

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DANETRIUS TOLLIVER,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

On Petition for A Writ of Certiorari
From The United States Court of
Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
With Appendix

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QUESTION PRESENTED FOR REVIEW

The Appellant's Appeal was denied on January 19, 2018 by the Sixth Circuit Court of Appeals. In this case, the Appellant raised one (1) issue for determination by this Court. That issue is a Tennessee Burglary conviction based on T.C.A. 49-14-402 qualifies as a predicate offense for Armed Career Criminal Act consideration. The Appellant objected to the inclusion of the Burglary convictions as predicate offenses because of the Tennessee Burglary Statute covers more ground than a generic Burglary. The burglary convictions allowed his sentence to be enhanced in the Armed Career Criminal Act (ACCA, 18 U.S.C. §924(c)). The Appellant objected to the use of these Burglary convictions to make him eligible for this enhanced punishment. At the Sentencing Hearing the Defendant argued that none of the five (5) Tennessee Burglary convictions qualified as a violent felony predicate offense. The Appellant was sentenced to one hundred and eighty (180) months. The sentence was ordered by the Honorable Judge Mattice of the United States District Court, Eastern District of Tennessee.

The Sixth Circuit, in *U.S. v. Stitt* No. 14-6158 an (*en banc* decision), (6th Cir. decided June 27, 2017), concluded that an aggravated burglary conviction from The State of Tennessee under T.C.A. 49-14-401 cannot be used as a predicate offense to qualify under The Armed Career Criminal Act based on the Tennessee

Burglary Statute. This case was decided four months after the Appellant was sentenced.

The *en banc* decision in *Stitt* held that,

“The Supreme Court has determined that under the ACCA, a generic Burglary means an unlawful or unprivileged entry into or remaining in a, building or structure with the intent to commit a crime.” *Taylor*, 495, U.S. at 598.

The Sixth Circuit went on to say in the *Stitt* decision that the Supreme Court left “building or other structure” undefined. The Supreme Court has held repeatedly that vehicles, moving enclosures, e.g., cars, motorcars, tents and booths, fall outside the definition and differential sweep of “building or other structure.” See *Mathis v. U.S* 136 S. Ct. 2243, 2250 (2016) The Supreme Court held that when considering the Iowa Burglary statute that it covers more ground than generic Burglary because it reaches a broader range of places, and because of that, it was broader than what a generic Burglary was, and because of that an Iowa Burglary conviction could not be used as a predicate offense for ACCA purposes.

The Sixth Circuit in *Stitt* went on to look at the fact that mobile homes, trailers and tents as well as any other self propelled vehicle that Tennessee’s Aggravated Burglary statute includes exactly the kinds of vehicles and moving enclosure the Supreme Court excludes from generic Burglary. The Court went on to look at one

(1) specific part of T.C.A. §39-14-401 (1), which criminalizes the unauthorized entry into vehicles and movable enclosures with criminal intent only designed for other accommodations or persons, and found that the statute was broader than a generic Burglary, and excluded Tennessee's Aggravated Burglaries as a predicate offense for ACCA purpose.

The Sixth Circuit in the *Stitt* decision, found that an Aggravated Burglary conviction from The State of Tennessee pursuant to T.C.A. §49-13-403 was not qualified as a predicate offense under the Armed Career Criminal Act. Further, that the definition of what a habitation is under the Aggravated Burglary conviction is defined in T.C.A. §39-14-401 and T.C.A. §39-14-402. T.C.A. §39-14-402 (a)(4) states,

“Provides the entry into any freight, passenger car, automobile, truck, trailer, boat airplane or other motor vehicle with attempt to commit a Felony, Theft or Assault or an attempt to commit a Felony, Theft or Assault was qualified.”

The fact that a Tennessee Burglary conviction could also be completed by entry into a variety of self-propelled vehicles in the Tennessee Burglary Statute is key. The Tennessee Burglary statute includes the same type of vehicles and movable structures, and is broader than the definition of generic burglary and as such, a conviction under this statute does not qualify as an ACCA predicate offense but the

Court ignored this argument and relied on prior decisions without considering the *Stitt* decision.

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1. Opinion, United States Court of Appeals for the Sixth Circuit, *United States of America v. Danetrius J. Tolliver*, C.A. No.17-5298, January 19, 2018, (not recommended for full text publication).

2. Judgment in a Criminal Case, United States District Court for the Eastern District of Tennessee at Chattanooga, *United States of America v. Danetrius J. Tolliver*, District Court No. 1:16-CR-42, March 6, 2017.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit entered its Opinion in this case on January 19, 2018. This Court's jurisdiction is invoked under Title 28 U.S. Code 1254 (1). Rule 13 of the Supreme Court allows ninety (90) days within which to file a Petition for Writ of Certiorari after entry of the Judgment by the Appellate Court for the denial of a Petition for rehearing, whichever is later. Accordingly, this Petition is timely filed.

The Petitioner, Danetrius J. Tolliver, respectfully prays that a Writ of Certiorari issue to review the Judgment of the District Court and the Opinion of the United States Court of Appeals for the Sixth Circuit. In that Opinion, the Sixth Circuit Affirmed the District Court and found no error in the sentence of the Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution.

STATEMENT OF THE CASE AND RELEVANT FACTS

The Defendant, Danetrius Tolliver, pled guilty to a one (1) count Indictment charging him with a violation of 18 U.S.C. §922 (g)(1) and was sentenced to one hundred eighty (180) months pursuant to the Armed Career Criminal Act (ACCA, 18 U.S.C. §924 (e)). He now challenges the District Court's determination that he was an Armed Career Criminal based on convictions of the Tennessee Burglary Statute which were ruled to be predicate offense.

On January 16, 2016 the Chattanooga Police Department responded to a residence in Chattanooga, Tennessee on a report of an attempted home invasion. When they arrived at the scene responding officers were advised by the residents that the suspect had fled the scene in a blue Silverado pickup truck. The Chattanooga Police Department spotted a truck matching the description in the area. After officers attempted to stop the vehicle, the truck sped away and wrecked into a ditch nearby. The Chattanooga Police Department arrested the Defendant in the truck. A firearm was found in the vehicle and the Appellant waived his Miranda Rights and made a statement to the police stating that the firearm was his. The Presentence Report designated Mr. Tolliver as an Armed Career Criminal with a mandatory minimum sentence of one hundred eighty (180) months based on his

five (5) Tennessee Burglary convictions as a predicate offense. The Appellant was sentenced to one hundred eighty (180) months, the mandatory minimum sentence by the District Court. The District Court relied on the Presentence Report (PSR) and found Mr. Tolliver to be an Armed Career Criminal for sentencing. The Court rejected the Defendant's/Appellant's Objections to the PSR that the Burglary convictions in the State of Tennessee would not apply because of the Tennessee Burglary Statute being over-broad in its definition of a Burglary.

The Court rejected the argument that the Burglary convictions would not apply as predicate offense. The District Court held that based upon the current state of the law at that time in the Sixth Circuit, that it was necessary to designate the Appellant as an Armed Career Criminal. The Court did not make a separate determination as to what the sentence would have been if Mr. Tolliver was not found to be an Armed Career Criminal under the ACCA. Because the Court did not rule on other objections in regards to the PSR based on the fact that that would not change the potential sentence of the Appellant if he was classified as an Armed Career Criminal. The Court stated,

“Okay. Having made all the rulings I’m going to make today, I’m going to order the presentence investigation report be made a part of the record in Mr. Tolliver’s case. I further find the Presentence investigation report accurately reflects the facts stated therein; and, to the extent we are bound by the armed career criminal statute,

reflects an advisory guideline range that would yield a sentence lower than that mandatory minimum. Okay?"

The U.S. Attorney also agreed that all other objections made to the Presentence Report were reserved if and when there was a favorable ruling in regards to the Appellant's Appeal. At that time, the Defendant/Appellant was sentenced to a term of one hundred eighty (180) months and the Defendant/Appellant timely Appealed.

ARGUMENT

The Appellant, Danetrius Tolliver, pled guilty to possession of a firearm as a convicted felon in violation of 18 U.S.C. §922(g). The Presentence Report prepared for the Court stated that, the Appellant was subject to being an Armed Career Criminal under the ACCA. The Appellant had five (5) prior Burglary convictions under the Tennessee Burglary Statute T.C.A. §39-14-402. The Presentence Report held that the Burglary convictions qualified as predicate offense. The Appellant objected to the use of the convictions under the Tennessee Burglary Statute T.C.A. §39-14-402. The Appellant filed written objections to the Presentence Report. The Appellant raised an objection stating that the Tennessee Burglary Statute and all convictions under the Burglary Statute should not count as predicate offenses based on the U.S. Supreme Court's decision in *Mathis v. The United States*, 136. S. Ct. 2243 (2016). His objections are based on the fact that the Tennessee Burglary Statute T.C.A. §39-14-401, which defines Burglary, was overly broad. The text of T.C.A. §39-14-402,

(a) a person who commits Burglary who without the effective consent of the property owner (4) enters a freight or passenger car, automobile, truck, trailer or other motor vehicle with the intent to commit a Felony, Theft or Assault or attempt to commit a Felony, Theft or Assault.

The statute is overly broad for ACCA purposes. And as such, a conviction under this statute should not qualify as an ACCA predicate offense.

The Sixth Circuit in a case decided on June 27, 2017 *United States of America v. Victor J. Stitt*, held that the Tennessee Aggravated Burglary Statute should not apply. The Sixth Circuit, in the *Stitt* decision stated,

“To determine whether *Stitt*’s aggravated-burglary convictions qualify, we apply the “categorical approach”. *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). Under this approach, we compare the statutory elements of Tennessee aggravated burglary to the elements of “generic burglary”. See *id.* If the elements of Tennessee aggravated burglary “are the same as, or narrower than, those of [generic burglary,]” *Stitt* convictions as violent felonies under the ACCA. *Id.*

“Tennessee defines aggravated burglary as the “burglary of a habitation,” Tenn. Code Ann. §39-14-403, and defines “habitation” as “any structure...which is designed or adapted for the overnight accommodation of persons,” *id.* §39-14-401(1)(A). The term “habitation” includes “mobile homes, trailers, and tents,” as well as any “self-propelled vehicle that is designed or adapted for the overnight accommodations of persons and is actually occupied at the time of initial entry by the defendant.” *Id.*

When this Court applied the categorical approach to the Tennessee Aggravated Burglary Statute, the Court decided that because the statute specifically allowed non-buildings to be subject to the Aggravated Burglary

Statute, that that itself made the statute too broad. The Supreme Court has determined under the ACCA that generic Burglary means, an unlawful or unprivileged entry into, or remaining in, a building or structure with the intent to commit a crime. The Sixth Circuit Court went on to state in the majority Opinion,

“By contrast, the Supreme Court has determined that under the ACCA, “generic burglary” means “an unlawful entry into, or remaining in, a building or other structure, with intent to commit a crime.” *Taylor*, 495 U.S. at 598. Although the Court left “building or other structure” undefined, it has confirmed repeatedly that vehicles and movable enclosures (e.g., railroad cars, tents and booths) fall outside the definitional sweep of “building or other structure”. See *id* at 599; *Mathis v. United States*, 136 S. Ct. 2243, 2250 (2016) (explaining that Iowa’s burglary statute “covers more conduct than generic burglary” because it “reaches a broader range of places”: “any building, structure, [or] land, water, or air vehicle,” (alteration in original) (citations omitted)); *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009) (differentiating between breaking into a “vessel,” which would not qualify as generic burglary, and “breaking into a building,” which would). *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186-87 (2007) (noting that Massachusetts defines burglary to include breaking into a vehicle, “which falls outside the generic definition of ‘burglary,’ for a car is not a ‘building or structure’” (citations omitted)); *Shepard v. United States*, 544 U.S. 13, 15-16 (2005) (“The [ACCA] makes burglary a violent felony only if committed in a building or enclosed space...not a boat or motor vehicle.”).

“By including “mobile homes, trailers, and tents,” as well as any “self-propelled vehicle,” Tennessee’s aggravated-burglary statute includes exactly the kinds of vehicles

and movable enclosures that the Court excludes from generic burglary. But the statute comes with a wrinkle: it criminalizes the unauthorized entry into vehicles and movable enclosures (with criminal intent) *only if* they are “designed or adapted for the overnight accommodation of persons.” Tenn. Code Ann. § 39-14-401(1). In other words, it restricts the ambit of the statute to only those vehicles and movable enclosures that are habitable.

This court went on to find that if the Burglary statute covers vehicles or other movable enclosures, then that the statute was too broad to qualify as a predicate offense under the ACCA. That is also true for a Tennessee Burglary decision.

Under ACCA, a defendant who violates 18 U.S.C. §922 (g) is subject to a fifteen (15) year mandatory minimum sentence if he has three (3) previous convictions by any Court for a crime punishable by the serving of a term exceeding one (1) year and those convictions constitute violent Felonies and/or serious drug offenses or both at times different from one another. 18 U.S.C. §924 (e)(1), 922 (g)(1). ACCA defines a violent felony

“As a crime punishable by imprisonment for a term exceeding one (1) 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 a term if committed by an adult that:

(i) the use, attempted use or threatened use of physical force against the person, or

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

The Sixth Circuit Court faced a similar issue in another recent case from the State of Michigan. *United States v. Christopher Ritchey*, No. 15-2460(6th Cir. Oct. 2016) which dealt with a Burglary from the State of Michigan, and the Michigan Statute that defined what a Burglary conviction was. The Court, in that decision, discussed the Supreme Court’s decision in *Mathis*. The Supreme Court in that case, stated,

“A state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense.”

The Court held,

“A conviction under the statute cannot serve as an ACCA predicate because the elements of Iowa’s burglary statute covers a greater swath of conduct than the elements of generic burglary.”

The decision goes on to say,

“In reaching this conclusion, the Court noted that under generally established principals, “the ‘underlying brute facts or means’ of commission are irrelevant for purposes of ACCA. *Id.* “Even if his conduct fits within the generic offense, the mismatch of elements saves the Defendant from an ACCA sentence.” *Id.* Thus, the Court clarified that Sentencing Courts should engage in “an elements-only inquiry” [a]ll the counts under the ACCA are the

elements of a statute of conviction.” *Id.* At 2251-52. This is true even if the “sentencing Judge knows (or can easily discover) that the Defendant carried out a ‘real’ Burglary.” *Id.* at 2251.

“The Court gave three basic justifications in *Mathis* for limiting the ACCA inquiry to elements, rather than treating as divisible a non-generic Burglary statute that lists alternative means for satisfying a particular element. First, it determined that the ACCA text favors this result. Second, a construction of ACCA allows a Sentencing Judge to go any further would raise Sixth Amendment concerns because only a jury and not a judge may find facts that includes the maximum penalty. Except for the simple fact of a prior convictions. *Id. Apprendi v. New Jersey*, 530 U.S. 466, 490(2000) and third “an elements-focus avoids unfairness to the Defendant given that “[s]tatement of ‘non-elemental fact’ in the records a prior convictions are prone to error, precisely because the proof is unnecessary.” *Id.* At 2253 (citing *Descamps*, 133 S. Ct. at 2288-89).

In another recent decision from the Eighth Circuit, *United States v. Sims*, which was filed on April 27, 2017, the Eighth Circuit, held that the residential Burglary convictions from Arkansas did not qualify as ACCA predicate offenses,

“It is inconsequential that Arkansas’s statute confines residential burglary to vehicles “[i]n which any person lives” or [t]hat [are] customarily used for overnight accommodation.” Ark. Code Ann. §5-39-101(4)(A); see also *United States v. Forrest*, 611 F. 3d 908, 913 (8th Cir. 2010) (finding a Colorado burglary statute was categorically broader than generic burglary because it covered vehicles adapted for overnight accommodations). We therefore conclude that Arkansas residential burglary categorically sweeps more broadly

than generic burglary.”

In this case, the Tennessee Burglary Statute is clearly overbroad under the *Mathis* decision, and a conviction under the Tennessee Burglary Statute should not be used as a predicate offense for ACCA consideration.

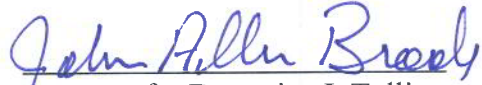
The Tennessee Burglary Statute specifically allows that a Burglary can occur either by a freight or passenger car, automobile, truck, trailer, boat or other motor vehicle. This clearly makes the Tennessee Burglary Statute overbroad and a conviction under the Tennessee Burglary Statute cannot be a predicate offense under the ACCA.

CONCLUSION

Based on the forgoing facts, the Petitioner respectfully prays that this Court issue a Writ of Certiorari to review the substantial and important Federal issues outlined above and to reverse the decision of the Sixth Circuit Court of Appeals and the Judgment of the United States District Court, Eastern District of Tennessee in Chattanooga.

Respectfully submitted,

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