No. 20-7701

IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL ALEX GANN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior convictions for aggravated burglary, in violation of Tenn. Code Ann. § 39-14-402(a)(3) (2014) and Tenn. Code Ann. § 39-14-403 (2010), are convictions 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 (E.D. Tenn.):

United States v. Gann, No. 19-CR-165 (Nov. 1, 2019)

United States Court of Appeals (10th Cir.):

United States v. Gann, No. 19-6287 (Sept. 29, 2020)

United States v. Gann, No. 19-6287 (Nov. 6, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted at 827 Fed. Appx. 566. The opinion and order of the district court is not published in the Federal Supplement but is available at 2019 WL 2746755.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 2020. A petition for rehearing was denied on November 6, 2020 (Pet. App. 6a). The petition for a writ of certiorari was filed

on April 5, 2021. 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 Eastern District of Tennessee, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 7a. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. Id. at 8a-9a. The court of appeals affirmed. Id. at 8a-9a.

1. On November 2, 2017, an employee at a Walmart store in Alcoa, Tennessee contacted police after observing petitioner and another person engage in suspicious behavior. Presentence Investigation Report (PSR) ¶ 6. Petitioner and the other individual had loitered in the store for several hours, filled two shopping carts with merchandise, and then abandoned them. Ibid. When officers arrived, the employees stated that petitioner and the other person were filling a third cart, and that store management wanted them to pay for the merchandise and leave. Ibid.

The officers approached petitioner and asked him for identification. PSR ¶ 7. Petitioner provided his brother's identification to one of the officers. Ibid. The officer recognized petitioner from a previous encounter, confirmed that petitioner had an outstanding arrest warrant, and placed him under arrest. Ibid. The officer then searched petitioner and found in

his pocket a 9mm caliber pistol loaded with one round of ammunition in the chamber and five rounds of ammunition in the magazine. Ibid. A later search of petitioner also uncovered a pill bottle with .4 grams of heroin, 1.3 grams of methamphetamine, and 8 Clonazepam pills. Ibid.

2. A federal grand jury indicted petitioner on one count of unlawfully possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). PSR ¶ 2. Petitioner pleaded guilty. PSR ¶ 3.

The default term of imprisonment for the offense of possessing a firearm as a felon is zero to 120 months. See 18 U.S.C. 924(a)(2). 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, or both, committed on occasions different from one another." The ACCA defines a "'violent felony'" to include, inter alia, any crime punishable by more than one year 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," examining "the statutory definition[]" of the previous crime in order to determine whether a prior conviction "substantially corresponds" to the "generic" form of burglary referenced in the ACCA. Id. at 600, 602.

Before sentencing in this case, the Probation Office prepared a presentence report stating that petitioner had four prior convictions under Tennessee law that qualified as "violent felon[ies]" for purposes of the ACCA: three convictions for aggravated burglary, in violation of Tenn. Code Ann. § 39-14-403(a) (2010); and one conviction for burglary, in violation of Tenn. Code Ann. § 39-14-402(a)(3) (2014). PSR ¶¶ 19, 28-31.

The relevant Tennessee burglary statute, Tenn. Code Ann. § 39-14-402(a) (2011), provides that a person commits burglary if, "without the effective consent of the property owner," the person:

> (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;
>
> (2) Remains concealed, with the intent to commit a felony, theft or assault, in a building;
>
> (3) Enters a building and commits or attempts to commit a felony, theft or assault; or
>
> (4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.

A person commits aggravated burglary if the structure at issue is a "habitation." Id. § 39-14-403(a) (2010). Petitioner's three aggravated burglary convictions fall under Section 39-14-402(a)(3). Pet. App. 3a.

Petitioner objected to the Probation Office's determination that he was subject to sentencing under the ACCA. In particular, petitioner argued that the (a)(3) variant of Tennessee burglary lacks generic burglary's requirement of intent to commit a crime. See 2019 WL 2746755, at *2. The district court rejected petitioner's arguments, ibid., and adopted the Probation Office's determination that petitioner qualified for sentencing under the ACCA, id. at *3. The court sentenced petitioner to 180 months of imprisonment, to be followed by three years of supervised release. Pet. App. 8a-9a.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-5a. The court explained that its prior decision in Brumbach v. United States, 929 F.3d 791 (6th Cir. 2019), cert. denied, 140 S. Ct. 974 (2020), foreclosed petitioner's contention that the (a)(3) variant of Tennessee burglary does not constitute generic burglary. Pet. App. 5a; see Brumbach, 929 F.3d at 794 ("[C]onvictions under subsections (a)(1), (a)(2), or (a)(3) of the Tennessee burglary statute * * * fit within the generic definition of burglary and are therefore violent felonies for purposes of the ACCA.") (quoting United States v. Ferguson,

868 F.3d 514, 515 (6th Cir. 2017), cert. denied, 139 S. Ct. 2712 (2019)).

ARGUMENT

Petitioner contends (Pet. 7-16) that his prior Tennessee convictions for aggravated burglary do not qualify as generic "burglary" under the ACCA, 18 U.S.C. 924(e)(2)(B)(ii), on the theory that the relevant variant of Tennessee burglary lacks an intent requirement. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or of another court of appeals. This Court has recently and repeatedly denied petitions for writs of certiorari raising various challenges to whether a Tennessee burglary conviction qualifies as generic "burglary," see, e.g., Morris v. United States, 141 S. Ct. 1121 (2021) (No. 20-6461); Gilliam v. United States, 141 S. Ct. 1108 (2021) (No. 20-6306); McClurg v. United States, 141 S. Ct. 937 (2020) (No. 20-6220); Bateman v. United States, 140 S. Ct. 2698 (2020) (No. 19-8030); Stitt v. United States, 140 S. Ct. 2573 (2020) (No. 19-7074); Barnett v. United States, 140 S. Ct. 2548 (2020) (No. 19-7664); Hall v. United States, 140 S. Ct. 1229 (2020) (No. 19-7271); Brumbach v. United States, 140 S. Ct. 974 (2020) (No. 19-6968), including petitions specifically arguing that Section 39-14-402(a)(3) lacks a sufficient intent requirement, see Greer v. United States, 140 S. Ct. 1234 (2020) (No. 19-7324); Ferguson v. United States,

139 S. Ct. 2712 (2019) (No. 17-7496). The Court also has repeatedly denied petitions raising an identical argument with respect to Texas's materially similar burglary statute. See pp. 12-13, infra. The same course is warranted here.

1. The court of appeals correctly recognized that petitioner's aggravated burglary convictions under Tennessee Code Annotated § 39-14-403(a) (2010) constitute convictions for "generic" burglary under Taylor v. United States, 495 U.S. 575 (1990).

a. Taylor held that Congress intended "burglary" in the ACCA to have a "uniform definition" that encompasses any "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." 495 U.S. at 580, 598. This Court further explained in Quarles v. United States, 139 S. Ct. 1872 (2019), that "burglary occurs for purposes of [Section] 924(e) if the defendant forms the intent to commit a crime at any time during the continuous event of unlawfully remaining in a building or structure." Id. at 1877. The Tennessee Court of Criminal Appeals' construction of the (a)(3) variant of burglary substantially corresponds to that definition. See Gov't C.A. Br. 22-23.

In State v. Ivey, No. 2017-2278, 2018 WL 5279375 (Tenn. Crim. App. Oct. 23, 2018), the court rejected a vagueness challenge to Section 39-14-402(a)(3). The court's decision included a thorough

discussion of the burglary statute's history, in which it explained (inter alia) that the (a)(3) variant of burglary jettisoned the requirement that the prosecution "prove intent at the time of entry," as opposed to the development of intent at a later time while the defendant remained in the structure. 2018 WL 5279375, at *10. It cited commentary by the Tennessee Sentencing Commission in 1989, when proposing the current burglary statute, that "[s]ubsection (a)(3) includes as burglary the conduct of one who enters without effective consent but, lacking intent to commit any crime at the time of the entry, subsequently forms that intent and commits or attempts a felony or theft." Ibid. (quoting Tenn. Sent. Comm'n, Proposed Revised Criminal Code 156 (1989)) (emphasis added). And it observed, "[i]ntent generally has to be proven by circumstantial evidence," which may be difficult in cases in which, for example, a building is generally open to the public. Ibid.; see id. at *7.

The Tennessee Court of Criminal Appeals further explained in Ivey that "the legislature chose to enact a burglary statute containing language that was substantially similar to subsection (a)(3) of the statute enacted in Texas." 2018 WL 5279375, at *11 (emphasis omitted); see Tex. Penal Code § 30.02(a)(3) (West 1974) (defining burglary to include instances where, "without the effective consent of the owner," a person "enters a building or habitation and commits or attempts to commit a felony or theft").

The court observed that the legislative history of the Texas provision likewise illustrated that the provision "includes as burglary the conduct of one who enters without effective consent but, lacking intent to commit any crime upon his entry, subsequently forms that intent and commits or attempts a felony or theft." Ivey, 2018 WL 5279375, at *9 (emphasis added; citation omitted). And the court "presume[d]" that the Tennessee legislature was aware of legal developments in Texas, id. at *11, which at the time of the Tennessee statute's enactment in 1989 included judicial interpretation of the Texas burglary provision as reaching "the conduct of one who enters without effective consent but, lacking intent to commit any crime upon his entry, subsequently forms that intent and commits or attempts a felony or theft." United States v. Herrold, 941 F.3d 173, 179 (5th Cir. 2019) (en banc) (quoting DeVaughn v. State, 749 S.W.2d 62, 65 (Tex. Crim. App. 1988) (en banc)), cert. denied, 141 S. Ct. 273 (2020). The Texas law's function as a model for the Tennessee law thus confirms that Tennessee Code Ann. § 35-14-402(a)(3) criminalizes generic remaining-in burglary of the sort at issue in Quarles, not a form of "burglary" for which intent would be wholly absent.

b. Petitioner urges (Pet. 12-16) the opposite construction of Tennessee law. But petitioner does not address the Tennessee Court of Criminal Appeals' analysis in Ivey construing the statute

to require intent. Moreover, in each of the Tennessee burglary decisions that petitioner cites, the defendant formed the intent to commit a crime either before or after entering the burglarized structure. See State v. Welch, 595 S.W.3d 615, 619 (Tenn. 2020) (defendant informed friend "[s]econds before" entering store that she intended to steal merchandise); Ivey, 2018 WL 5279375, at *2 (defendant entered store and stole merchandise); State v. Bradley, No. M2017-376, 2018 WL 934583, at *1 (Tenn. Crim. App. Feb. 15, 2018) (defendant and two accomplices "intrude[d]" into an apartment, "kicked [one victim] in the ribs," and "fir[ed] multiple gunshots at [another victim]"). Petitioner notes (Pet. 15) that, when defining the elements of Tennessee burglary, the Tennessee Pattern Jury Instructions advise that "the defendant [must have] acted either intentionally, knowingly, or recklessly," and that the same instructions advise in a footnote that "'intent' is not required" for burglary under Section 39-14-402(a)(3). 7 Tenn. Pattern Jury Instructions Crim. 14.02 & n.4, Pt. C. (24th ed. 2020). But even assuming that a state burglary statute that criminalizes entry followed by commission of a reckless offense sweeps more broadly than generic burglary, the Tennessee Pattern Jury Instructions "do not have the force of law." State v. Rutherford, 876 S.W.2d 118, 120 (Tenn. Crim. App. 1993); accord State v. Davis, 266 S.W.3d 896, 901 n.2 (Tenn. 2008), cert. denied, 557 U.S. 906 (2009). They accordingly do not undermine the

Tennessee Court of Criminal Appeals' definitive construction of the statute.

In any event, the question whether the court of appeals properly interpreted the Tennessee burglary statute's intent requirement does not warrant this Court's review. Although federal courts must address that issue in applying the ACCA, it is fundamentally a question of state law. This Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," and no sound reason exists to depart from that practice in this case. Bowen v. Massachusetts, 487 U.S. 879, 908 (1988); see Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004) (observing that 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").

2. Petitioner contends (Pet. 8-12, 16) that the decision below and decisions of the Fifth Circuit considering Texas's burglary statute conflict with the Seventh Circuit's decision in Van Cannon v. United States, 890 F.3d 656 (2018). That contention lacks merit.

As petitioner observes (Pet. 16), the Fifth Circuit has upheld an ACCA sentence based on a narrow construction of the Texas burglary statute on which the Tennessee statute was modeled. United States v. Herrold, 941 F.3d 173 (5th Cir. 2019) (en banc),

cert. denied, 141 S. Ct. 273 (2020); see Tex. Penal Code Ann. § 30.02(a)(3) (West 2017). The Fifth Circuit explained that "Texas law rejects [the defendant's] no-intent interpretation" of the statute. Herrold, 941 F.3d at 179. The Fifth Circuit's construction of the Texas statute -- and its determination that burglary under that statute qualifies as "burglary" for purposes of the ACCA -- is thus consistent with the decision of the court of appeals in this case.

The Seventh Circuit in Van Cannon, however, construed a Minnesota burglary statute not to "require proof of intent to commit a crime at all." 890 F.3d at 664. According to the Seventh Circuit, a conviction under the Minnesota statute could be premised on a mental state of "only recklessness or criminal negligence." Ibid.; see Chazen v. Marske, 938 F.3d 851, 860 (7th Cir. 2019) (reaffirming Van Cannon). For that reason, the court of appeals adopted the view that a conviction under the Minnesota statute does not constitute generic burglary for purposes of the ACCA.

Given the courts' differing interpretations of the Tennessee and Texas statutes, on the one hand, and the Minnesota statute, on the other, Van Cannon "has little relevance" to the question presented in this case. Herrold, 941 F.3d at 180. This Court has accordingly denied several petitions for writs of certiorari asserting a conflict between the Fifth Circuit's decision in Herrold and the Seventh Circuit's decision in Van Cannon. See,

e.g., Smith v. United States, No. 20-6773 (Apr. 19, 2021); Lister v. United States, 141 S. Ct. 1727 (2021) (No. 20-7242); Webb v. United States, 141 S. Ct. 1448 (2021) (No. 20-6979); Wallace v. United States, 141 S. Ct. 910 (2020) (No. 20-5588); Herrold v. United States, 141 S. Ct. 273 (2020) (No. 19-7731). The same result is warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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