

No. 17-6681

IN THE SUPREME COURT OF THE UNITED STATES

JASON PERRY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's convictions for burglary, in violation of Ind. Code Ann. § 35-43-2-1 (West Supp. 2002) and (West 2004), qualify as convictions for "violent felon[ies]" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2) (B) (ii).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 862 F.3d 620.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2017. A petition for rehearing was denied on August 4, 2017 (Pet. App. 9a). The petition for a writ of certiorari was filed on November 2, 2017. 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 Southern District of Indiana, petitioner was convicted on two counts of unlawful possession of a firearm or ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). He was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. Judgment 1-3. The court of appeals affirmed. Pet. App. 1a-8a.

1. In 2013, petitioner purchased a box of 12-gauge shotgun shells from a Wal-Mart in Indiana. Later that day, police were dispatched to a Mexican restaurant, where petitioner was arguing with his ex-girlfriend. The police asked petitioner to leave, but he returned less than an hour later. Petitioner confronted his ex-girlfriend in the parking lot and shot her to death in front of their 13-year-old son and the victim's mother. Petitioner was convicted of murder in state court and received an 85-year sentence, with 15 years suspended to probation. Pet. App. 2a.

A federal grand jury charged petitioner with two violations of 18 U.S.C. 922(g)(1), one for unlawful possession of a firearm by a felon, and the other for unlawful possession of ammunition by a felon. Petitioner pleaded guilty to both counts. Pet. App. 2a.

2. Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of unlawful possession of a firearm

or ammunition following a felony conviction is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), 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," 18 U.S.C. 924(e) (1). 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 generally to employ a "categorical approach" to determine whether a prior conviction meets that definition. 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 are the same as, or narrower than, generic burglary, the prior offense categorically qualifies

as a predicate conviction under the ACCA. 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) (citation omitted); Descamps v. United States, 570 U.S. 254, 262 (2013); Shepard v. United States, 544 U.S. 13, 26 (2005).

Prior to sentencing, the Probation Office prepared a Presentence Investigation Report (PSR). The PSR stated that petitioner was subject to sentencing under the ACCA because he had three prior convictions for a "violent felony": one conviction for battery resulting in serious bodily injury, and two convictions for burglary under Indiana Code Annotated § 35-43-2-1 (West Supp. 2002) and (West 2004), which criminalizes the burglary of any "building or structure of another person." Ind. Code § 35-43-2-1 (2017);¹ see PSR ¶¶ 20, 33, 36, 37; Pet. App. 2a.

¹ Although Indiana's burglary statute was amended in 2014, the current version and the versions in effect at the time of petitioner's prior offenses classify burglary of a "building or structure of another person" as a felony. Ind. Code § 35-43-2-1 (2017) (Level 5 felony); Ind. Code Ann. § 35-43-2-1 (West Supp. 2002) and (West 2004) (Class C felony).

At sentencing, the district court determined that petitioner's three prior convictions qualified as "violent felonies" for purposes of the ACCA. Pet. App. 2a, 10a. As relevant here, the court explained that petitioner's prior burglary convictions were violent felonies "because burglary is an enumerated offense" in the ACCA. Id. at 10a. The court sentenced petitioner to 360 months of imprisonment, to be followed by five years of supervised release. Id. at 1a-2a; Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1a-8a. It determined that a conviction under the Indiana burglary statute categorically qualifies as a conviction for "generic" burglary under the ACCA. Id. at 3a-7a. The court rejected petitioner's argument that the Indiana burglary statute is broader than "generic" burglary because "Indiana burglary may be committed in outdoor, fenced-in areas." Id. at 4a. The court explained that the Indiana burglary statute was different from a Florida statute encompassing burglary of "curtilage," which this Court in James v. United States, 550 U.S. 192 (2007), viewed as broader than "generic" burglary. Pet. App. 4a; see id. at 4a-5a. "Although curtilage under the Florida burglary statute requires 'some form of enclosure,'" the court of appeals observed, "it 'does not require total enclosure.'" Id. at 5a (quoting Chambers v. State, 700 So. 2d 441, 442 (Fla. Dist. Ct. App. 1997)). "Indiana

burglary," the court emphasized, "requires that the defendant enter a wholly enclosed area." Ibid.; see id. at 5a-6a. The court therefore concluded that James "does not take Indiana burglary outside the definition of generic burglary." Id. at 6a.

ARGUMENT

Petitioner renews his contention (Pet. 6-18) that burglary in violation of Indiana Code Annotated § 35-43-2-1 (West Supp. 2002) and (West Supp. 2004) does not qualify as "burglary" under the ACCA, 18 U.S.C. 924(e)(2)(B)(ii), because the Indiana statute criminalizes burglary of completely fenced-in areas. The court of appeals correctly rejected petitioner's argument, and its decision is not in direct conflict with any decision of this Court or of another court of appeals. Further review is not warranted.²

1. a. The original 1984 version of the ACCA provided an enhanced sentence for offenders who had three previous convictions "for robbery or burglary," with "burglary" defined to include "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." Armed Career Criminal Act of 1984 (1984 ACCA), Pub. L. No. 98-473, Tit. II, ch.

² Another pending petition for a writ of certiorari presents the same question. See Steele v. United States, No. 17-6779 (filed Nov. 10, 2017).

XVIII, 98 Stat. 2185 (18 U.S.C. App. 1202(a) and (c)(9) (Supp. III 1985)) (repealed in 1986 by the Firearms Owners' Protection Act (FOPA), Pub. L. No. 99-308, § 104(b), 100 Stat. 459); see Taylor v. United States, 495 U.S. 575, 581 (1990). When Congress amended the list of enumerated offenses in 1986, it left burglary in place as the first of those offenses, but deleted the preexisting definitional section. See Taylor, 495 U.S. at 582-585 (discussing this history); Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39; 18 U.S.C. 924(e)(2)(B)(ii).

In Taylor, this Court held that Congress intended "burglary" in the amended version of the ACCA to have a "uniform definition." 495 U.S. at 580; see id. at 591-592. The Court declined to adopt the common law's definition of burglary -- "the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony" -- because that narrow definition "ha[d] little relevance to modern law enforcement concerns" that animated the ACCA. Id. at 580 n.3, 593 (citation omitted). Instead, the Court adopted a broader construction of "burglary" that encompassed any "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Id. at 599. The Court has since equated a "structure"

with an "enclosed space" for purposes of burglary under the ACCA. Shepard v. United States, 544 U.S. 13, 15-16 (2005).

b. Indiana's burglary statute mirrors Taylor's definition of generic burglary: it criminalizes the burglary of any "building or structure of another person." Indiana Code § 35-43-2-1 (2017). Like this Court in Shepard, Indiana courts equate a "structure" with certain "enclosed space[s]." Shepard, 544 U.S. at 15-16. Indiana courts have construed the term "structure" to include a gated fence "without any holes or openings" that "surround[s]" and "secure[s]" or "protect[s]" a business "premises." McCovens v. State, 539 N.E.2d 26, 29 (Ind. 1989); see also Gray v. State, 797 N.E.2d 333, 335-336 (Ind. Ct. App. 2003) (locked fence enclosing and protecting a car lot that served as "an integral part" of auto-repair business was a "structure"); Joy v. State, 460 N.E.2d 551, 555, 558 (Ind. Ct. App. 1984) (gated fence surrounding and protecting lumber company premises was "an integral part of a closed compound" and constituted a "structure") (citation omitted); Hankins v. State, 9 N.E.3d 259 (Ind. Ct. App. 2014) (Tbl.), 2014 WL 1053714, at *1 (unpublished) (storage cage surrounded on two sides by Wal-Mart building and "completely fenced in on the other two sides" was a "structure"); cf. Calhoon v. State, 842 N.E.2d 432, 435 (Ind. Ct. App. 2006) (declining to

conclude that a fence that was open on one side was a "structure" for purposes of Indiana burglary).

Taylor explained that "Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598. At the time of the 1986 amendments, numerous States had burglary statutes that, like Indiana's, encompassed burglary of certain completely fenced-in premises. See, e.g., State v. Olivero, 115 A.3d 1270, 1274-1277 (N.J. 2015) (fenced-in parking lot used as storage for a manufacturing facility is a "structure" within the meaning of New Jersey burglary statute enacted in 1980); State v. Hill, 449 N.W.2d 626, 626-628 (Iowa 1989) (fenced enclosure behind auto parts store is an "occupied structure" for purposes of Iowa burglary statute enacted in 1984); People v. Moyer, 635 P.2d 553, 556 (Colo. 1981) (en banc) (city pound's fenced outdoor kennel is an "occupied structure" for purposes of Colorado burglary statute); Stanley v. State, 512 P.2d 829, 831-832 (Okla. Crim. App. 1973) (lumber yard that was "completely enclosed by building walls or by a fence" is a "structure" for purposes of Oklahoma burglary statute); Jenkins v. State, 230 A.2d 262, 275 (Del. 1967) (Delaware's fourth-degree burglary statute covers burglary of junkyard "surrounded by a fence").

Taylor further explained that its definition of generic burglary "approximate[d] [the definition] adopted by the drafters of the Model Penal Code." 495 U.S. at 598 n.8. Since 1980, the Model Penal Code has described burglary as the unlawful entry into "a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein." Model Penal Code § 221.1(1) (1980). The phrase "occupied structure" includes "any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." Id. § 221.0(1). The Code's commentary accordingly makes clear that someone could be prosecuted for burglarizing "structures other than buildings, e.g., mines or ships," as long as the particular structure was "adapted for overnight accommodation or for the ordinary carrying on of business." Id. § 221.1 cmt. 3(b). Indiana courts' interpretation of the term "structure" to include fully-fenced in business premises is thus consistent with the Model Penal Code's definition.

2. Petitioner's contrary argument (Pet. 15-18) rests on this Court's decision in James v. United States, 550 U.S. 192 (2007). James held that the Florida offense of attempted burglary of a dwelling does not categorically qualify as "burglary" under the ACCA because, under Florida law, a "dwelling" includes "not

only the structure itself, but also the 'curtilage thereof.'" Id. at 212 (quoting Fla. Stat. § 810.011(2) (1993)). Petitioner's reliance on James is misplaced. Unlike Indiana's burglary statute, Florida's provision encompasses burglary of curtilage that is not completely enclosed and protected by a fence. See id. at 213 (observing that the Florida Supreme Court has construed curtilage to require "'some form of an enclosure'" (quoting State v. Hamilton, 660 So. 2d 1038, 1044 (Fla. 1995))). To constitute curtilage in Florida -- and thus to qualify as the location of a burglary -- "the enclosure need not be continuous and an ungated opening for ingress and egress does not preclude a determination that [a] yard is included in the curtilage." Dubose v. State, 210 So. 3d 641, 653-654 (Fla. 2017) (per curiam) (citation omitted; first set of brackets in original); see Chambers v. State, 700 So. 2d 441, 442 (Fla. Dist. Ct. App. 1997) ("Hamilton does not require total enclosure.").

Because James addressed curtilage that is not fully enclosed, it does not undermine the conclusion that certain fully fenced-in and enclosed premises constitute "structures" for purposes of "burglary" under the ACCA. Indeed, neither the Court nor the parties in James focused on the distinction between partially and fully-enclosed spaces. See James, 550 U.S. at 213 (stating that "curtilage" under Florida law requires "'some form of an

enclosure'") (citation omitted); U.S. Br. at 39-40, James, supra (No. 05-9264) (noting that Florida case law distinguishes between a space protected by "some form of an enclosure" and one that is "not enclosed in any manner") (citations omitted); Pet. Br. at 22-23 & n.14, James, supra (No. 05-9264) (citing cases for the proposition that Florida burglary may be committed by entering an "open carport," a "paved area [that is] partially enclosed," or a "'neighbor's backyard'") (citation omitted).

3. Petitioner contends (Pet. 7-9) that the decision below conflicts with decisions from the Third, Ninth, and Eleventh Circuits. That contention is mistaken. As a threshold matter, no other court of appeals has addressed whether burglary under Indiana law constitutes "burglary" for purposes of the ACCA. And the decisions on which petitioner relies, which interpret other state provisions, do not present a square conflict warranting this Court's review.

The Third Circuit has not directly addressed whether burglary of a completely fenced-in and secured business premises constitutes "burglary" under the ACCA. In United States v. Bennett, 100 F.3d 1105 (1996), the court held that Pennsylvania's burglary statute, which covers "[a]ny structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein," 18 Pa. Cons. Stat. § 3501 (1995), is broader

than generic burglary. 100 F.3d at 1109. In reaching that conclusion, the Third Circuit stated that a person could be convicted of Pennsylvania burglary "for unlawful entry into a yard where commercial activity occurs." Ibid. But the court did not address whether burglary of such a yard completely enclosed and secured by a fence would constitute generic burglary for purposes of the ACCA. See ibid.

Nor did the Ninth Circuit squarely address that question in United States v. Wenner, 351 F.3d 969 (2003). Wenner examined whether Washington's residential burglary statute qualifies as "burglary of a dwelling" under the former version of Sentencing Guidelines § 4B1.2, which the court of appeals considered to be governed by the definition of "burglary" set forth in Taylor. 351 F.3d at 972-973. Wenner concluded that Washington's residential burglary statute is broader than generic burglary because "[s]ome things that are dwellings under Washington law" -- such as "fenced areas, railway cars, and cargo containers" -- "are not buildings or structures under federal law, and so cannot support a conviction for generic 'burglary' under Taylor." Id. at 972; see Wash. Rev. Code § 9A.52.025(1) (2002); id. § 9A.04.110(5) and (7). With respect to "fenced areas," the court stated that "burglarizing a fenced area that doubles as a dwelling is a residential burglary under Washington law, but not a

'burglary' under Taylor." 351 F.3d at 972-973.³ But Wenner did not address any potential distinction between partially and fully-fenced areas. See ibid.

The Eleventh Circuit's decision in United States v. Esprit, 841 F.3d 1235 (2016), is likewise inapposite. Esprit addressed Florida's burglary statute, which "defines 'structure' to include the curtilage of a building." Id. at 1240 (citing Fla. Stat. § 810.011(1) (2015)). The court of appeals concluded that Florida burglary is broader than generic burglary under the ACCA because Florida burglary does not require an unlawful entry into a building or structure. Id. at 1241. As explained above, however, Florida's burglary statute does not require curtilage to be completely fenced in. See Dubose, 210 So. 3d at 653-654. Accordingly, Esprit does not address whether burglary of a completely fenced-in premises constitutes ACCA burglary.

³ The Fifth Circuit concluded that Washington's residential burglary statute does constitute the generic crime of "burglary of a dwelling" for purposes of the former Sentencing Guidelines. See United States v. Guerrero-Navarro, 737 F.3d 976, 979-980 (2013). The court in Guerrero-Navarro noted that as a practical matter, prosecutions under Washington's residential burglary statute generally involve burglary of "vacant houses, vacation houses, 'trailer' houses, attached garages, attached sheds and apartment work rooms," all of which constitute "building[s] or structure[s]" under Taylor. Id. at 980.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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