

No. 17-8153

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL EDWARD MOORE, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOHN P. CRONAN
Acting Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

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

QUESTION PRESENTED

Whether a state offense that criminalizes continued unauthorized presence in a building following the formation of intent to commit a crime has "the basic elements of unlawful * * * remaining in * * * a building or structure, with intent to commit a crime," Taylor v. United States, 495 U.S. 575, 599 (1990), thereby qualifying as "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2) (B) (ii).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-4a) is unreported. The memorandum opinion of the district court (Pet. App. 5a-10a) is unreported. A prior opinion of the court of appeals (Pet. App. 11a-20a) is not published in the Federal Reporter but is reprinted at 578 Fed. Appx. 550.

JURISDICTION

The judgment of the court of appeals was entered on December 14, 2017. The petition for a writ of certiorari was filed on March

14, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on one count of unlawful possession of a firearm following a prior felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e); and one count of possession of a stolen firearm, in violation of 18 U.S.C. 922(j) and 924(a)(2). Judgment 1-2. He was sentenced to 235 months of imprisonment, to be followed by three years of supervised release. Id. at 3-4. The court of appeals affirmed. Pet. App. 11a-20a.

In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. Pet. App. 5a. The district court denied petitioner's motion and his request for a certificate of appealability (COA). Id. at 5a-10a. The court of appeals likewise denied a COA. Id. at 1a-4a.

1. In May 2010, petitioner was involved in a child-custody dispute with his wife. Pet. App. 12a. When petitioner enlisted the police to help him obtain physical custody of his child, they ran a computerized record check on petitioner, which revealed an outstanding warrant. Ibid. Officers attempted to arrest petitioner, who fled on foot to a friend's automobile. Ibid. Officers then discovered a magazine containing ten bullets under

the seat petitioner had occupied in the vehicle. Ibid.; see Presentence Investigation Report (PSR) ¶ 12. Police later recovered a pistol also associated with petitioner. PSR ¶ 13.

In September 2010, police responded to a report of a stolen pistol. PSR ¶ 14. Officers learned that the individual who had stolen the pistol brought it to petitioner's home, and that petitioner -- who knew the gun was stolen -- accepted it in exchange for tattoos. PSR ¶¶ 15-16. Officers later recovered the gun from the residence of petitioner's relative. PSR ¶ 16.

A federal grand jury charged petitioner with two counts of unlawful possession of a firearm following a previous felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e); one count of unlawful possession of ammunition following a previous felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e); and one count of possession of a stolen firearm, in violation of 18 U.S.C. 922(j). Indictment 1-2. Petitioner proceeded to trial, and a jury found him guilty on one count of possession of a firearm by a felon and one count of possession of a stolen firearm (the counts related to the stolen gun recovered in September 2010) and acquitted him on the remaining counts. PSR ¶ 3.

2. Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of unlawful possession of 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), 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, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. 924(e)(2)(B)(ii). The latter part of that definition (beginning with “otherwise involves”) is frequently referred to as the “residual clause.” See Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

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 further instructed courts generally to employ a “categorical approach” to determine whether a prior conviction meets this definition. Id. at 600.

Under that approach, courts examine “the statutory definition[]” of the previous crime in order to determine whether the prior conviction necessarily reflects conduct that constitutes the “generic” form of burglary referenced in the ACCA. Taylor, 495 U.S. at 600. If the statute of conviction encompasses a range

of conduct that is 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 -- under what is known as the "modified categorical approach" -- (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) (citations omitted); Descamps v. United States, 570 U.S. 254, 262 (2013); Shepard v. United States, 544 U.S. 13, 26 (2005).

The Probation Office determined that petitioner had five prior convictions under Tennessee law that qualified as "violent felon[ies]" for purposes of the ACCA: one conviction for aggravated burglary, and four convictions for burglary. Pet. App. 13a; see PSR ¶¶ 30, 58. The Probation Office thus determined that, with respect to the felon-in-possession conviction, petitioner qualified for sentencing under the ACCA. PSR ¶ 89. The Probation Office calculated petitioner's advisory Guidelines range at 235 to 293 months. PSR ¶ 91.

At sentencing, petitioner objected to application of the ACCA. He argued that his four Tennessee burglary convictions did

not categorically qualify as generic "burglary" under the ACCA, and that they also did not qualify as violent felonies under the statute's "residual clause." Pet. App. 13a. The district court overruled petitioner's objections and sentenced him to 235 months of imprisonment. Ibid.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 11a-20a. The court held that Tennessee's burglary statute was divisible and, accordingly, applied the modified categorical approach to determine which version of the crime formed the basis of petitioner's prior Tennessee convictions.¹ Id. at 14a-16a. Because the state court judgments indicated that petitioner had pleaded guilty to a Class D felony version of burglary, the court of appeals concluded that petitioner must have been convicted under Tennessee Code Annotated § 39-14-402(a)(1), (a)(2), or (a)(3) (2010). Pet. App. 16a-18a.

Petitioner had conceded that Subsection (a)(1) and (a)(2) constitute generic "burglary" under the Taylor definition. Pet.

¹ A person commits "burglary" in Tennessee when, "without the effective consent of the property owner," he (1) "[e]nters 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) "[r]emains concealed, with the intent to commit a felony, theft or assault, in a building;" (3) "[e]nters a building and commits or attempts to commit a felony, theft or assault;" or (4) "[e]nters 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." Tenn. Code Ann. § 39-14-402(a) (2010).

App. 17a-18a. The court of appeals therefore assumed without deciding that petitioner had been convicted under Subsection (a)(3), which covers circumstances in which the defendant “[e]nters a building and commits or attempts to commit a felony, theft or assault,” Tenn. Code Ann. § 39-14-402(a)(3) (2010). Pet. App. 17a. The court determined that this offense “qualifies as a violent felony under the residual clause of the ACCA,” and it “express[ed] no view on whether it would also” constitute “burglary” under the enumerated-offenses clause. Id. at 18a & n.3.

4. In 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551, that the ACCA’s residual clause is unconstitutionally vague. Id. at 2557. In 2016, this Court held in Welch, supra, that Johnson’s holding applies retroactively to cases on collateral review. 136 S. Ct. at 1268.

Following Johnson, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. D. Ct. Doc. No. 63 (May 13, 2016). He argued that application of the ACCA in his case depended on the operation of the now-invalid residual clause and that he should be resentenced without the ACCA enhancement. Id. at 2. Petitioner further contended that his Tennessee burglary convictions did not alternatively qualify as generic “burglary” convictions under the ACCA’s enumerated-offenses clause. Id. at 3. In particular, petitioner argued that burglary under Tennessee Code Annotated

§ 39-14-402(a)(3) (2010) is “broader than generic burglary because it does not require the intent to commit a crime upon entry.” D. Ct. Doc. 63, at 3.

The district court denied petitioner’s motion. Pet. App. 5a-10a. The court observed that petitioner’s burglary convictions were for Class D burglary, and that the Sixth Circuit had held, in United States v. Priddy, 808 F.3d 676 (2015), abrogated on other grounds by United States v. Stitt, 860 F.3d 854 (6th Cir. 2017) (en banc), cert. granted, 138 S. Ct. 1592 (2018) (No. 17-765), that all three variants of Class D burglary qualify as “generic burglary” under the ACCA. Pet. App. 9a; see Priddy, 808 F.3d at 685 (“[B]urglary under § 39-14-402(a)(3) is also 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.”). The district court accordingly determined that petitioner was not entitled to relief, because at least three of petitioner’s prior burglary convictions remain violent felonies under the ACCA. Pet. App. 9a.²

The district court declined to issue a COA under 28 U.S.C. 2253(c)(2) because petitioner “ha[d] failed to make a substantial

² In light of that conclusion, the district court declined to address whether petitioner’s prior Tennessee conviction for aggravated burglary qualified as generic “burglary” under the ACCA. Pet. App. 9a-10a.

showing of the denial of a constitutional right.” Pet. App. 10a (citing 28 U.S.C. 2253).

5. The court of appeals denied petitioner’s application for a COA in an unpublished order. The court reasoned that “pursuant to [its] decision in Priddy, [petitioner’s] burglary convictions qualify as generic burglary and thus are violent felonies under the ACCA’s enumerated-offense clause.” Pet. App. 3a (citing Priddy, 808 F.3d at 684-685). The court thus concluded that “reasonable jurists could not debate the district court’s conclusion that [petitioner’s] burglary convictions qualify as violent felonies.” Id. at 4a.

DISCUSSION

Petitioner contends (Pet. 6-19) that this Court should grant certiorari to determine whether “generic” burglary, as defined by Taylor v. United States, 495 U.S. 575 (1990), requires that a defendant have the intent to commit a crime at the precise moment that he first enters or initially remains in a building or structure without authorization. Although the court of appeals correctly resolved that question, as the government has explained in its brief in Quarles v. United States, No. 17-778 (Mar. 30, 2018), and its petition for a writ of certiorari in United States v. Herrold, No. 17-1445 (filed Apr. 18, 2018), the question has divided the courts of appeals and warrants this Court’s review.

See Gov't Br. at 10-12, Quarles, supra (No. 17-778); Pet. at 9-11, Herrold, supra (No. 17-1445).

Herrold and Quarles would each provide a better vehicle for deciding the question presented than would this case. The Court should therefore grant the petition for a writ of certiorari in one or both of those cases and hold this case pending disposition that would follow such plenary review. In the alternative, the Court may wish to hold the petitions in Herrold, Quarles, and this case pending its decision in United States v. Stitt, 138 S. Ct. 1592 (2018) (No. 17-765), and United States v. Sims, 138 S. Ct. 1592 (2018) (No. 17-766), which may illuminate the proper scope of "burglary" under the ACCA.³

1. For the reasons explained in the government's brief in Quarles, supra, and the petition for a writ of certiorari in Herrold, supra, the court of appeals in this case correctly recognized that "burglary" under the ACCA encompasses circumstances in which a defendant develops the intent to commit a crime after his entry or initial decision to remain in a building or structure without authorization. See Gov't Br. at 7-10, Quarles, supra (No. 17-778); Pet. at 9-10, Herrold, supra (No. 17-1445). This Court has construed "burglary" in the ACCA to

³ In addition to Herrold, supra, and Quarles, supra, two other pending petitions for a writ of certiorari present the same question. See Secord v. United States, No. 17-7224 (filed Dec. 19, 2017); Ferguson v. United States, No. 17-7496 (filed Jan. 17, 2018).

encompass any “unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” Taylor, 495 U.S. at 599. As relevant here, Tennessee law defines burglary as follows:

A person commits burglary who, without the effective consent of the property owner:

- (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; [or]
- (3) Enters a building and commits or attempts to commit a felony, theft or assault.

Tenn. Code Ann. § 39-14-402(a)(1)-(3) (2010). As the court of appeals has interpreted the statute, under any of these variants, petitioner necessarily had to form the intent to commit a felony, theft, or assault, either before he entered the building or while he was still inside. See United States v. Priddy, 808 F.3d 676, 684-685 (6th Cir. 2015), abrogated on other grounds by United States v. Stitt, 860 F.3d 854 (6th Cir. 2017) (en banc), cert. granted, 138 S. Ct. 1592 (2018) (No. 17-765). Even if the intent was formed after petitioner entered, his offenses satisfied Taylor’s definition of “burglary” because he entered the building without authorization and “remain[ed]” there “with intent to commit a crime.” Taylor, 495 U.S. at 599.

2. As petitioner notes (Pet. 8-13), however, the courts of appeals are divided on the question presented, which concerns the proper interpretation of the common ACCA predicate of burglary.

See Gov't Br. at 10-12, Quarles, supra (No. 17-778). This Court's review is accordingly warranted in an appropriate case.

Quarles and Herrold provide better vehicles than this case for resolving the conflict in the courts of appeals. In both cases, the courts of appeals considered the question presented in published opinions on direct appeal of the imposition of a criminal sentence; in Herrold, the court did so en banc. See United States v. Herrold, 883 F.3d 517, 520-521, 531-536 (5th Cir. 2018), petition for cert. pending, No. 17-1445 (filed Apr. 18, 2018); United States v. Quarles, 850 F.3d 836, 837, 840 (6th Cir. 2017), petition for cert. pending, No. 17-778 (filed Nov. 24, 2017). By contrast, in this case, the court of appeals addressed the question presented in an unpublished order denying petitioner's application for a COA to contest the denial of a motion for collateral relief. See Pet. App. 1a-4a. This Court accordingly should grant the petition for a writ of a certiorari in either or both of Quarles and Herrold, and hold the petition in this case pending its decision there. See Pet. at 11, Herrold, supra (No. 17-1445) (suggesting that if the Court wishes to review the issue in the context of multiple state statutes, it could grant the petitions in both Quarles and Herrold and consolidate them for review).

3. In the alternative, this Court may wish to hold the petitions in Quarles, Herrold, and this case pending its decision in Stitt, supra, and Sims, supra. Stitt and Sims present the

question whether burglary of a nonpermanent or mobile structure adapted or used for overnight accommodation can qualify as "burglary" under the ACCA. The Court's decision may provide guidance on the proper scope of ACCA burglary and thus the question presented in Quarles, Herrold, and this case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of the petitions for a writ of certiorari in United States v. Herrold, No. 17-1445 (filed Apr. 18, 2018), and Quarles v. United States, No. 17-778 (filed Nov. 24, 2017), and then disposed of as appropriate. In the alternative, the petition should be held pending the Court's decision in United States v. Stitt, 138 S. Ct. 1592 (2018) (No. 17-765), and United States v. Sims, 138 S. Ct. 1592 (2018) (No. 17-766), and then disposed of as appropriate.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JOHN P. CRONAN
Acting Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

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