No. 19-6296

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL HOLMES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether police officers violated the Fourth Amendment when they walked through a partially open gate near a "No Trespassing" sign, stepped onto a screened-in porch, and knocked on petitioner's door, after which he agreed to talk to them.

2. Whether a former version of the Georgia burglary statute, Ga. Code Ann. § 16-7-1(a) (Michie 1996), is a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (M.D. Fla.):

United States v. Holmes, No. 14-cr-21 (Nov. 21, 2017)

United States Court of Appeals (11th Cir.):

United States v. Holmes, No. 17-15404 (May 29, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the Federal Reporter but is reprinted at 770 Fed. Appx. 1013. The order of the district court is reported at 143 F. Supp. 3d 1252.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2019. A petition for rehearing was denied on July 25, 2019 (Pet. App. 6). The petition for a writ of certiorari was filed on October 11, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Middle District of Florida, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e); possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and possessing cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Judgment 1. He was sentenced to 210 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-3.

1. After police in Jacksonville, Florida, received a complaint that a man was selling drugs at a house, they twice attempted to have confidential informants purchase drugs from the residence. Presentence Investigation Report (PSR) ¶ 11; Suppression Hr'g Tr. 12-17. Although both informants spoke to petitioner, who was at the house, neither attempt was successful. PSR ¶ 11. After the second failed attempt, a group of detectives went to the house "to make a knock-and-talk," but "[t]here was no answer at the door, so [they] had to leave." Suppression Hr'g Tr. 17-18; see PSR ¶ 11.

Ten days later, police tried again. PSR ¶ 12; Suppression Hr'g Tr. 19-20. To reach petitioner's front door, the officers walked through a large, two-section chain-link swinging gate across the driveway, and then onto an attached screened-in porch.

143 F. Supp. 3d at 1255. A four-foot-high chain-link fence surrounds the property, and the gate across the driveway provides the only path to the porch door, which does not itself have a doorbell or knocker. Ibid. The gate has a typical lift-up latch but no lock, and was unlatched and "partially open" on that day. Id. at 1256 (citation omitted); see id. at 1255. Neither the gate nor the fence obstructs the view of the property from the street. Id. at 1255. A "Beware of Dog" sign hangs on the left section of the swinging gate, and a "No Trespassing" sign hangs on the fence to the right of the gate (away from the house). Ibid. (capitalization altered). Another driveway was under construction approximately twenty feet to the right of the house's existing driveway; a gate in front of that construction project had a "Private Property" sign that also said "No Trespassing," and a "Beware of Dog" sign. Id. at 1255-1256 (capitalization altered).

Petitioner answered the door when police knocked, and stepped out onto the porch to speak with the officers. PSR ¶ 12. The officers smelled "fresh burnt marijuana coming from inside the residence," Suppression Hr'g Tr. 32, and asked petitioner if he had used illegal drugs or had drugs in the house, id. at 34; PSR ¶¶ 13-14. Petitioner admitted to using drugs but denied having any drugs in the house. PSR ¶ 14. Officers detained petitioner and sought a search warrant for the house. PSR ¶¶ 14-16. Meanwhile, petitioner, who had answered the door shirtless, asked to retrieve a shirt from the house. PSR ¶ 16. Officers agreed,

but told petitioner that they would have to escort him. Suppression Hr'g Tr. 37. While walking through the house to petitioner's bedroom, officers saw in plain view a bag of marijuana in the living room and marijuana joints in the bedroom. PSR ¶ 16. Police added those observations to the search warrant affidavit. Suppression Hr'g Tr. 37.

After obtaining a warrant, police searched petitioner's house. PSR ¶ 17. The search revealed a dozen firearms, more than a thousand rounds of ammunition, a bulletproof vest, a tactical vest, roughly $3600 in cash, 49 grams of marijuana, 20 grams of crack cocaine, 29 grams of powder cocaine, and various drug paraphernalia. PSR ¶¶ 18-19. Petitioner was indicted on one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e); one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and one count of possessing cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Superseding Indictment 1-4.

2. a. The district court denied petitioner's motion to suppress the evidence seized from his home. 143 Supp. 3d at 1252-1274. Petitioner argued that police officers violated the Fourth Amendment's protection against unreasonable searches when they crossed his driveway and stepped onto his porch to knock on his front door on the theory that by posting the "No Trespassing" sign,

he had revoked any implied consent for police to enter his property in that manner. See id. at 1259, 1263.

The district court rejected that argument. Adopting the findings of a magistrate judge following an evidentiary hearing, the district court found that petitioner's main gate was open when police walked through it. See 143 F. Supp. 3d at 1257 n.4. The court also explained that the "No Trespassing" signs did not unambiguously revoke the implied license for the public (including police) to approach petitioner's front door and knock, because that conduct is not ordinarily considered a trespass. See id. at 1262-1266. And the court found that petitioner willingly stepped out onto his porch to speak to the officers, and did not tell them to leave his property at any point in the interaction. See id. at 1269-1270. Applying a "'totality of the circumstances' analysis," id. at 1268, the court determined that the "knock and talk" here did not violate the Fourth Amendment. See id. at 1271-1272.

b. Petitioner proceeded to a bench trial and was convicted on all three counts. Judgment 1. The default term of imprisonment for a Section 922(g) conviction is zero to 120 months. 18 U.S.C. 924(a)(2). Under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), that penalty increases to a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). As relevant here, the ACCA defines a "violent felony" to include

any crime punishable by more than one year of imprisonment that "is burglary." 18 U.S.C. 924(e)(2)(B)(ii).

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, 139 S. Ct. 399 (2018), this Court clarified that "building" or "structure," for the purposes of the generic-burglary definition, includes vehicles "adapted or customarily used for lodging." Id. at 406.

Taylor also instructed courts to employ a "categorical approach" to determine whether a prior conviction is for an offense that meets the definition of "burglary." 495 U.S. at 600. Under that approach, courts examine "the statutory definition[]" of the previous crime in order to determine whether the jury's finding of guilt, or the defendant's plea, necessarily reflects conduct that constitutes the "generic" form of burglary referenced in the ACCA. Ibid. If the statute of conviction consists of elements that "substantially correspond[]" to, or are 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 (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 necessarily found, or the defendant necessarily admitted, the elements of generic burglary. See Mathis v. United States, 136 S. Ct. 2243, 2249 (2016); Descamps v. United States, 570 U.S. 254, 262 (2013); Shepard v. United States, 544 U.S. 13, 26 (2005).

The Probation Office recommended that petitioner be sentenced under the ACCA based on two prior Florida state convictions for sale or delivery of cocaine, which it determined to be serious drug offenses, and a 1997 Georgia state conviction for burglary of a dwelling, which it determined to be a violent felony. PSR ¶¶ 44, 58, 65, 67. It recommended a guidelines range of 188 to 235 months of imprisonment. PSR ¶ 108. Petitioner objected to the classification of his Georgia burglary conviction as an ACCA predicate, arguing that the statute is categorically overbroad because it permits burglary of vehicles, see D. Ct. Doc. 108, at 4-6 (Aug. 26, 2016), and that it is indivisible, see id. at 6-10.

The district court overruled petitioner's objection. Sent. Tr. 5-6. The court explained that the Eleventh Circuit's decision in United States v. Gundy, 842 F.3d 1156 (2016), cert. denied, 138 S. Ct. 66 (2017), already had determined that the Georgia burglary statute under which petitioner was convicted, Ga. Code Ann. § 16-7-1(a) (Michie 1996), was a violent felony under the ACCA. See Sent. Tr. 5-6. That statute, which was unchanged between 1980 and May 2012, see Gundy, 842 F.3d at 1167 n.6, provided:

> A person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof.

Ga. Code Ann. § 16-7-1(a) (Michie 1996).

Although Gundy -- which was decided before this Court's decision in Stitt, supra -- concluded that the statute as a whole "encompassed not only unlawful entry into buildings or other structures, but also into vehicles, railroad cars, watercraft, or aircraft," it also determined that the statute was divisible as to the locational element because "the plain text of the Georgia statute has three subsets of different locational elements, stated in the alternative and in the disjunctive." 842 F.3d at 1165, 1167. Surveying Georgia case law, Gundy found that "a prosecutor must select, identify, and charge the specific place or location that was burgled," which is "the hallmark of a divisible statute." Id. at 1167. The court further observed that the Supreme Court of Georgia had held that the fact "that the vehicle [burgled] was designed as a dwelling was an essential element of the offense." Id. at 1168 (quoting DeFrancis v. Manning, 271 S.E.2d 209, 210 (Ga. 1980)) (emphasis omitted).

Relying on Gundy, the district court determined that petitioner's burglary conviction, which petitioner did not dispute to have involved a dwelling house, was a violent felony under the ACCA. Sent. Tr. 5-6. The court sentenced petitioner to 210

months of imprisonment on each of his counts of conviction, to be served concurrently. Id. at 38.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1-3. The court summarily "affirm[ed] the district court's well-reasoned opinion denying [petitioner's] motion to suppress" and explained that its prior decision in Gundy "forecloses [petitioner's] argument that his 1997 Georgia burglary conviction was not for a violent felony." Id. at 2-3.

ARGUMENT

Petitioner renews his contention (Pet. 3-7, 14-21) that the "knock and talk" that led to the search warrant was an unreasonable search, in violation of the Fourth Amendment. He also contends (Pet. 7-9, 22-24) that his prior conviction for Georgia burglary is not a violent felony under the ACCA. The court of appeals correctly rejected both contentions, and its unpublished decision does not merit this Court's review.

1. The court of appeals correctly affirmed the district court's determination that police officers did not violate the Fourth Amendment when they approached petitioner's door and knocked on it, and its brief factbound affirmance does not conflict with any decision of this Court or another court of appeals. In any event, this case would be a poor vehicle in which to address the circumstances under which a knock-and-talk violates the Fourth Amendment because police here acted reasonably in light of existing case law, so suppression would not be an appropriate remedy.

a. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. "[T]he central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." Terry v. Ohio, 392 U.S. 1, 19 (1968); see Birchfield v. North Dakota, 136 S. Ct. 2160, 2186 (2016) ("[R]easonableness is always the touchstone of Fourth Amendment analysis.").

Although this Court has recognized that "the area 'immediately surrounding and associated with the home'" known as "the curtilage" is considered "'part of the home itself for Fourth Amendment purposes,'" an officer does not violate the Fourth Amendment by approaching a residence, knocking, and then waiting briefly to be received. Florida v. Jardines, 569 U.S. 1, 6 (2013) (citation omitted); see id. at 8. "'A license may be implied from the habits of the country,'" available equally to police officers and private citizens alike, that "permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." Id. at 8 (citing Kentucky v. King, 563 U.S. 452, 469 (2011), and McKee v. Gratz, 260 U.S. 127, 136 (1922)). Although a license created by a landowner to enter land can be terminated by a revocation of consent, such revocation has legal force only if the visitor knows or has reason to know that his entry is forbidden.

United States v. Carloss, 818 F.3d 988, 999 (10th Cir.) (Tymkovich, C.J., concurring) (citing Restatement (Second) of Torts § 171(b) (1965)), cert. denied 137 S. Ct. 231 (2016). "A visitor has 'reason to know' when he 'has information from which a person of reasonable intelligence * * * would infer that the homeowner revoked the license.'" Ibid. (quoting Restatement (Second) of Torts § 12) (brackets omitted).

Applying those principles, the district court correctly determined that, on the particular facts of this case, the police officers did not violate the Fourth Amendment because they acted as "reasonably respectful citizen[s]" would be expected to act. 143 F. Supp. 3d at 1259 (quoting Jardines, 569 U.S. at 8 n.2). Although petitioner had a fence around his house, with a gate for access, the court correctly observed that a fence and gate on their own do not expressly revoke the implied license, because "a fence and closed gate are often intended to keep children and pets in, as opposed to keeping visitors out." Id. at 1263. And here, petitioner had a dog in the fenced part of his yard. Id. at 1266. Furthermore, while a fenced property combined with a "locked gate" might represent "an express order revoking the implied license," petitioner not only left his gate unlocked, he left it "partially open." Id. at 1262-1263; see United States v. Lakoskey, 462 F.3d 965, 973 (8th Cir. 2006) ("The absence of a closed or blocked gate in this country creates an invitation to the public that a person can lawfully enter along the driveway during daylight hours to

contact the occupants for a lawful request.") (citation omitted), cert. denied, 549 U.S. 1259 (2007).

With respect to petitioner's "No Trespassing" sign, the district court recognized that such a sign may, when combined with "other measures to prevent entry," provide enough information to a visitor of reasonable intelligence to infer that the homeowner has revoked the license. 143 F. Supp. 3d at 1267-1268. But it correctly explained that a "No Trespassing" sign is not always, on its own, sufficient to revoke the implied license. Ibid. Someone who walks down a driveway to knock at the front door to invite a consensual conversation with the resident is not necessarily trespassing under the "habits of the country," Jardines, 569 U.S. at 8 (citation omitted). Not every entry onto private property is a "trespass"; instead, the term encompasses only wrongful or "unauthorized intrusion[s]." United States v. Jones, 565 U.S. 400, 420 (2012) (Alito, J., concurring in the judgment); see also Black's Law Dictionary 1733 (10th ed. 2014) (defining "trespass" as "[a]n unlawful act committed against the person or property of another; esp., wrongful entry on another's real property") (emphasis added). Given the general implied license to visitors, knocking on someone's front door during the daytime is an authorized entry, not a trespass.

As the district court explained, rather than preclude all visitors, "the plain meaning of 'No Trespassing' is that it prohibits what people ordinarily think of as trespassing," such as

"us[ing] the basketball hoop in [petitioner's] front yard." 143 F. Supp. 3d at 1263, 1265. In addition, "'No Trespassing' signs are commonly used to alert passersby that land that might otherwise appear available for public use for anything from pickup football games to hunting are, in fact, private property that should be treated as such." Id. at 1263. The court correctly found that here, petitioner's "No Trespassing" signs, even when combined with "other measures to prevent entry," id. at 1267, did not revoke the implied license for legitimate visitors to see if the occupants are willing to speak (as petitioner in fact was). Id. at 1271. In particular, because petitioner "left the gate partially open, * * * '[r]easonably respectful citizens' could avail themselves of the implied license to walk through [petitioner's] open driveway gate, onto his front porch and to his front door, whereupon they could knock and speak with him if he answered." Ibid. (quoting Jardines, 569 U.S. at 8 n.2)).

b. Petitioner does not identify any decision of another court of appeals that addressed similar facts but reached a different outcome. Rather, he asserts (Pet. 5-6, 15-16) that this Court should grant a writ of certiorari because "the lower courts have established a bright-line rule that says unless a person's private property is otherwise physically inaccessible to anyone, a homeowner can never revoke the implied license to enter." But neither the unpublished decision below nor any of the court of

appeals cases petitioner cites (Pet. 15, 20-21) establishes such a bright-line rule.

In Carloss, supra, the Tenth Circuit considered the effect of such signs on the implied license to knock and talk, but rejected any bright-line rules. 818 F.3d at 994. Carloss explained that whether the implied license has been revoked "depends on the context in which a member of the public, or an officer seeking to conduct a knock-and-talk, encountered the signs and the message that those signs would have conveyed to an objective officer, or member of the public, under the circumstance." Ibid. The other cases petitioner cites did not involve posted signs or locked gates at all, nor did they adopt bright-line rules for such scenarios. In United States v. Walker, 799 F.3d 1361 (2015) (per curiam), cert. denied, 136 S. Ct. 857 (2016), the Eleventh Circuit applied an "all the circumstances" approach, finding that officers reasonably approached a car in a carport, early in the morning, when a light was on in the vehicle and "it was not unreasonable to think that someone was inside it." Id. at 1364. The Ninth Circuit similarly considered the totality of the circumstances to conclude in United States v. Lundin, 817 F.3d 1151 (2016), that the implied license to knock and talk did not extend to the officers' "knock[ing] on [the defendant's] door around 4:00 a.m. without evidence that [the defendant] generally accepted visitors at that hour, and without a reason for knocking that a resident would

ordinarily accept as sufficiently weighty to justify the disturbance." Id. at 1159.

Likewise, the court of appeals here did not establish, as petitioner asserts (Pet. 18), "a bright-line rule that says unless a resident otherwise seals his or her property and makes such property physically inaccessible in combination and alone with the posting of conspicuous No Trespassing signs, a homeowner can never successfully revoke the implied license to enter one's property." Instead, the court affirmed the district court's application of a "'totality of the circumstances' analysis," 143 F. Supp. 3d at 1268, to the specific facts here. The lower courts did not address whether some other signage, or different placement of signs, might have revoked the implied license in a way that the "No Trespassing" signs here did not. Cf. Carloss, 818 F.3d at 1003 (Gorsuch, J., dissenting) (observing that the homeowner there had "literally substitute[d] the knocker with a No Trespassing sign, one smack in the middle of the front door," and had added at least three more such signs "along the very route any visitor would use to approach the home"). The district court here suggested that it might have reached a different result had the gate been closed or locked. See 143 F. Supp. 3d at 1269-1271. And the court of appeals neither discussed the facts nor issued a published decision that would bind future panels. Its unpublished decision affirming the district court's denial of suppression here does not merit further review.

c. Even if the issue otherwise merited review, this case is not a suitable vehicle for addressing it because suppression of evidence would be unwarranted in light of the good-faith exception to the exclusionary rule. The exclusionary rule is a "judicially created remedy" designed to "safeguard Fourth Amendment rights generally through its deterrent effect." United States v. Leon, 468 U.S. 897, 906 (1984) (citation omitted). This Court has emphasized, however, that suppression is an "extreme sanction," id. at 916, because the "exclusion of relevant incriminating evidence always entails" "grave" societal costs, Hudson v. Michigan, 547 U.S. 586, 595 (2006). Most obviously, it allows "guilty and possibly dangerous defendants [to] go free -- something that 'offends basic concepts of the criminal justice system.'" Herring v. United States, 555 U.S. 135, 141 (2009) (quoting Leon, 468 U.S. at 908).

This Court has thus held that, "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring, 555 U.S. at 144. Suppression may be warranted "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights." Davis v. United States, 564 U.S. 229, 238 (2011) (citation omitted). "But when the police act with an objectively reasonable good-faith belief that their conduct is lawful, * * * the deterrence rationale

loses much of its force, and exclusion cannot pay its way." Ibid. (citations and internal quotation marks omitted). Reliance on binding appellate precedent can establish the applicability of the good-faith exception. Id. at 239-241.

Under those principles, suppression would not be appropriate here even if the officers' actions were held to violate the Fourth Amendment. In finding no Fourth Amendment violation here, the district court identified as relevant precedent this Court's decision in Oliver v. United States, 466 U.S. 170 (1984), which "uph[eld] a search of open fields with posted 'No Trespassing' signs," 143 F. Supp. 3d at 1264, and the Eleventh Circuit's published decision in United States v. Taylor, 458 F.3d 1201 (2006), which upheld a knock-and-talk when officers "pass[ed] through a closed but unlocked gate," 143 F. Supp. 3d at 1263. Petitioner does not attempt to distinguish those precedents here, and they would lead a reasonable officer to believe that the actions of the officers here were permissible. Under the circumstances, petitioner has not demonstrated that the officers displayed the sort of "'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights" that is required to justify the high costs of suppression. Davis, 564 U.S. at 238 (citation omitted).

2. Petitioner separately contends (Pet. 7-9, 22-24) that the court of appeals erred in determining that his Georgia burglary conviction was for a "violent felony" under the ACCA. The court's

determination was correct, no disagreement exists among the courts of appeals as to the ACCA classification of the now-superseded version of the Georgia burglary statute under which petitioner was convicted, and this Court typically defers to the regional courts of appeals in their interpretations of state law. No further review is warranted.

a. In United States v. Gundy, 842 F.3d 1156 (11th Cir. 2016), cert. denied, 138 S. Ct. 66 (2017), the court of appeals correctly applied this Court's divisibility analysis from Mathis v. United States, 136 S. Ct. 2243 (2016), to the Georgia burglary statute under which petitioner was convicted. Gundy recognized that its task under Mathis was to identify the elements of that statute, including whether the permutations of the statute involved elements of separate offenses or different means of satisfying a single element, and to match the elements of a particular defendant's offense of conviction to the ACCA's definition of generic burglary. 842 F.3d at 1161-1164; see Mathis, 136 S. Ct. at 2256 ("The first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means."); see also Taylor v. United States, 495 U.S. 575, 598 (1990). The court also employed the methodology described in Mathis, looking to the text of the state statute, state court decisions interpreting that text, and, if necessary, a defendant's prior records. Compare Mathis, 136 S. Ct. at 2256-2257, with Gundy, 842 F.3d at 1164-1168; see Gundy,

842 F.3d at 1170 (J. Pryor, J., dissenting) (agreeing that the majority had applied the correct framework). And it correctly determined that the Georgia burglary statute under which petitioner was convicted was a violent felony.

That statute is phrased in the disjunctive, with three distinct categories of locations (two of which themselves include a series of locations): "[1] the dwelling house of another or [2] any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or [3] * * * any other building, railroad car, aircraft, or any room or any part thereof." Ga. Code Ann. § 16-7-1(a) (Michie 1996) (emphasis added). That phrasing strongly suggests that each category is an element defining a separate crime, not a means of committing a single crime; otherwise, the statute simply would have included all of the locations in a single list. Cf. Mathis, 136 S. Ct. at 2249 (observing that a statute "that lists multiple elements disjunctively" is divisible). That is especially clear with respect to the third locational category, which is disconnected from the others by a repetition of the prohibited act: a person commits burglary if, without authority and with the requisite intent, he "enters or remains within the dwelling house of another or any building, vehicle, [etc.] * * * or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof." Ga. Code Ann. § 16-7-1(a) (Michie 1996) (emphasis added). The insertion of "enters or remains within"

immediately preceding the third locational category makes clear that the entire clause defines a separate crime.

Confirming that plain reading of the statute is the Supreme Court of Georgia's decision in DeFrancis v. Manning, 271 S.E.2d 209 (1980), which indicates that the locational categories are elements, by stating that when the burglary involved a vehicle, the vehicle's "design[] as a dwelling was an essential element of the offense." Id. at 210. If the third clause, which includes certain vehicles not designed as dwellings, were simply a means for committing a singular offense, proof of design as a dwelling would not be treated as an offense element.

In addition, in accord with Mathis's recognition that in particular cases an "indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements," 136 S. Ct. at 2257, indictments under the Georgia burglary statute here have done just that. As the Sixth Circuit explained in Richardson v. United States, 890 F.3d 616, cert. denied, 139 S. Ct. 349 (2018), its examination of multiple such indictments revealed that "[e]ach indictment references only one of the several alternative locations listed in Georgia's burglary statute." Id. at 629. Likewise, petitioner's indictment "refer[s to] one alternative [locational element] to the exclusion of all others," Mathis, 136 S. Ct. at 2257, charging that he "without authority and with intent

to commit a theft therein, did enter and remain in the dwelling house of Mark Fields," D. Ct. Doc. 107-1, at 6 (Aug. 25, 2016).

b. Every court of appeals to have considered the Georgia burglary statute in effect between 1980 and 2012 agrees that it is divisible as to the locational element. See Richardson, 890 F.3d at 629 (6th Cir.); Gundy, 842 F.3d at 1166-1168 (11th Cir.); United States v. Martinez-Garcia, 625 F.3d 196, 198 (5th Cir. 2010). Petitioner asserts (Pet. 8, 22-23) that those decisions conflict with the Fourth Circuit's decision in United States v. Cornette, 932 F.3d 204 (2019). Petitioner, however, overstates the conflict. The Fourth Circuit did not consider the same version of the Georgia burglary statute that is at issue here. Rather, Cornette involved a burglary conviction under the 1968 version of the Georgia burglary statute. Id. at 214 (citing Ga. Code Ann. § 26-1601 (Harrison 1968)); see id. at 211 ("We must first determine whether Georgia's burglary statute at the time of Cornette's 1976 conviction is divisible or indivisible.").

Although that version of the Georgia burglary statute is not substantially different from the version under which petitioner was convicted, compare Ga. Code Ann. § 26-1601 (Harrison 1968) with Ga. Code Ann. § 16-7-1(a) (Michie 1996), because the divisibility analysis under Mathis turns in part on the statutory text and state court decisions interpreting that text, see 136 S. Ct. at 2256-2257, the Fourth Circuit's decision in Cornette does not create a square conflict with the court of appeals' decision

here. Indeed, Cornette refused to consider the Supreme Court of Georgia's 1980 decision in DeFrancis, supra, and other Georgia appellate decisions in part because they were issued after the defendant's 1976 conviction there. See Cornette, 932 F.3d at 215 (stating that courts should consider only "caselaw at the time of [the] defendant's state court conviction," and not "subsequent judicial interpretations," when determining whether the conviction qualifies as an ACCA predicate). The possibility thus remains that the Fourth Circuit would reach a different answer to the question whether the later version of the Georgia burglary statute is divisible -- especially when, as here, the defendant's prior conviction under that statute postdates DeFrancis.

c. Even if a clear conflict existed between the decision below and that of the Fourth Circuit, such a conflict would not warrant this Court's review. The court of appeals here applied the correct test under Mathis to a statute of a state within its geographic jurisdiction, and any disagreement with the Fourth Circuit on the classification of that offense is unlikely to affect a significant number of cases. This Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 16 (2004); see Bowen v. Massachusetts, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law."). No

reason exists to depart from that "settled and firm policy" here, particularly since the statute at issue was substantially amended in 2012. See 2012 Ga. Laws 907-908 (H.B. 1176, § 3-1).

In any event, this would be a poor vehicle for further review of the former Georgia statute's classification under the ACCA. After it was informed of the advisory guidelines range that would have applied to petitioner had he not been classified as an armed career criminal under the ACCA, the district court explained that petitioner required "a higher sentence in any event." Sent. Tr. 33. The court observed that petitioner's offenses were "very serious" and that "on the spectrum of felon in possessions, this is on the more serious side" in light of the "number and types of firearms that [petitioner] had accumulated." Id. at 34. And the court explained that petitioner had previously received a 15-year sentence on his 1997 cocaine-distribution conviction, "which did nothing to deter him -- in fact, his conduct here is an escalation of what occurred in the 1997 conviction." Id. at 37; see PSR ¶ 65.

For those reasons, the district court explained that notwithstanding its usual practice in ACCA cases of "revert[ing] to the minimum mandatory," here it "ha[d] other considerations at play." Sent. Tr. 37. Not only did the court impose a 210-month sentence on the felon-in-possession count -- well above the 180-month ACCA minimum -- it imposed concurrent 210-month sentences on each of petitioner's other two counts of conviction for possessing

with intent to distribute cocaine and cocaine base, respectively, to which the ACCA does not apply. Id. at 38. Under those circumstances, it is unlikely that petitioner would receive a lower overall sentence on resentencing even if he were to prevail on the question presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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