

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-1690

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMAR ALONZO QUARLES,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Michigan at Grand
Rapids.

Decided and Filed: March 10, 2017

Before: SILER, MOORE, and GRIFFIN, *Circuit
Judges.*

SILER, *Circuit Judge:*

Defendant Jamar Quarles appeals his sentence, including the district court's determination that Michigan's crime of third-degree home invasion is equivalent to generic burglary, thus constituting a predicate offense under the Armed Career Criminal

Act (“ACCA”). Specifically, he argues that the Michigan statute: (1) includes locations that are broader than generic burglary and (2) does not properly have an intent-upon-entry element that is required under generic burglary. If Quarles succeeds on his challenge, he also challenges a three-point increase in criminal history. We affirm the district court’s determination that Michigan’s crime of third-degree home invasion is categorically equivalent to generic burglary.¹

FACTUAL AND PROCEDURAL BACKGROUND

Quarles was charged in a single-count indictment with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). He pleaded guilty to that charge without a plea agreement. At his original sentencing, the district court held that Quarles’s conviction for third-degree home invasion was a violent felony under the residual clause of the ACCA. The district court expressly declined to rule whether that offense qualified as generic burglary. Finding this as Quarles’s third-predicate offense under the ACCA, the district court sentenced him to 204 months’ incarceration. On appeal, this court vacated the sentence in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and remanded the case for resentencing. On remand, the district court considered whether Michigan’s crime of third-degree home invasion constituted a “violent felony.” Finding that it was the “functional equivalent of generic burglary,” the district court resentenced Quarles to 204 months’ incarceration.

¹ We do not address Quarles’s arguments as they relate to the modified-categorical approach or his three-point increase in criminal history.

DISCUSSION

I. Quarles's *Johnson* Claim

a. Standard of Review

We review de novo whether a prior conviction qualifies as a “violent felony” under the ACCA. *United States v. Mitchell*, 743 F.3d 1054, 1058 (6th Cir. 2014).

b. Categorical Approach

When determining whether a particular crime qualifies as a violent felony, we start with the “categorical approach.” *Id.* We look “to the fact of conviction and the statutory definition of the prior offense.” *Id.* We then “compare the elements of the crime of conviction with the elements of the ‘generic’ version of the listed offense—*i.e.*, the offense as commonly understood.” *Mathis v. United States*, 136 S. Ct. 2243, 2247 (2016). The prior conviction qualifies as an ACCA predicate offense only if its “elements are the same as, or narrower than, those of the generic offense.” *Id.*

In this case, we must compare Michigan’s third-degree home invasion statute with the elements of generic burglary. Michigan Compiled Laws § 750.110a(4) provides:

(4) A person is guilty of home invasion in the third degree if the person does either of the following:

(a) Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is

entering, present in, or exiting the dwelling, commits a misdemeanor.

(b) Breaks and enters a dwelling or enters a dwelling without permission and, at any time while the person is entering, present in, or exiting the dwelling, violates any of the following ordered to protect a named person or persons:

- (i) A probation term or condition.
- (ii) A parole term or condition.
- (iii) A personal protection order term or condition.
- (iv) A bond or bail condition or any condition of pretrial release.

The generic definition of burglary, as defined by the Supreme Court, is “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). Comparing these two definitions, Quarles argues that the Michigan statute is overbroad in two respects. First, he argues that the term “dwelling,” as defined in the statute, encompasses more than the “building or other structure[s]” found in *Taylor*. Second, Quarles argues that the Michigan statute does not require intent to commit a crime upon entry, thus making it overbroad. We will address each of these arguments separately.

The Government argues that this court has already decided the issue. *See United States v. Gibbs*, 626 F.3d 344, 353 (6th Cir. 2010); *see also United States v. Horton*, 163 F. App’x 378, 381–82 (6th Cir. 2006) (finding that subsection (4)(a) of the third-degree home invasion statute is categorically the

equivalent of burglary of a dwelling). In *Gibbs*, this court held that “a conviction for second-degree home invasion under Michigan law is the equivalent of the enumerated offense of burglary of a dwelling and therefore constitutes a ‘crime of violence.’” *Id.* at 353 (citations omitted). While second-degree home invasion and third-degree home invasion are indistinguishable for ACCA purposes, *Gibbs* was decided prior to *Descamps v. United States*, 133 S. Ct. 2276 (2013). Just to ensure that *Descamps* did not upset the holdings in *Gibbs* and *Horton*, we will engage in a full de novo review.

i. Dwelling

Michigan Compiled Laws § 750.110a(1)(a) defines a dwelling as “a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter.” Quarles argues that the term “shelter” could include places such as a “tree . . . a vehicle, boat, outcropping of rock, cave, bus stop, or a suspended tarp” that “are not buildings or structures.” This argument fails.²

The Supreme Court has explained that “to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute’s language.” *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). In order to succeed, the defendant must show “a realistic probability, not a theoretical possibility, that the

² Quarles conceded, in the district court, that the term structure “arguably has the same meaning as the term ‘structure’ in the generic burglary definition.” Therefore, his argument focuses on the term “shelter.”

State would apply its statute to conduct that falls outside the generic definition of a crime.” *Id.* In this case, Quarles offers only hypothetical arguments.

The main reason that Quarles can point only to hypothetical arguments rather than concrete examples is because the plain language of Michigan’s third-degree home invasion statute is narrow. The American Heritage Dictionary defines shelter as “something, especially a structure, that provides cover or protection, as from the weather.” While this definition does provide room for broad application, the Michigan statute limits shelter to only those that are “used permanently or temporarily as a place of abode.” Mich. Comp. Laws § 750.110a(1)(a). The American Heritage Dictionary defines abode as “a dwelling place; a home.” With this limitation, it would be a stretch, rather than a realistic probability, that a tree, vehicle, boat, outcropping of rock, cave, bus stop, or suspended tarp would be considered a “home.” Furthermore, the claim that the Michigan legislature intended to encompass a broad range of places is undercut by the fact that when the legislature intended to include those places, they were expressly incorporated. For example, Michigan Compiled Laws § 750.110(1) states:

A person who breaks and enters, with intent to commit a felony or a larceny therein, a tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat, ship, shipping container, or railroad car is guilty of a felony punishable by imprisonment for not more than 10 years.

See, e.g., *United States v. Ritchey*, 840 F.3d 310, 318 (6th Cir. 2016) (finding Mich. Comp. Laws § 750.110 broader than generic burglary).³

Therefore, we hold this statute’s use of the term “dwelling” does not encompass more areas than “building or structures” found in *Taylor*.

ii. Intent-At-Entry

An alternative way of committing third-degree home invasion is to break and enter a dwelling and, at any time while entering, present in, or exiting the dwelling, commit a misdemeanor. See Mich. Comp. Laws § 750.110a(4)(a). Quarles argues that this alternative “does not qualify as generic burglary” because it “does not necessarily have an intent-at-entry element.”

The question of whether generic burglary requires intent at entry has resulted in a circuit split focusing on *Taylor*’s “remaining in” language. Compare *United States v. Bonilla*, 687 F.3d 188, 193–94 (4th Cir. 2012) (finding that *Taylor* does not require that intent exist at entry), with *United States v. Constante*, 544 F.3d 584, 587 (5th Cir. 2008) (finding a statute “is not a generic burglary under the *Taylor* definition because it does not contain an element of intent to commit a [crime] at the moment of entry”). Essentially, the circuit split hinges on whether the “remaining in” language allows for the development of intent at any point or whether the intent must exist at entry.

³ In his Rule 28(j) letter, Quarles argues that *Ritchey* compels us to rule in his favor. However, *Ritchey* is distinguishable because the statute at issue explicitly lists places outside of buildings or structures.

We have already ruled on the issue. *See United States v. Priddy*, 808 F.3d 676, 685 (6th Cir. 2015). In *Priddy*, we determined whether a variant of the Tennessee burglary statute, Section 39-14-402(a)(3), qualified as an ACCA predicate offense. *Id.* Finding that it qualified under *Taylor*, we held that it was “a ‘remaining-in’ variant of generic burglary because someone who enters a building or structure and, while inside, commits or attempts to commit a felony will necessarily have remained inside the building or structure to do so.” *Id.*

Accordingly, generic burglary, as defined in *Taylor*, does not require intent at entry; rather the intent can be developed while “remaining in.” *See Taylor*, 495 U.S. at 598 (defining generic burglary as “an unlawful or unprivileged entry into, *or remaining in*, a building or other structure, with intent to commit a crime”) (emphasis added).

AFFIRMED.

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APPENDIX B

Case No. 16-1690

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMAR ALONZO QUARLES,

Defendant-Appellant.

Before: SILER, MOORE, and GRIFFIN, Circuit
Judges

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

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ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

/s/ Deborah S. Hunt

Issued: June 28, 2017

APPENDIX C
STATUTORY PROVISIONS

1. 18 U.S.C. § 922 provides:

* * *

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * *

2. 18 U.S.C. § 924 provides:

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever--

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of

a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter, shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922, shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a

violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)--

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or

otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

* * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C.

802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * *

3. Mich. Comp. Laws § 750.110a provides:

* * *

(4) A person is guilty of home invasion in the third degree if the person does either of the following:

(a) Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is

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entering, present in, or exiting the dwelling, commits a misdemeanor.

(b) Breaks and enters a dwelling or enters a dwelling without permission and, at any time while the person is entering, present in, or exiting the dwelling, violates any of the following ordered to protect a named person or persons:

(i) A probation term or condition.

(ii) A parole term or condition.

(iii) A personal protection order term or condition.

(iv) A bond or bail condition or any condition of pretrial release.

* * *