No. 19-7288

IN THE SUPREME COURT OF THE UNITED STATES

JOHN KELSEY GAMMELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's prior conviction for aiding and abetting second-degree burglary, in violation of Minn. Stat. § 609.582, subdiv. (2)(a) (Supp. 1983) and Minn. Stat. § 609.05 (1982), is a conviction for "burglary" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Minn.):

United States v. Gammell, No. 17-cr-134 (May 23, 2018)

United States Court of Appeals (8th Cir.):

United States v. Gammell, No. 18-2211 (Aug. 8, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-7288

JOHN KELSEY GAMMELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 932 F.3d 1175.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2019. A petition for rehearing was denied on October 15, 2019 (Pet. App. 15a). The petition for a writ of certiorari was filed on January 7, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Minnesota, petitioner was convicted on one count of conspiring to cause intentional damage to a protected computer, in violation of 18 U.S.C. 1030(a)(5)(A), (b), (c)(4)(A)(i)(I), (VI), and (B); and two counts of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), 924(a)(2) and (e). Pet. App. 16a. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Id. at 17a-18a. The court of appeals affirmed. Id. at 1a-14a.

1. Between 2015 and 2017, petitioner directed malicious computer attacks, known as denial-of-service attacks, on websites associated with 40 entities across the United States. Pet. App. 2a-3a. A denial-of-service attack disables or interrupts service to a computer or website by creating a large amount of Internet traffic for that computer or website. Ibid. Petitioner directed his attacks at websites operated by companies that had previously employed him, companies that had declined to hire him, and competitors of his businesses, as well as various law-enforcement and court systems. Id. at 3a. To initiate his attacks, petitioner used his own computers and also hired third-party companies. Ibid.

To avoid detection, petitioner masked his Internet Protocol address, purchased services using cryptocurrency, and concealed digital evidence using encryption and drive-cleaning tools. Pet.

App. 3a. As a result of petitioner's attacks, the targeted websites experienced disruptions and shutdowns. Ibid.

Petitioner's attacks came to light when a company he had previously worked for alerted the Federal Bureau of Investigation that it had been the victim of repeated denial-of-service attacks. Presentence Investigation Report (PSR) ¶ 11. Law enforcement subsequently conducted a warrant-authorized search of petitioner's personal email account and collected evidence documenting his involvement in denial-of-service attacks. PSR ¶ 13. Agents also executed a search warrant at petitioner's motel room, where they recovered computers, smartphones, external hard-drives, other electronic storage devices, components of AR-15 assault rifles, and 15 high-capacity magazines. PSR ¶ 16. In addition, they visited petitioner's workplace and found 420 rounds of ammunition in his desk. PSR ¶ 18. A subsequent search of petitioner's storage unit revealed USB drives, other electronic storage devices, two handguns, and hundreds of rounds of ammunition. PSR ¶ 19.

A federal grand jury charged petitioner with one count of conspiring to cause intentional damage to a protected computer, in violation of 18 U.S.C. 1030(a)(5)(A), (b), (c)(4)(A)(i)(I), (VI), and (B); and two counts of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), 924(a)(2) and (e). PSR ¶ 2. Petitioner pleaded guilty to those charges. PSR ¶ 3.

2. Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of unlawfully possessing a firearm following a felony conviction is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense." The ACCA defines a "'violent felony'" to include, inter alia, any crime punishable by more than one year of imprisonment that "is burglary, arson, or extortion, [or] involves use of explosives." 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. Taylor instructed courts to employ a "categorical approach" to determine whether a prior conviction meets that definition, examining "the statutory definition[]" of the previous crime in order to determine whether it "substantially corresponds" to the "generic" form of burglary referenced in the ACCA. Id. at 600.

In this case, the Probation Office determined that petitioner had three prior Minnesota convictions for "violent felonies" that made him subject to an enhanced penalty under the ACCA: one conviction for aiding and abetting second-degree burglary, in

violation of Minn. Stat. § 609.582 subdiv. 2(a) (Supp. 1983) and Minn. Stat. § 609.05 (1982), and two convictions for aggravated robbery, in violation of Minn. Stat. § 609.11 (Supp. 1981) and Minn. Stat. § 609.245 (1980). PSR ¶¶ 47, 58-60; Pet. App. 4a. The Probation Office calculated petitioner's advisory Sentencing Guidelines range at 180 months. PSR ¶ 106.

As relevant here, petitioner objected to the Probation Office's determination that his burglary conviction constituted a "violent felon[y]" under the ACCA. Addendum to PSR ¶ 2. Petitioner argued that the offense did not qualify because he was convicted on an aiding-and-abetting theory and, in petitioner's view, Minnesota's aiding-and-abetting statute is broader than "generic aiding and abetting." D. Ct. Doc. No. 93, at 6 (May 1, 2018).

The district court overruled petitioner's objection and determined that his burglary conviction qualified as a "violent felony" under the ACCA. Sent. Tr. 49-50. The court observed that a person "may be convicted of aiding and abetting a violent offense * * * only if all of the elements of the violent offense are proved beyond a reasonable doubt." Id. at 49. The court further noted that, "for the purpose of defining a violent felony under the Armed Career Criminal Act," the Eighth Circuit had explained that it is "irrelevant whether a defendant's prior conviction is for aiding and abetting a violent offense rather than personally committing the violent offense." Id. at 50 (citing United States

v. Salean, 583 F.3d 1059 (8th Cir. 2009), cert. denied, 559 U.S. 961 (2010)).

The district court sentenced petitioner to 180 months of imprisonment (consisting of concurrent terms of 180 months of imprisonment on each of the felon-in-possession counts, and 60 months of imprisonment on the count of conspiring to damage to a protected computer), to be followed by five years of supervised release (consisting of concurrent terms of five years of supervised release on each of the felon-in-possession counts, and three years of supervised release on the count of conspiring to damage a protected computer). Pet. App. 17a.

3. The court of appeals affirmed. Pet. App. 1a-14a.

As relevant here, petitioner "d[id] not dispute" on appeal "that [Minnesota] second-degree burglary is a violent felony," but renewed his claim that "aiding and abetting accomplice liability is distinct from the substantive offense and requires evaluation of the Minnesota aiding and abetting statute." Pet. App. 6a. The court disagreed, observing that its prior decision in United States v. Salean, supra, "explicitly rejected this distinction." Ibid. In Salean, the court of appeals had relied on this Court's decision in Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007), in explaining that "the 'generic sense' of [criminal] statutes * * * 'covers "aiders and abettors" as well as principals,'" 583 F.3d at 1061 n.2 (quoting Duenas-Alvarez, 549 U.S. at 190) (ellipsis omitted). The court accordingly determined that in this case, "it matters

not whether [petitioner] was convicted as a principal or aider or abettor; it matters only whether the substantive offense qualifies as a violent felony." Pet. App. 6a.

Judge Kobes concurred in part and concurred in the judgment. Pet. App. 11a-14a. He took the view that Duenas-Alvarez required the court to analyze whether Minnesota's aiding-and-abetting statute "i[s] broader than generic aiding and abetting." Id. at 11a. On that question, however, Judge Kobes "d[id] not believe Minnesota strays from the generic definition." Ibid. Judge Kobes rejected petitioner's assertions that Minnesota's aiding-and-abetting statute broadly imposed criminal lability on persons "merely present at the scene of [the] crime," id. at 12a, or incorporated "conspiracy liability," id. at 14a. Based on a review of Minnesota case law, Judge Kobes "d[id] not find anything 'special' about Minnesota's aiding and abetting doctrine." Id. at 14a. He accordingly agreed that petitioner had been properly sentenced under the ACCA. Ibid.

ARGUMENT

Petitioner contends (Pet. 6-19) that his prior Minnesota conviction for aiding and abetting second-degree burglary is not a violent felony under the ACCA. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. This Court recently denied review of a petition for a writ of certiorari

presenting a similar question. See Douglas v. United States, No. 19-6229 (Feb. 24, 2020). The same result is warranted here.

1. The court of appeals correctly determined that petitioner's prior conviction for aiding and abetting second-degree burglary, in violation of Minn. Stat. § 609.582, subdiv. (2)(a) (Supp. 1983) and Minn. Stat. § 609.05 (1982), was a conviction for "burglary" under the ACCA, 18 U.S.C. 924(e)(2)(B)(ii).

Section 609.582, subdiv. (2), provides that "[w]hoever enters a building without consent and with intent to commit a crime commits burglary in the second degree." Minn. Stat. § 609.582, subdiv. (2) (Supp. 1983). Section 609.582, subdiv. (2)(a), in turn defines the term "building" as "a dwelling." Minn. Stat. § 609.582, subdiv. (2)(a) (Supp. 1983). Petitioner "does not dispute that the Minnesota burglary statute under which he was convicted satisfies the generic definition of burglary under the ACCA." Pet. 14. Indeed, a conviction under the statute includes all the elements of generic "burglary" -- specifically, "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." Taylor v. United States, 495 U.S. 575, 598 (1990).

Petitioner nevertheless contends (Pet. 6-19) that because he was charged with, and pleaded guilty to, second-degree burglary under an aiding-and-abetting theory of liability, his conviction for that offense does not qualify as "burglary" under the ACCA.

But petitioner does not "dispute that conviction as an aider and abettor does not, by virtue of that fact alone, disqualify the conviction as an ACCA predicate." Pet. 14. Instead, petitioner argues (Pet. 17-19) that Minnesota's aiding-and-abetting statute is broader than generic aiding and abetting, and thus that his offense of conviction encompasses more conduct than the "generic" form of burglary referenced in the ACCA. Pet. 17-19 (citation omitted).

Petitioner's argument relies on this Court's decision in Gonzalez v. Duenas-Alvarez, 549 U.S. 183 (2007), in which the Court recognized that the definition of a generic "theft offense" for purposes of immigration law includes offenses premised on accomplice liability and rejected an alien's efforts to "show something special" about California's "version of the [accomplice-liability] doctrine -- for example, that [the State] in applying it criminalizes conduct that most other States would not consider 'theft'" -- that would render it non-generic. 549 U.S. at 191; see 8 U.S.C. 1101(a)(43)(G); 8 U.S.C. 1227(a)(2)(A). Even assuming that a showing of that sort could exempt a defendant's prior state conviction from the definition of "burglary" under the ACCA, petitioner cannot demonstrate that Minnesota's aiding-and-abetting doctrine is such an outlier. To the contrary, as Judge Kobes explained (Pet. App. 11a-14a) (concurring in part and concurring in the judgment), Minnesota aiding-and-abetting law substantially corresponds to the generic doctrine.

To the extent that generic aiding and abetting is defined by federal law, the federal statute, 18 U.S.C. 2, encompasses "those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime." Rosemond v. United States, 572 U.S. 65, 71 (2014) (quoting Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994)); see United States v. Peoni, 100 F.3d 401, 402 (2d Cir. 1938) (Hand, J.) (explaining that aiding and abetting requires that the accessory "associate himself with the venture, * * * participate in it as something that he wishes to bring about, [and] * * * seek by his action to make it succeed"); see generally Duenas-Alvarez, 549 U.S. at 190-194. Minnesota's aiding-and-abetting statute goes no further, but instead includes only a person who "intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime," Minn. Stat. § 609.05 subdiv. 1 (1982). As Judge Kobes's concurring opinion observed, Minnesota "do[es] not * * * stray[] from the generic definition." Pet. App. 11a.

Petitioner's contrary arguments lack merit. Petitioner misinterprets Minnesota law when he asserts (Pet. 17) that Minnesota authorizes conviction as an aider and abettor when "the defendant was merely present at the scene of the crime" and took no other affirmative action, whereas federal law requires "an affirmative act," Rosemond, 572 U.S. at 71. As Judge Kobes explained, the Minnesota statute authorizes conviction only where

the individual's "presence [is] intended to aid a principal." Pet. App. 13a (concurring in part and concurring in the judgment); see also State v. Ostrem, 535 N.W.2d 916, 925 (Minn. 1995) ("[A] person's presence can be sufficient to impose liability if it somehow aids the commission of the crime."). Judge Kobes cited the "'lookout' [a]s a classic example" of an aider and abettor under Minnesota law, Pet. App. 14a (quoting State v. Parker, 164 N.W.2d 633, 641 (Minn. 1969)), and explained that Minnesota's approach was "in line with federal law," ibid.; see Rosemond, 572 U.S. at 74 (federal aiding-and-abetting statute "comprehends all assistance rendered by words, acts, encouragement, support, or presence") (quoting Reves v. Ernst & Young, 507 U.S. 170, 178 (1993)).

Petitioner further contends (Pet. 18) that "the Minnesota statute criminalizes as an aider and abettor one who merely conspires to commit the underlying offense" and, accordingly, lacks an affirmative act requirement. As Judge Kobes observed, however, Minnesota uses a separate statute to punish conspiracies, see Minn. Stat. § 609.175 (1982), and petitioner failed to identify a single case "in which Minnesota has applied its aiding and abetting statute" to punish an inchoate conspiracy. Pet. App. 14a; see Pet. 18-19 (similarly failing to identify any such case). Like the petitioner in Duenas-Alvarez, petitioner here has therefore failed to show "a realistic probability * * * that the State would apply its statute to conduct that falls outside the

generic definition of [the] crime." 549 U.S. at 193. Petitioner's Minnesota burglary conviction accordingly qualifies as generic "burglary" under the ACCA, even if a comparison between state and generic aiding-and-abetting principles is required.

2. Petitioner does not point to any conflict among the courts of appeals on whether his prior offense -- aiding and abetting Minnesota second-degree burglary -- qualifies as generic "burglary" under the ACCA. Instead, petitioner contends (Pet. 10-12) that the decision below conflicts with the Ninth Circuit's decision in United States v. Valdivia-Flores, 876 F.3d 1201 (2017), and the Eleventh Circuit's decision Bourtzakis v. United States Attorney General, 940 F.3d 616 (2019). But those cases addressed the question whether certain convictions under Washington's drug-trafficking statute, Wash. Rev. Code § 69.50.401 (1989, 1994), qualify as "aggravated felon[ies] for purposes of federal immigration law," Valdivia-Flores, 876 F.3d at 1203; see Bourtzakis, 940 F.3d at 618 -- not whether aiding and abetting second-degree burglary, in violation of Minn. Stat. § 609.582, subdiv. (2)(a) (Supp. 1983) and Minn. Stat. § 609.05 (1982), qualifies as "burglary" under the ACCA.

Nor can petitioner show that either the Ninth Circuit or the Eleventh Circuit would have declined to classify his conviction as "burglary" under the ACCA. The Ninth Circuit in Valdivia-Flores determined that a conviction under Washington's drug-trafficking statute is not an aggravated felony on the theory that the state

offense has "a more inclusive mens rea requirement for accomplice liability than its federal analogue." 876 F.3d at 1207; see id. at 1209. The Eleventh Circuit in Bourtzakis similarly examined the scope of Washington's accomplice-liability statute, but concluded that it "mirror[ed]" the federal standard. Bourtzakis, 940 F.3d at 623. Here, Judge Kobes conducted the same analysis for Minnesota's aiding-and-abetting statute and determined that it is "in line with federal law." Pet. App. 14a (concurring in part and concurring in the judgment). In light of that analysis, petitioner cannot demonstrate any disagreement between the courts of appeals that would warrant this Court's review.*

* Petitioner's assertion (Pet. 13-14) of an intra-circuit conflict between the decision below and United States v. Boleyn, 929 F.3d 932 (8th Cir. 2019), cert. denied, Nos. 19-6671, 19-6672, 19-6677, 19-6687, 19-6688 (Feb. 24 2020), also lacks merit. Allegations of such intra-circuit conflict do not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). In any event, no conflict exists between Boleyn's classification of a prior conviction under Iowa's drug statute as a "serious drug offense" under the ACCA, see 929 F.3d at 938; 18 U.S.C. 924(e)(2)(A)(ii), and the classification of petitioner's prior offense here as a "violent felony." Indeed, to the extent that Boleyn deemed it necessary to "look to Iowa's aiding and abetting statute," 929 F.3d at 937 n.3, to classify the Iowa drug crime at issue, that mode of analysis has been abrogated by Shular v. United States, No. 18-6662 (Feb. 26, 2020), slip op. at 2.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

APRIL 2020