touch or strike battery" under § 784.03(1)(a)(1) and "bodily harm battery" under § 784.03(1)(a)(2). Because the district court found Fla. Stat. § 784.03 to be divisible, the district court applied the modified categorical approach to determine what crime and elements formed the basis of Lee's prior Florida aggravated battery and felony battery convictions.

With respect to Lee's prior Florida aggravated battery conviction, the district court found that the Shepard documents reflected that the victim, who was six months pregnant, was found lying on the ground vomiting after Lee had beat her up by pushing her down and repeatedly striking her. The district court found that these facts in the arrest report, to which Lee assented in his plea agreement, established that Lee was necessarily convicted on the basis of bodily harm battery on a pregnant person.

***4** With respect to Lee's prior Florida felony battery conviction, the district court found that the Shepard documents reflected that Lee pulled the victim's hair, hit her repeatedly, and pried open the side of her mouth, which caused bleeding and visible cuts and tears in the corners of her lips. The district court found that these facts in the arrest report also established that Lee was necessarily convicted on the basis of bodily harm battery.

The district court addressed and rejected Lee's objections that the district court could not consider the arrest reports associated with his prior Florida aggravated battery and felony battery convictions because the pleas were nolo contendere, and that the nolo contendere pleas themselves did not establish anything about which type of Florida battery formed the basis of Lee's convictions. The district court determined that criminal convictions based on

nolo contendere pleas are valid for ACCA predicate offense purposes, as nolo contendere pleas are treated the same as any other conviction for purposes of federal sentencing. The district court found that the incorporated police arrest reports were valid Shepard documents because Lee assented to the facts in the police reports as the factual basis to support his convictions.

After rejecting Lee's objections and finding that Lee's two prior convictions were based on bodily harm battery, the district court then determined whether bodily harm battery has as an element the use, attempted use, or threatened use of physical force. The district court concluded that bodily harm battery necessarily contains an element of physical force because it requires the defendant to intentionally inflict physical pain or injury on another person. Therefore, the district court determined that Florida bodily harm battery under Fla. Stat. § 784.03(1)(a)(2) qualifies as a violent felony under the ACCA.

Because Lee's two battery and one drug convictions were qualifying predicates, the district court concluded Lee was subject to the ACCA. As a result, the district court found that Lee's advisory guidelines range was 180 to 210 months. After hearing from the parties and adopting the PSI, the district court imposed a 180-month sentence.

After sentencing, the district court entered a written order memorializing and further explaining its reasoning for classifying Lee as an armed career criminal. Notably, the district court explained that the arrest reports for Lee's prior Florida aggravated battery and felony battery convictions were valid Shepard documents because Lee explicitly agreed to incorporate the contents of the arrest reports into the state court judgments, even though standing alone the arrest reports would not have been valid Shepard documents. The district court stated that the fact that the Shepard documents could also support a conviction for touch or strike battery under Fla. Stat. § 784.03(1)(a)(1) did not disqualify Lee's aggravated battery and felony battery convictions from serving as ACCA predicate offenses because the Shepard documents allowed the district court itself to find that Lee was convicted of a violent felony—bodily harm battery under Fla. Stat. § 784.03(1)(a)(2).

II. GENERAL PRINCIPLES

A defendant who violates 18 U.S.C. § 922(g) and has three or more previous convictions for a violent felony or serious drug offense is subject to an enhanced sentence under the ACCA. See 18 U.S.C. § 924(e); U.S.S.G. § 4B1.4.[4] The ACCA defines a violent felony as any crime punishable by a term of imprisonment exceeding one year that:

*5 (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)(i), (ii). The first prong of this definition is referred to as the "elements clause," while the second prong contains the "enumerated crimes" clause and, finally, the "residual clause." See United States v. Owens, 672 F.3d 966, 968 (11th Cir. 2012). In 2015, the Supreme Court struck down as unconstitutionally vague the residual clause, but did not call into question the ACCA's elements and enumerated crimes clauses. See Johnson v. United States, 576 U.S. ——, ——, 135 S. Ct. 2551, 2563, 192 L.Ed.2d 569 (2015).

In determining whether a prior conviction qualifies as a violent felony under the ACCA, sentencing courts look at "the elements of the crime, not the underlying facts of the conduct that led to the conviction." United States v. Braun, 801 F.3d 1301, 1304 (11th Cir. 2015). In other words, all that matters are "the elements of the statute of conviction." Taylor v. United States, 495 U.S. 575, 601, 110 S. Ct. 2143, 2159, 109 L.Ed.2d 607 (1990).

When a statute " 'comprises multiple, alternative versions of a crime' "—that is, when a statute is "divisible"—the court "must determine which version of the crime the defendant was convicted of," then determine whether that specific offense qualifies as an ACCA predicate. Braun, 801 F.3d at 1304 (quoting Descamps v. United States, 570 U.S. 254, 262, 133 S. Ct. 2276, 2284, 186 L.Ed.2d 438 (2013)). A statute is divisible if it sets out one or more elements of the offense in the alternative, thereby defining multiple crimes, and indivisible if it contains a single set of elements. Descamps, 570 U.S. at 257, 261-64, 133 S. Ct. at 2281, 2284-85.

If the statute is divisible, then the sentencing court may consult a limited class of documents to determine which alternative element formed the basis of the prior conviction. Id. at 257, 133 S. Ct. at 2281. That class of documents, known as Shepard documents, may include the charging document, any plea agreement submitted to the court, the transcript of the plea colloquy, or any "record of comparable findings of fact adopted by the defendant upon entering the plea." Shepard, 544 U.S. at 20, 125 S. Ct. at 1259-60. Guilty pleas may establish ACCA predicate offenses. Id. at 19, 125 S. Ct. at 1259.

In this Court's recent decision in United States v. Gandy, this Court concluded that "an arrest report that is incorporated by reference in a plea agreement qualifies as a 'record of comparable findings of fact adopted by the defendant upon entering the plea' " that this

Court may consider under the modified categorical approach. 917 F.3d 1333, 1340 (11th Cir. 2019) (quoting Shepard, 544 U.S. at 20, 125 S. Ct. at 1259-60).

III. LEE'S CLAIMS

On appeal, Lee does not challenge the district court's reliance on his conviction for delivery or sale of a controlled substance, focusing solely on his two prior Florida convictions for aggravated battery and felony battery.

A. Nolo Contendere Pleas

***6** As an initial matter, Lee argues that Shepard applies only to guilty pleas and does not authorize the application of the modified categorical approach to nolo contendere pleas. Lee contends that the district court erred in applying the modified categorical approach to determine that his prior battery convictions, to which he pled nolo contendere, qualified as violent felonies under the ACCA. Also, Lee argues, inter alia, that his nolo contendere pleas and assent to the incorporated arrest records do not operate as admissions to the facts contained in them and thus cannot establish that he was convicted of bodily harm battery.

Lee's arguments about nolo contendere pleas are foreclosed by this Court's recent decision in Gandy. See Gandy, 917 F.3d at 1341-42. This Court explained in Gandy that we treat Florida nolo convictions no differently than convictions based on guilty pleas or verdicts of guilt for purposes of the Sentencing Guidelines. Id. at 1342; see also United States v. Drayton, 113 F.3d 1191, 1193 (11th Cir. 1997) (holding that a Florida nolo conviction constitutes a prior conviction for purposes of the ACCA).

Also, in Gandy, the defendant argued that, although he agreed to the arrest report as the factual basis for his plea, he only agreed to the arrest report's factual allegations, not any statements that his offense was for bodily harm battery. Gandy, 917 F.3d at 1341. This Court concluded that "because Gandy agreed to the arrest report as the factual basis of his plea without qualification, he agreed with the statements describing his offense as bodily-harm battery and that he necessarily pleaded nolo contendere to that offense." Id.

Further, this Court in Gandy rejected the defendant's argument that this Court could not rely on the factual basis in the state arrest report because, absent a plea colloquy, this Court could not determine either that the state court found a factual basis to support the nolo contendere plea or that it specifically relied on the factual basis as stated in the arrest report. Id. at 1342. This Court concluded that the absence of a plea colloquy in state court does not

bar this Court from considering other Shepard documents to determine the elements of the defendant's conviction. Id.

Having concluded we may consider the admitted facts in Lee's nolo contendere pleas as valid Shepard documents, we apply the modified categorical approach to determine the type of battery underlying Lee's aggravated battery and felony battery convictions.

B. Aggravated Battery

At the time Lee was convicted of aggravated battery, Florida law defined aggravated battery as:

> (1)(a) A person commits aggravated battery who, in committing battery:
>
> 1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
>
> 2. Uses a deadly weapon.
>
> (b) A person commits aggravated battery if the person who was the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant.

Fla. Stat. § 784.045(1).

The Shepard documents tell us, and Lee does not dispute, that he was convicted of aggravated battery by battery of a pregnant person under Fla. Stat. § 784.045(1)(b). The victim was six months pregnant and Lee does not dispute that he knew or should have known that the victim was pregnant. See Fla. Stat. § 784.045(1)(b). Thus, the question here is what type of battery did Lee inflict on the pregnant victim.

The Florida battery statute provided, at the relevant time, that:

> The offense of battery occurs when a person:
>
> 1. Actually and intentionally touches or strikes another person against the will of the other; or
>
> 2. Intentionally causes bodily harm to another person.

Fla. Stat. § 784.03(1)(a). The parties do not dispute, and we agree, that subsection (2) of Fla. Stat. § 784.03(1)(a) is divisible from the rest of the statute and that battery by "intentionally causing bodily harm" is a separate element of the battery offense. See Gandy, 917 F.3d at

1339; United States v. Vereen, 920 F.3d 1300, 1314 (11th Cir. 2019); Braun, 801 F.3d at 1305; United States v. Diaz-Calderone, 716 F.3d 1345, 1347 (11th Cir. 2013). [5]

Further, in Gandy, this Court held that Florida battery by "intentionally causing bodily harm" categorically constitutes a crime of violence under the Sentencing Guidelines. 917 F.3d at 1339-40. We explained that the government must establish two elements to prove bodily harm battery: "the defendant caused bodily harm to another person, and he did so intentionally." Id. at 1340; see Fla. Stat. § 784.03(1)(a)(2). This Court also determined that the definition of bodily harm under Florida law satisfies Curtis Johnson's definition of violent force—"force capable of causing physical pain or injury to another person." Gandy, 917 F.3d at 1340; see Curtis Johnson, 559 U.S. at 140, 143, 130 S. Ct. at 1271-72. The Gandy Court further concluded that a defendant convicted of bodily harm battery must have intentionally used such violent force, and thus, bodily harm battery necessarily constitutes a crime of violence. Gandy, 917 F.3d at 1340.

In Gandy, this Court then looked to the Shepard documents for the defendant's battery conviction to determine whether he was convicted of bodily harm battery. Id. at 1340-41. The charging document, the judgment, and Gandy's sentence recommendation did not identify which type of battery offense Gandy was convicted of committing. Id. at 1340. However, Gandy's incorporated arrest report identified his offense as bodily harm battery. Id. Because Gandy agreed to the arrest report as the factual basis of his plea, this Court determined that Gandy had agreed with the statements describing his offense as bodily harm battery. Id. at 1341. In Gandy's case, the Shepard documents—the arrest report—showed that Gandy was necessarily convicted of bodily harm battery. Id. at 1340-41. [6]

Similarly in Vereen, this Court concluded that the record necessarily showed the defendant was convicted of bodily harm battery under Fla. Stat. § 784.03(1)(a)(2). 920 F.3d at 1315. The defendant Vereen argued, in relevant part, that his prior Florida felony battery conviction did not constitute a violent felony under the ACCA. Id. at 1314. Like in Gandy, this Court explained that the district court was permitted to look to Shepard documents to determine which of the alternative elements of the Florida battery statute, Fla. Stat. § 784.03, Vereen was convicted of violating. Id.

***8** In Vereen, the prosecutor provided the factual basis for Vereen's felony battery charge during his plea colloquy. Id. at 1314-15. "[T]he prosecutor detailed that Vereen had falsely imprisoned a woman he was in a domestic relationship with for nine to ten hours, during which time he 'repeatedly hit and struck' her." Id. The prosecutor also added that the police had "observed injuries on [the victim] consistent with the batteries that had been reported." Id. (emphasis added).

After reviewing these and other Shepard documents, this Court in Vereen concluded that the defendant Vereen was convicted of a form of Florida battery that is a violent felony—the bodily harm prong under Fla. Stat. § 784.03(1)(a)(2). Id. at 1315. This Court determined that "Vereen's conviction under Florida's battery statute, requiring a use of force that 'intentionally cause[s] bodily harm,' qualifies as a violent felony under the elements clause, because force that in fact causes this level of harm 'necessarily constitutes force that is capable of causing pain or injury.' " Id. at 1315-16 (quoting United States v. Vail-Bailon, 868 F.3d 1293, 1303 (11th Cir. 2017) (en banc)). Therefore, Vereen's prior felony battery conviction qualified as an ACCA predicate offense. Id. at 1316.

Turning back to Lee's 2001 aggravated battery conviction, the arrest report incorporated into the plea agreement included an offense narrative from the responding law enforcement officer. The arrest report stated, in relevant part, that, when the officer was on vehicle patrol, he observed the victim "lying on the ground" at a road intersection. He then approached the victim, who was vomiting. The victim advised the officer that "she was six months pregnant and that her boyfriend had beat her up. [The victim] said that she and her boyfriend were arguing in the hotel room when Lee pushed her off the bed, onto the floor. Lee then struck and pushed on [the victim] several more times in the room." The altercation then moved outside into the hotel's parking lot where Lee "continued to strike and cuss at [the victim]." The victim was taken to the hospital.

The arrest report shows that Lee was convicted of bodily harm battery. Of particular note, the victim was six months pregnant, lying on the ground, vomiting, and was taken to the hospital. The victim recounted that she was struck not once but "several more times" in the hotel room and that Lee continued to strike her in the parking lot. She was not just struck once or twice. Rather, she was a "beat up" pregnant woman vomiting.

A finding by the state court that the offense was committed violently is not required when we are able to make that determination based on the available Shepard documents. See Diaz-Calderone, 716 F.3d at 1350-51. A battery offense where the officer finds the female victim is six months pregnant, vomiting, beat up, lying on the ground at a road intersection, and taken to the hospital plainly shows bodily harm. That the victim needed immediate medical attention at a hospital from the repeated batteries further supports the district court's finding of a bodily harm battery. Under Florida law, these allegations are plainly sufficient for a charge of intentionally causing bodily harm. See, e.g., Gordon v. State, 126 So. 3d 292, 295-96 & n.4 (Fla. Dist. Ct. App. 2011) (holding that striking an individual with a belt and causing bruising established intentional bodily harm). Lee has given us no reason to think that this case would have been prosecuted as just a simple touching-or-striking battery, and so, given the violent nature of the facts alleged, we are confident that Lee was convicted of the bodily harm form of battery. See Vereen, 920 F.3d at 1315.

*9 Because Lee agreed to the arrest report as the factual basis of his plea, he agreed with its description of his offense and the victim's physical condition, which as explained above reveals that his offense constituted a bodily harm battery. Thus, Lee necessarily was convicted of bodily harm battery under Fla. Stat. § 784.03(1)(a)(2). See Gandy, 917 F.3d at 1340-41.

C. Felony Battery

For Lee's 2015 felony battery conviction, we analyze the same Florida battery statute, Fla. Stat. § 784.03(1)(a), as outlined above. The Florida battery statute provides that "[a] person who has one prior conviction for battery, aggravated battery, or felony battery and who commits any second or subsequent battery commits a felony of the third degree[.]" Fla. Stat. § 784.03(2).

The arrest report incorporated into the plea agreement for Lee's felony battery conviction included an offense narrative from the responding law enforcement officer. The arrest report stated, in relevant part, that the officer arrived at the victim's apartment and the victim was crying and upset. The victim told the officer that, earlier that morning, she was sitting on her couch and Lee asked her for his money, and they began to argue. The victim stated that Lee got on top of her while she was on the couch and began pulling her hair. The victim began screaming for help. After the victim began to scream, "Lee pried open the side of her mouth with his fingers and told her to be quiet." The victim stated that "while [ ]Lee pried her mouth, it cause[d] small tears in the corner of her lips." The victim advised the officer that "Lee got on top of her from behind and started hitting her in the back and once in the head." When speaking with the victim, the officer "observed small cuts on the corner portion on the inside of her lips." The officer also observed blood on the victim's shirt and the couch cushions.

The arrest report shows that Lee was convicted of bodily harm battery. Similar to Vereen, the officer observed injuries to the victim of Lee's felony battery that were consistent with the reported battery. See Vereen, 920 F.3d at 1315. Notably, Lee caused small tears in the corner of the victim's lips and hit her in the back and head. The officer saw the cuts on the corners of the victim's lips and blood on the victim's shirt and on the couch cushions. Cuts and blood plainly show bodily harm to the victim.

Because Lee agreed to the arrest report as the factual basis of his plea, he agreed with its description of his offense and the victim's physical condition, which as explained above reveals that his offense constituted a bodily harm battery. Thus, Lee necessarily was convicted of bodily harm battery under Fla. Stat. § 784.03(1)(a)(2). See Gandy, 917 F.3d at 1340-41.

IV. CONCLUSION

For these reasons, the district court did not err in concluding that Lee's convictions for aggravated battery and felony battery qualified as violent felonies under the ACCA's elements clause. Accordingly, we affirm Lee's ACCA-enhanced 180-month sentence.

AFFIRMED.

All Citations

--- Fed.Appx. ----, 2019 WL 2448250

Footnotes

* Honorable Susan Webber Wright, United States District Judge for the Eastern District of Arkansas, sitting by designation.

1 The probation officer prepared the PSI using the 2016 United States Sentencing Guidelines Manual.

2 The PSI also designated a fourth conviction for Florida felony battery in 2015 to support Lee's armed career criminal designation, but the district court declined to include this conviction in its ACCA analysis. As this conviction is not necessary for Lee's armed career criminal designation, we do not address this fourth conviction.

3 Shepard v. United States, 544 U.S. 13, 125 S. Ct. 1254, 161 L.Ed.2d 205 (2005).

4 This Court reviews de novo whether an offense qualifies as a violent felony under the ACCA. United States v. Lockett, 810 F.3d 1262, 1265-66 (11th Cir. 2016).

5 Because we can determine that Lee was necessarily convicted of battery by "intentionally causing bodily harm" under Fla. Stat. § 784.03(1)(a)(2), we need not, and therefore do not, address whether battery by "touching or striking" under Fla. Stat. § 784.03(1)(a)(1) is further divisible or whether Lee's convictions would qualify as "striking" battery.

6 We recognize Gandy is a Sentencing Guidelines case, but we apply a similar analysis in deciding whether a given offense qualifies as a crime of violence under the Sentencing Guidelines or a violent felony under the ACCA because "the definitions for both terms are virtually identical." United States v. Alexander, 609 F.3d 1250, 1253 (11th Cir. 2010) (internal quotations omitted).

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APPENDIX B

828 F.3d 744
United States Court of Appeals,
Eighth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Cody James HORSE LOOKING, Defendant–Appellant.

No. 15-2739
|
Submitted: February 12, 2016
|
Filed: July 11, 2016

Synopsis

Background: Following denial of his motion to dismiss the indictment, 102 F.Supp.3d 1109, defendant pleaded guilty in the United States District Court for the District of South Dakota, Roberto A. Lange, J., to unlawful possession of a firearm by a person convicted of a misdemeanor crime of domestic violence. Defendant appealed.

[Holding:] The Court of Appeals, Colloton, Circuit Judge, held that defendant's prior conviction for simple assault domestic violence was not necessarily for a misdemeanor crime of domestic violence, and thus, it could not support federal conviction.

Reversed.

West Headnotes (4)

[1] Weapons ⇐ Domestic violence

To determine whether a defendant's conviction qualifies as a misdemeanor crime of domestic violence, as would prohibit defendant from possessing a firearm, the court must apply the "categorical approach," under which the court looks to the statute of conviction to determine whether it necessarily had, as an element, the use

or attempted use of physical force, or the threatened use of a deadly weapon. 18 U.S.C.A. §§ 921(a)(33)(A)(ii), 922(g)(9).

3 Cases that cite this headnote

[2] **Weapons** ⇐ Domestic violence

Defendant's prior South Dakota conviction for simple assault domestic violence was not necessarily for a misdemeanor crime of domestic violence, and thus, it could not support federal conviction for unlawful possession of firearm by person convicted of such a crime; indictment charged defendant with violating three subsections of South Dakota assault statute in the alternative, state court did not specify which alternative was basis for conviction, defendant could have been convicted under one subsection, which prohibited attempting by physical menace to put another in fear of imminent bodily harm, without using or attempting to use force, and without threatening use of a deadly weapon, as required to qualify as misdemeanor crime of domestic violence, and neither defendant's plea colloquy, in which he admitted pushing down his wife during argument, nor fact that wife suffered abrasions excluded possibility that he was convicted under this subsection. 18 U.S.C.A. §§ 921(a)(33)(A)(ii), 922(g)(9); S.D. Codified Laws §§ 22-18-1, 25-10-34.

5 Cases that cite this headnote

[3] **Weapons** ⇐ Domestic violence

Under the "modified categorical approach" to determine which alternative formed the basis for the defendant's prior conviction under a divisible statute, in order to determine whether the conviction qualified as a misdemeanor crime of domestic violence that would prohibit defendant from possessing a firearm, the court may examine charging documents, plea agreements, plea colloquies, and comparable judicial records to make the determination. 18 U.S.C.A. §§ 921(a)(33)(A)(ii), 922(g)(9).

1 Cases that cite this headnote

[4] **Weapons** ⇐ Domestic violence

The sole permissible purpose of the modified categorical approach for determining if defendant's prior conviction was for a misdemeanor crime of domestic violence, as would prohibit defendant from possessing a firearm, is to determine which statutory phrase in a divisible statute was the basis for the conviction. 18 U.S.C.A. §§ 921(a)(33)(A)(ii), 922(g)(9).

1 Cases that cite this headnote

*745 Appeal from United States District Court for the District of South Dakota—Pierre

Attorneys and Law Firms

Counsel who presented argument on behalf of the appellant was Molly Quinn, AFPD, of Sioux Falls, SD. The following attorney(s) appeared on the appellant brief; Randall B. Turner, AFPD, of Pierre, SD.

*746 Counsel who presented argument on behalf of the appellee was Kevin Koliner, AUSA, of Sioux Falls, SD. The following attorney(s) appeared on the appellee brief; Carrie G. Sanderson, of Pierre, SD.

Before SMITH and COLLOTON, Circuit Judges, and GRITZNER,[1] District Judge.

Opinion

COLLOTON, Circuit Judge.

Cody James Horse Looking was charged in August 2014 with unlawful possession of a firearm by a person "who has been convicted in any court of a misdemeanor crime of domestic violence." *See* 18 U.S.C. § 922(g)(9). Horse Looking moved to dismiss the indictment on the ground that he had not sustained a qualifying prior conviction. The district court denied the motion, and Horse Looking entered a conditional guilty plea, reserving his right to appeal the district court's ruling. We conclude, based on the relevant judicial records under the required analytical approach, that Horse Looking's prior conviction does not meet the definition of a "misdemeanor crime of domestic violence."

Under 18 U.S.C. § 922(g)(9), any person "who has been convicted in any court of a misdemeanor crime of domestic violence" is prohibited from possessing a firearm. A "misdemeanor crime of domestic violence" must have, "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. § 921(a)(33)(A)(ii). The perpetrator also must have a familial or similar domestic relationship to the victim. *Id.*

In 2010, a grand jury in Hughes County, South Dakota, charged Horse Looking with "Simple Assault Domestic Violence." The South Dakota simple assault statute provides in relevant part:

Any person who:

(1) Attempts to cause bodily injury to another and has the actual ability to cause the injury;

(2) Recklessly causes bodily injury to another;

(3) Negligently causes bodily injury to another with a dangerous weapon;

(4) Attempts by physical menace or credible threat to put another in fear of imminent bodily harm, with or without the actual ability to harm the other person; or

(5) Intentionally causes bodily injury to another which does not result in serious bodily injury;

is guilty of simple assault.

S.D. Codified Laws § 22–18–1. The indictment charged Horse Looking in the alternative with violating subsections (1), (4), and (5). It also alleged that the assault involved a domestic relationship. *See* S.D. Codified Laws § 25–10–34 (requiring the state's attorney to indicate on an indictment whether the charge involves domestic abuse).

[1] To determine whether a conviction qualifies as a misdemeanor crime of domestic violence, we must apply the Supreme Court's "categorical approach." *United States v. Castleman*, —— U.S. ——, 134 S.Ct. 1405, 1413, 188 L.Ed.2d 426 (2014). In that analysis, we look to the statute of conviction to determine whether it "necessarily 'ha[d], as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon.' " *Id.* (alteration in original) (quoting 18 U.S.C. § 921(a)(33)(A)); *see* ***747** *Shepard v. United States*, 544 U.S. 13, 26, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005); *Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990).

[2] **[3]** **[4]** The South Dakota assault statute effectively lists at least five separate crimes with different elements. It is, in the parlance of the field, a "divisible statute." *Descamps v. United States*, —— U.S. ——, 133 S.Ct. 2276, 2281, 186 L.Ed.2d 438 (2013). In that situation, we are directed to apply the "modified categorical approach" to determine which alternative formed the basis for the defendant's conviction. *Id.* at 2285. We may examine charging documents, plea agreements, plea colloquies, and comparable judicial records to make the determination. *Id.*; *Shepard*, 544 U.S. at 26, 125 S.Ct. 1254. The "sole permissible purpose of the modified categorical approach is 'to determine which statutory phrase was the basis for *the conviction*.' " *United States v. Martinez*, 756 F.3d 1092, 1097 (8th Cir. 2014) (quoting *Johnson v. United States*, 559 U.S. 133, 144, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010)).

The parties agree that subsections (1) and (5) of the South Dakota statute qualify as misdemeanor crimes of domestic violence. Subsection (5) requires proof that the defendant intentionally caused bodily injury; subsection (1) requires an attempt to do so. Because "intentional causation of bodily injury necessarily involves the use of physical force," *Castleman*, 134 S.Ct. at 1414, these two offenses have, as an element, the use or attempted use of physical force.

The parties also agree, however, that subsection (4) does not qualify as a predicate offense. This alternative forbids an attempt "by physical menace or credible threat to put another in fear of imminent bodily harm." An offender might use physical force when attempting by "physical menace" to put another in fear of harm. But he also could violate subsection (4) without using or attempting to use force, and without threatening the use of a deadly weapon, as required by the definition of "misdemeanor crime of domestic violence." Pumping a fist in an angry manner could be sufficient. *Cf. United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999) (holding that a statute forbidding "[a]ny act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive" did not have, as an element, the use or attempted use of force); *United States v. Larson*, 13 Fed.Appx. 439, 439–40 (8th Cir. 2001) (per curiam). Thus, if Horse Looking was convicted under § 22–18–1(4), his federal conviction cannot stand.

We look to judicial records of the state court proceeding in an effort to determine which subsection was the basis for Horse Looking's conviction. *See Johnson v. United States*, 559 U.S. 133, 144, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). In *Castleman*, that inquiry was "straightforward": the state-court indictment specified which of several alternative offenses formed the basis for the defendant's conviction. 134 S.Ct. at 1414. Not so here. The indictment charged Horse Looking with violating subsections (1), (4), and (5) of the South Dakota statute in the alternative. The order suspending imposition of sentence and a later order revoking suspended imposition of sentence do not help either. Both say that Horse Looking pleaded guilty "to the charge of Simple Assault Domestic Violence (SDCL 22–18–1)," without specifying under which subsection he was convicted.

The government relies on the guilty plea colloquy to urge that Horse Looking was convicted under subsection (5). At the plea hearing, the court summarized the charges against Horse Looking by stating that "you attempted to cause—you threatened to cause, or you intentionally caused bodily injury to [your wife]." This summary covers ***748** all three subsections: (1) ("attempted to cause ... bodily injury"), (4) ("threatened to cause ... bodily injury"), and (5) ("intentionally caused bodily injury"). When asked what happened, Horse Looking said that he and his wife "got into an argument and she became physical and she cut me and I pushed her." R. Doc. 33-2, at 5. The court then asked "did you threaten some sort

of—to her, was there some injury to her?" Horse Looking answered that he "pushed her," and "she fell down." The court inquired whether that caused "some cuts or bruises," and Horse Looking said he was not aware of any, but his attorney volunteered that the victim "testified that she had some abrasions on her ankle or knee." *Id.* at 6. Based on these facts, the state court found a factual basis for the plea and entered an order suspending imposition of sentence.

The plea colloquy establishes that Horse Looking *could have been* convicted under subsection (5). His attorney admitted that the victim testified to suffering bodily injury in the form of abrasions. Horse Looking's admission that he pushed the victim down supported an inference that he acted intentionally and thus satisfied the general intent element of the offense. *Cf. State v. Boe*, 847 N.W.2d 315, 323 (S.D. 2014) (explaining that aggravated assault is a general intent crime).

But the colloquy does not exclude the possibility that Horse Looking was convicted under subsection (4)—*i.e.*, attempting by physical menace to put another in fear of imminent bodily harm. Horse Looking's push of his wife is sufficient to establish a "physical menace." Physical menace requires "some physical act," *People ex rel. R.L.G.*, 707 N.W.2d 258, 261 (S.D. 2005) (per curiam), and it can include the use of physical force. *People ex rel. A.D.R.*, 499 N.W.2d 906, 911 (S.D. 1993) (applying S.D. Codified Laws § 22–18–1.1(5)). The attempt element requires a general intent to try to put the victim in fear by physical menace. *State v. Schmiedt*, 525 N.W.2d 253, 256 (S.D. 1994) (per curiam). Horse Looking's act of pushing down his wife in the course of an argument also supported a reasonable inference that he intended to put her in fear.

Unlike the situation in *United States v. Fischer*, 641 F.3d 1006 (8th Cir. 2011), we cannot say that convictions under the two alternatives are mutually exclusive. In *Fischer*, the defendant was convicted under a divisible Nebraska assault statute that forbade both (1) intentionally causing bodily injury and (2) threatening another in a menacing manner. *Id.* at 1008. Where the factual basis established that the defendant struck the victim's face and bit her nose, we concluded that "the biting of a victim's nose is an intentional act causing bodily harm and *not merely a threatening act*." *Id.* at 1009 (emphasis added). On that basis, the court ruled that the defendant necessarily was convicted of intentionally causing bodily injury. Under the South Dakota statute, however, the physical menace offense in subsection (4) requires a physical act by the defendant, not merely a threat, so Horse Looking's intentional push does not preclude a conviction under subsection (4). That the victim suffered abrasions on her knee or ankle does not foreclose a conviction for attempting by physical menace to put her in fear of greater bodily harm.

We have been instructed time and again that the categorical approach introduced by *Taylor* created a "demand for certainty" when determining whether a defendant was convicted of a qualifying offense. *Mathis v. United States*, No. 15–6092, —— U.S. ——, 136 S.Ct. 2243, 2256–57, 195 L.Ed.2d 604, 2016 WL 3434400, at *11 (U.S. June 23, 2016); *see Descamps*, 133 S.Ct. at 2290 (asking whether the defendant ***749** "necessarily" committed the qualifying crime); *Shepard*, 544 U.S. at 21, 125 S.Ct. 1254 (referring to "*Taylor*'s demand for certainty"); *Taylor*, 495 U.S. at 602, 110 S.Ct. 2143. It is clear that Horse Looking admitted using physical force against his wife, and that he *could have been* found guilty of a crime that has, as an element, the use of force against his wife. But the judicial record does not establish that Horse Looking necessarily *was convicted* of an assault that has the required element. He was charged in the alternative with a non-qualifying assault, and the state court did not specify which alternative was the basis for conviction. The absence of definitive records frustrates the application of the modified categorical approach, but the Supreme Court has made clear that the vagaries of state court recordkeeping do not justify a different analysis. *Johnson*, 559 U.S. at 145, 130 S.Ct. 1265; *Shepard*, 544 U.S. at 22-23, 125 S.Ct. 1254. We are thus constrained to hold that the district court should have dismissed the indictment.

* * *

The judgment of the district court is reversed.

All Citations

828 F.3d 744

Footnotes

1 The Honorable James E. Gritzner, United States District Judge for the Southern District of Iowa, sitting by designation.

End of Document

APPENDIX C

SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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JAMAR ALONZO QUARLES,)

Petitioner,)

v.) No. 17-778

UNITED STATES,)

Respondent.)

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Pages: 1 through 66

Place: Washington, D.C.

Date: April 24, 2019

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Washington, D.C.

Wednesday, April 24, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

JEREMY C. MARWELL, Washington, D.C.;
on behalf of the Petitioner.

ZACHARY D. TRIPP, Assistant to the Solicitor General, Department of Justice, Washington, D.C.;
on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 17-778, Quarles versus United States.

Mr. Marwell.

ORAL ARGUMENT OF JEREMY C. MARWELL

ON BEHALF OF THE PETITIONER

MR. MARWELL: Mr. Chief Justice, and may it please the Court:

For centuries, the essence of burglary has been punishing those who trespass for the purpose of committing a crime. That was the rule at common law. It remained the majority view at the time of ACCA and Taylor. For two main reasons, the Court should confirm that generic burglary retains that traditional requirement of contemporaneous intent, intent at the time of the initial trespass.

First, the sources that matter under Taylor show that "remaining in" was understood as a modest expansion of the traditional offense to cover those who entered lawfully, but then overstay their welcome to commit a crime.

But the government reads Taylor's use of that one word, "remaining in", as a sharp break from that tradition. Under that view, "remaining" would cover anyone who enters unlawfully, regardless of whether they had that burglarious intent at the time of entry as long as the intent was formed later. And nothing in Taylor or the sources that existed at the time of ACCA suggest an intention or acknowledgment of making such a dramatic change.

JUSTICE GINSBURG: Well, something -- something in Taylor tugs the other way; that is, Taylor said that there would be few statutes that were broader than the generic, and even in, what, 1986, there were more than a few statutes that are like the statute before us.

MR. MARWELL: Yes, Justice Ginsburg. The government claims there were six statutes as of -- or six states as of 1986 that had defined remaining-in burglary more broadly than -- than our definition. I think that's well below the threshold. And, in fact, Taylor contemplated that there would be a few. It gave the example of California, in which

shoplifting qualified as burglary.

JUSTICE GINSBURG: I thought --

MR. MARWELL: So --

JUSTICE GINSBURG: -- it was higher? I thought it was somewhere between nine and 14?

MR. MARWELL: Well, the -- the government claims six statutes. There were 29 statutes as of -- 29 jurisdictions as of 1986 that had remaining-in variants, but I think when you -- when you look at how the states had interpreted those and -- and in some cases, at the plain language of the statutes, I think the best reading of where those states were -- it shows that a majority, even of the remaining-in stat -- states, retained the traditional requirement of contemporaneous --

JUSTICE ALITO: Well --

MR. MARWELL: -- intent.

JUSTICE ALITO: -- if we look at the statutes in existence in 1986, and we count only those in which there is a judicial opinion interpreting the statute on the remaining-in question, and not those which contain dicta in cases involving -- where the -- where there was an intent at the time of entry, what is the

breakdown?

MR. MARWELL: Well, as you know, we -- we think you should not only look --

JUSTICE ALITO: I know.

MR. MARWELL: -- at the remaining --

JUSTICE ALITO: You think we should look more broadly. You want us to count all the statutes in which there is no remaining-in burglary to start out with.

MR. MARWELL: Correct --

JUSTICE ALITO: Okay.

MR. MARWELL: -- be -- because Taylor refers -- Taylor instructs to look at how a majority of states define burglary, and --

JUSTICE ALITO: Well, we know that Taylor -- that Taylor's definition of burglary includes "remaining in," does it not?

MR. MARWELL: Correct. And --

JUSTICE ALITO: All right. So then why would we look at the -- the statutes that don't have any remaining-in element at all?

MR. MARWELL: Because the 22 jurisdictions that had just entry burglary show a widespread adherence to that traditional rule, that you needed intent at the time of

entry. And the government's rule, the government's interpretation of the Taylor test takes that away because they say, if you enter unlawfully without any intent at the time and you form intent later, that's burglary. And that's not consistent. That's much broader than the 22 entry states.

But I think -- if -- if I can respond to the question about just looking at the 29.

JUSTICE ALITO: Right.

MR. MARWELL: There are states like Alaska, which has the Arabie decision from 1985; New York, which has the Licata decision from 1971; Connecticut, which has the Belton decision from 1983, where the court said that "remaining in" applies to a lawful entry followed by a subsequent formation of intent.

And I take the point that may not be 100 percent on point with the question, but we think it forecloses the government's reading, again, because they -- that preserves the requirement of intent at initial unlawful entry.

There are also some statutes, Justice Alito, where the plain language of the statute,

we think, supports our view. Maine had a statutory sentencing provision that said you can be punished not only for burglary but also for the offense that you commit after entering or remaining. Maine had that entry or remaining statute.

JUSTICE KAGAN: And I guess what strikes me, Mr. Marwell, is that the distinction just wasn't -- you know, it wasn't really present at that time, that -- that -- that now we can look and see how there really is a split on this question, but in 1986, there were so few cases or -- or statutes that clearly made the distinction and put a state on one side or the other of it.

And if that's the case, if the distinction wasn't salient, why would we assume that Congress meant to incorporate it into the burglary element?

MR. MARWELL: Well, I -- I think the Court typically interprets statutes to assume some degree of continuity with what had come before, and here Taylor acknowledged the common law rule. And we have a number of authorities that suggest that this contemporaneous intent

requirement was -- was the essential thing that differentiated burglary from trespass.

JUSTICE SOTOMAYOR: What do you do with the "surreptitiously" definition that was in existence before 1986? How does that inform our analysis?

MR. MARWELL: So the Court said in Taylor that it -- it was adopting a definition that was very close to the 1984 statute, which had the surreptitious. I think surreptitious helps us. It certainly indicates that remaining was not a continuous state in the sense that the government says it was.

And I think "surreptitiously," as our amicus explains, has a connotation of doing something for a -- for -- for a fraudulent reason or staying -- staying past your welcome for the purpose of committing a crime.

JUSTICE SOTOMAYOR: Justice Alito asked you what the lineup was of states that read it your way and the states that read it the government's way. You mentioned at least three or four that predated 1986 that read it your way.

At 1986, how many states had opined in

the government -- in the government's way?

MR. MARWELL: The government has five where there were judicial decisions in Texas, which adopted a slightly different statutory language that made clear that it was covering anyone who was present in and then committed.

I think -- in our blue brief we -- we cited 15 jurisdictions, 15 of the 29, but I think, again, if -- if we look at the entry states, that gets us 22 as of 1986. And then we get over the -- the hurdle of Taylor --

JUSTICE SOTOMAYOR: Well that's --

MR. MARWELL: -- which is --

JUSTICE SOTOMAYOR: -- 15 is a -- is a third of -- not quite a third, a little less than a third, of the states. Isn't that enough to say that that's what Congress had in mind? If Taylor says only a few would be excluded by its definition, that's a lot more than a few.

MR. MARWELL: Well, we -- Taylor says you're trying to craft a generic burglary definition that aligns with how most states viewed it, viewed burglary, at the time. And we think most states viewed burglary in -- in our way.

And so the government has a different reading. If you adopt our rule, that it -- it will exclude six jurisdictions as of 1986. And I think that's below the threshold that the Court has -- has declined to read a statute in a way that might exclude ten jurisdictions.

JUSTICE SOTOMAYOR: So I'm sorry, what was the 15 you were talking about?

MR. MARWELL: Fifteen are jurisdictions that read "remaining" in our way.

JUSTICE SOTOMAYOR: Oh, I'm sorry, I -- that's not the question I asked.

MR. MARWELL: Oh, I'm sorry.

JUSTICE SOTOMAYOR: As of 1986, how many jurisdictions read it the government's way?

MR. MARWELL: Six.

JUSTICE SOTOMAYOR: Six.

MR. MARWELL: Five -- five using intermediate, mostly intermediate state court decisions, and one was Texas.

JUSTICE SOTOMAYOR: What has -- how -- how large has that number grown since 1986?

MR. MARWELL: So the government cites 18 jurisdictions today. But we think this

Court's decision in Castleman and Stokeling looks -- when it asks the question of how many jurisdictions would be excluded, is looking to the time that Congress adopted the statute.

And I think that makes sense. Otherwise you are interpreting the word "burglary" in ACCA in 1986 to expand potentially in the future without any further congressional action.

And that's why I think in Stokeling and Castleman the Court said we're looking to how many jurisdictions would be excluded as of 1986.

JUSTICE KAVANAUGH: The -- the LaFave treatise at -- at the time said, "far more common today is the burglary statute which covers one who either enters or remains in the premises. This means, of course, that the requisite intent to commit a crime within need only exist at the time the defendant unlawfully remained within."

So how do you respond to that --

MR. MARWELL: So the --

JUSTICE KAVANAUGH: -- contemporaneous evaluation of the law?

MR. MARWELL: So I think that language could -- could support our rule or the government's rule, potentially, but if you look at the rest of what LaFave said, LaFave --

JUSTICE KAVANAUGH: Well, let's just stick with that --

MR. MARWELL: Okay.

JUSTICE KAVANAUGH: -- sentence. How could it -- it said the intent "need only exist at the time the defendant unlawfully remained within."

MR. MARWELL: And -- and we think that "remaining within" refers to that point where somebody overstays their welcome. And I think you can see that by how LaFave discussed the other remaining-in statutes.

They said -- the LaFave treatise said, for instance, it gave one example of what the remaining statutes were intended to do and it's the classic bank customer who comes into the bank while the bank is open and then stays on to steal the bank's money.

That, I think, is the -- is the classic example of what states were trying to get at when they added the words "remaining."

But LaFave then talked about the Texas statute and said Texas has a different -- different words in its statute and it says, if you are present in and you commit a crime, then that's -- that -- that counts as burglary in Texas.

And LaFave said that's -- that was intended to fix potential concerns about proof that would exist in the remaining jurisdictions.

JUSTICE BREYER: Is there any reason to think that the person who stays in the bank, and then, ah, what a nice idea, I'll help myself to some money, is any the less violent or at risk of violence or risk of -- is there any less risk there than when he gets the idea of going into the bank two weeks earlier?

MR. MARWELL: Yes. I think the -- the -- the existence of pre-formed intent, so somebody who comes to the bank with the advance plan to commit another crime shows that they will be more resolute in their desire to accomplish that crime.

It may result in them bringing a weapon because they know they're going to do

that. And I think it aligns with this -- with the fact that ACCA is governing career criminals, trying to select people who have that profit motive to do multiple crimes.

And you look at the fact patterns of the cases that are really the point of disagreement between us and the government, you know, Gaines from the New York Court of Appeals, a homeless person who breaks into a warehouse to get out of the cold, while he's in there decides to grab a jacket and is caught coming out, or the case of young people who break into a house not -- not intending to steal something -- this is the JNS case from Oregon -- take something while they're in there and caught on the way out.

JUSTICE BREYER: There are --

JUSTICE KAGAN: Part of --

JUSTICE BREYER: -- no -- no people who think, well, I want to rob this bank, I'm a little worried about the noise if I break in, or I guess, I want to rob this bank, he thinks it when he's inside.

A night watchman, a teller who forgot to go out -- I don't know if that exists, but I

can't quite figure out -- I'm sure there is some cases both ways, I would think.

MR. MARWELL: So --

JUSTICE BREYER: Anybody ever look at that and --

MR. MARWELL: Well, so Taylor, just -- just to -- Taylor referred to the risk of violence when somebody does an intrusion to commit a crime. And I think that's -- that captures this idea of --

JUSTICE BREYER: Right.

MR. MARWELL: -- of why we care about pre-formed intent.

JUSTICE KAGAN: But -- but part of our understanding of why burglary is a -- is a risky crime is when the burglar meets somebody else, the victim, the police officer, whoever.

And that person is not going to know when the criminal formed his intent.

MR. MARWELL: That -- that's correct. But two -- two points, Justice Kagan: One, it's -- the government's position comes very close to saying that any time you are present somewhere where you're not supposed to be, there's that risk of a violent confrontation.

And Congress did not use the word "trespass" in ACCA. It could have enumerated trespass. I think the government's position comes close to that.

And then, second, I -- I do think there is, you know, a distinction from the -- from the victim or the property owner's perspective of somebody who comes having pre-formed the intent to do something else as opposed to the innocent rationales of somebody who's trespassing for -- by assumption for -- for doing something other than committing a crime.

JUSTICE ALITO: Is the offense we're concerned with here, his third degree home invasion conviction in Michigan, anything like these cases that you've just described?

In that case, as I understand it, he assaulted his girlfriend and then -- and this is what the judge said as the factual basis for his no contest plea -- "The victim reported that Mr. Quarles broke in through a screen window and assaulted her while in the house."

And the judge said, "We certainly can infer that he had an intent to commit an

assault while he was entering." And this establishes that he did commit an assault while he was in the house.

MR. MARWELL: So the -- the facts that you've recited, Justice Alito, I think would not be available to a sentencing court. That was a colloquy in the state court where Mr. Quarles pleaded no contest. So he was not asked to confirm those facts.

And I think that --

JUSTICE ALITO: Well, doesn't -- doesn't the judge, in order to accept a no contest plea, have to establish, be satisfied that there is a factual basis for the plea?

MR. MARWELL: I think -- well, in Michigan law, no contest is -- is -- is acquiescing in the imposition of punishment but not confirming or denying the facts. And I think under --

JUSTICE ALITO: So the judge doesn't have to be satisfied -- we'll check it out.

Under Michigan law -- this is surprising to me -- a judge can accept a non -- a no contest plea without ascertaining that there is a factual basis for the plea?

MR. MARWELL: Even if so, I think under this Court -- the way this Court said in Shepard and Mathis, the kinds of facts that are available to the sentencing judge, those are limited to ones where the defendant confirmed the accuracy.

But I think under, under the Court's categorical approach, what matters is the text of the Michigan statute, which is very broad. It's as broad as that Texas statute because it says any time you're present in and you -- and you commit.

And if there's a concern about whether the question presented is presented, the government didn't raise that in its brief in opposition. And the Sixth Circuit very clearly engaged with the question of what "remaining in" means.

JUSTICE KAVANAUGH: Taylor didn't say that the statute had to exactly correspond to generic burglary. It said "substantially corresponds"?

MR. MARWELL: That -- that's right. But we think that the -- the -- the -- the element here of contemporaneous intent is

what's been called the most fundamental essence of burglary.

So I think substantial -- it's hard to say that it substantially corresponds if it's missing, you know, the core element.

JUSTICE GINSBURG: When you gave the number six, did that exclude all the states with remaining-in statutes that had not interpreted those statutes?

MR. MARWELL: That's correct. Well, the -- the number six, I think, was how many states at the time of ACCA had -- had clearly adopted the government's reading. And the government says -- identifies only six.

We think the other jurisdictions are most fairly read to have adopted our rule, especially when viewed in light of the background interpretive principles, that you're going to assume a degree of continuity and you're going to not assume that the states had completely reconfigured the offense of burglary just by adding a word "remaining."

JUSTICE GINSBURG: Did that turn out to be the case, states that had remaining-in statutes in 1986 and then interpreted them

later?

MR. MARWELL: Well, some jurisdictions have gone towards the government's view. The government identifies 18 as of today. There are some jurisdictions that have adopted our view, and 19 jurisdictions that have not adopted any remaining-in variant and have stayed only defining burglary as intent at entry. So --

JUSTICE SOTOMAYOR: Give me the count again?

MR. MARWELL: So if the question is what's the headcount today?

JUSTICE SOTOMAYOR: Yes.

MR. MARWELL: Nineteen states retain the intent at entry, so entry only. Three states have remaining statutes and they have adopted our rule. Eighteen states, the government has identified today as adopting their rule.

And I think that leaves 11, that gets us to 51 jurisdictions, where the government implicitly says they haven't resolved the question.

JUSTICE KAGAN: The -- the 18 states