

No. 17-9127

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL HERROLD, PETITIONER

v.

UNITED STATES OF AMERICA

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2) (B) (ii).

2. Whether a holding by this Court that cross-petitioner's prior burglary convictions constitute "burglary" under the ACCA's enumerated-offenses clause, 18 U.S.C. 924(e) (2) (B) (ii), would deprive cross-petitioner of fair notice in violation of the Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-70a)¹ is reported at 883 F.3d 517. A prior opinion of the court of appeals (Pet. App. 71a-73a) is not published in the Federal Reporter but is reprinted at 685 Fed. Appx. 302, and an additional prior opinion (Pet. App. 74a-81a) is reported at 813 F.3d 595.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2018. The petition for a writ of certiorari in No. 17-1445

¹ References to "Pet. App." refer to the appendix to the government's petition for a writ of certiorari in No. 17-1445.

was filed on April 18, 2018. The conditional cross-petition for a writ of certiorari in this case was filed on May 21, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The background of this case is described in the government's petition for a writ of certiorari (at 2-9) in No. 17-1445. That petition seeks review of the court of appeals' holding that continued unpermitted presence in a dwelling following the formation of intent to commit a crime does not constitute "unlawful[ly] * * * remaining in * * * a building or structure, with intent to commit a crime," Taylor v. United States, 495 U.S. 575, 599 (1990), so as to qualify as "burglary" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii). This statement sets forth additional facts relevant to the questions presented in the conditional cross-petition.

1. Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of unlawful possession of a firearm following a prior felony conviction is zero to 120 months. The 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." 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 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." 495 U.S. 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 crime of conviction in order to determine whether it 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 -- 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) (citation omitted); Descamps v. United

States, 570 U.S. 254, 261-262 (2013); Shepard v. United States, 544 U.S. 13, 26 (2005).

2. Following a guilty plea in the United States District Court for the Northern District of Texas, cross-petitioner was convicted of unlawful possession of a firearm after a previous felony conviction, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The Probation Office prepared a presentence report, which stated that cross-petitioner had three prior convictions under Texas law that qualified as either a "violent felony" or "serious drug offense" for purposes of the ACCA: (1) possession with intent to distribute LSD, (2) burglary of a habitation, and (3) burglary of a building. See PSR ¶¶ 24, 31, 33, 34. With respect to the burglary convictions, the relevant Texas statute, Texas Penal Code Annotated § 30.02(a) (West Supp. 2017), provides that a person commits burglary,

if, without the effective consent of the owner, the person:

- (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
- (2) remains concealed, with the intent to commit a felony, theft, or an assault, in a building or habitation; or
- (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

Ibid.; see Pet. App. 5a-6a.

As relevant here, cross-petitioner disputed that his prior Texas burglary convictions qualified as "burglary" under the ACCA. Cross-petitioner argued that the Texas burglary statute is

indivisible and that a burglary conviction under Section 30.02(a)(3) does not constitute generic burglary. Def.'s Objections to the PSR 13-15. He further argued that the Texas burglary statute's locational element is overbroad because Texas law defines "[h]abitation" to include vehicles adapted for overnight accommodation, see Tex. Penal Code Ann. § 30.01(1) (West. Supp. 2017). Def.'s Objections to the PSR 8-12.

The district court rejected cross-petitioner's arguments and adopted the PSR's determination that he qualified for an ACCA sentence. Sent. Tr. 52. The court sentenced cross-petitioner to 211 months of imprisonment, to be followed by two years of supervised release. Id. at 52-53.

3. The court of appeals affirmed. Pet. App. 74a-81a. As relevant here, the court held that cross-petitioner's prior convictions under Texas Penal Code Annotated § 30.02(a) (West Supp. 2017) constitute generic burglary for purposes of the ACCA. Pet. App. 75a-80a.

Cross-petitioner filed a petition for a writ of certiorari. While that petition was pending, this Court decided Mathis, supra, which clarified when statutes are divisible and subject to the modified categorical approach. The Court then granted cross-petitioner's petition, vacated the Fifth Circuit's judgment, and remanded the case for further consideration in light of Mathis. 137 S. Ct. 310.

On remand, the court of appeals affirmed cross-petitioner's sentence in an unpublished opinion. The court relied on circuit precedent rejecting cross-petitioner's arguments that the Texas burglary statute is indivisible, and that Texas's definition of "habitation" renders the statute overbroad. Pet. App. 71a-73a.

4. The court of appeals granted rehearing en banc, vacated petitioner's sentence, and remanded for resentencing. Pet. App. 1a-70a.

a. As discussed in the government's petition for a writ of certiorari (at 6-8) in No. 17-1445, over the dissent of seven of the 15 judges who participated in the proceeding, the en banc majority overturned prior circuit law, concluded that Texas Penal Code Annotated § 30.02(a) (West Supp. 2017) is indivisible, and held that Subsection (a)(3) is broader than Taylor's definition of generic burglary. Pet. App. 5a-37a.

The majority construed Taylor to include "a contemporaneity requirement: to be guilty of generic burglary, a defendant must have the intent to commit a crime when he enters or remains in the building or structure." Pet. App. 25a-26a. On the majority's view, Taylor's reference to "remaining in" refers only to "a discrete event that occurs at the moment when a perpetrator, who at one point was lawfully present, exceeds his license and overstays his welcome," rather than "a continuous state that begins immediately after unauthorized entrance and lasts until departure." Id. at 27a (quoting United States v. McArthur,

850 F.3d 925, 939 (8th Cir. 2017)). The majority applied that reading of Taylor to hold that neither of cross-petitioner's prior burglary convictions counted as ACCA predicates, Pet. App. 37a, because Section 30.02(a)(3) "contains no textual requirement that a defendant's intent to commit a crime contemporaneously accompany" the defendant's initial act of entering or remaining without authorization, id. at 25a-26a.

Given its resolution of the contemporaneous-intent issue, the majority declined to resolve cross-petitioner's alternative contention that Texas's definition of "habitation" -- which includes "a structure or vehicle that is adapted for the overnight accommodation of persons" -- makes burglary of a habitation under Texas law broader than generic burglary. Pet. App 38a (quoting Tex. Penal Code Ann. § 30.01(1) (West Supp. 2017)).

b. Judge Haynes, joined by six other judges, dissented. Pet. App. 48a-70a. She explained that cross-petitioner's prior convictions for burglary under Section 30.02(a) constituted ACCA burglaries regardless of whether the statute is divisible, because each of the statute's subsections -- including Section 30.02(a)(3) -- is a generic burglary offense. Id. at 53a-58a. Judge Haynes reasoned that Section 30.02(a)(3) criminalizes the "remaining-in" burglary described in Taylor 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. at 56a-57a (quoting United States v.

Priddy, 808 F.3d 676, 685 (6th Cir. 2015), abrogated on other grounds by United States v. Stitt, 860 F.3d 854 (6th Cir. 2017), cert. granted, No. 17-765 (Apr. 23, 2018)).

Judge Haynes also rejected cross-petitioner's alternative argument that the Texas burglary statute is overbroad because it protects vehicles designed for overnight accommodation, such as motor homes. Pet. App. 59a-70a. Judge Haynes explained that "[c]areful consideration of Supreme Court precedent plus common sense" indicate that a statute does not exceed the scope of ACCA "burglary" simply because its locational element includes mobile habitations. Id. at 70a.

5. The government filed a petition for a writ of certiorari in No. 17-1445 seeking review of the court of appeals' holding that "generic" burglary, as defined in Taylor, supra, requires that a defendant have the intent to commit a crime at the moment he enters or initially remains in a building or structure without authorization. Cross-petitioner then filed this conditional cross-petition for a writ of certiorari.

DISCUSSION

Cross-petitioner contends that if this Court grants the government's petition for a writ of certiorari in No. 17-1445, it should also grant review of two questions the court of appeals did not address: (1) whether Texas's statutory definition of "habitation" renders the relevant burglary offense overbroad; and

(2) whether, if the Court agrees with the government that cross-petitioner's prior burglary offenses constitute "burglary" under the ACCA, applying that decision in this case would deprive cross-petitioner of fair notice in violation of the Constitution. Because the first question presented is currently before the Court in United States v. Stitt, cert. granted, No. 17-765 (Apr. 23, 2018), and United States v. Sims, cert. granted, No. 17-766 (Apr. 23, 2018), if this Court grants the government's petition for a writ of certiorari, it should hold the conditional cross-petition pending the decision in Stitt and Sims and then dispose of it as appropriate. Review of cross-petitioner's second question, however, is not warranted.

1. Cross-petitioner first renews his contention (Cross-Pet. 4-10) that his Texas burglary-of-a-habitation conviction does not qualify as "burglary" under the ACCA because Texas's definition of a "habitation" includes "a structure or vehicle that is adapted for the overnight accommodation of persons." Tex. Penal Code Ann. § 30.01(1) (West Supp. 2017). The Court is currently considering two similar state provisions in Stitt, supra, and Sims, supra, which present the question whether burglary of a nonpermanent or mobile structure adapted or used for overnight accommodation can qualify as "burglary" under the ACCA. In the event the Court grants the government's petition for a writ of certiorari in No. 17-1445, or holds that petition pending its resolution of another case that presents an identical question, the conditional cross-

petition should be held pending the Court's decision in Stitt and Sims, and then disposed of as appropriate in light of that decision.

Cross-petitioner argues (Cross-Pet. 10) that any plenary review in this case should include express consideration of his first question presented on the theory that Stitt, supra, and Sims, supra, "will not necessarily resolve whether Texas's adapted-vehicle offense is a generic burglary." On cross-petitioner's view (ibid.), "[b]oth [the] Tennessee and Arkansas" provisions at issue in Stitt and Sims "require proof that the vehicle be used in its non-transportation capacity," while the Texas provision "only requires that the vehicle be adapted for overnight accommodation." That is incorrect. The Arkansas provision at issue in Sims applies to, inter alia, "a vehicle * * * [t]hat is customarily used for overnight accommodation of a person whether or not a person is actually present." Ark. Code Ann. § 5-39-101(4)(A) (2013) (emphasis added). And the Tennessee statute at issue in Stitt applies to, inter alia, "any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of a person." Tenn. Code Ann. § 39-14-401(1)(A) (2014) (emphasis added). Neither statute categorically requires proof of actual occupancy or use for overnight accommodation at the time of the burglary.² Because

² As cross-petitioner notes (Cross-Pet. 10), Tennessee Code Annotated § 39-14-401(1)(B) (2014) defines a "habitation" to include "a self-propelled vehicle that is designed or adapted for

Stitt and Sims present the same question as does the cross-petition, that question need not be added to this case.

2. Cross-petitioner also argues that if the Court grants the government's petition for a writ of certiorari in No. 17-1445, it should "consider whether the confluence" of this Court's agreement with the government on both the question presented in Stitt and Sims regarding the locational element of generic burglary and the question presented in this case regarding generic burglary's intent requirement would be "consistent with the principle of fair notice." Cross-Pet. 11 (capitalization and emphasis altered); see id. at 11-14. Review of that issue is not warranted.

Cross-petitioner briefly raised a fair-notice argument before the en banc court of appeals, see Cross-Pet. 12 n.10, but neither the majority nor the dissent addressed it, see Pet. App. 1a-70a. Because this Court is one "of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), this Court should not consider the issue in the first instance. That is particularly so because cross-petitioner fails to identify any court that has addressed the type of fair-notice challenge to the ACCA's enumerated-offenses provision that he makes here, let alone upheld such a challenge. See Cross-Pet. 11-14. Thus, review of this question would be premature.

the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant."

In any event, cross-petitioner's claim fails on the merits. Cross-petitioner invokes (Cross-Pet. 11) this Court's decision in Johnson v. United States, 135 S. Ct. 2551, 2557 (2015), which held that the ACCA's residual clause was unconstitutionally vague. But Johnson "d[id] not call into question application of the [ACCA] to the four enumerated offenses," including burglary. Id. at 2563. Nor does petitioner's claim even rely on the vagueness doctrine that provided the basis for the holding in Johnson.

Instead, cross-petitioner appears to contend (Cross-Pet. 11-14) that a judicial interpretation agreeing with the government's interpretation of ACCA burglary would constitute a change from existing law that would violate his right to fair notice of what conduct may be used to enhance a criminal sentence. But to the extent an "unforeseeable judicial enlargement of a criminal" sentencing statute could be deemed to violate the Due Process Clause, Marks v. United States, 430 U.S. 188, 192 (1977) (citation omitted), that principle would not apply here. Until the en banc decision below, Fifth Circuit precedent foreclosed cross-petitioner's arguments. See Pet. App. 72a-73a, 75a-80a. Thus, at the time cross-petitioner unlawfully possessed a gun in 2012, he was on notice that his prior Texas burglary convictions made him eligible for sentencing under the ACCA. Although the Fifth Circuit changed its law in this case and granted him relief, cross-petitioner cannot insulate that change from review by arguing that

a return to the state of circuit law before he succeeded in overturning it would deprive him of fair notice.

Furthermore, even if prior circuit law had not foreclosed cross-petitioner's claims, this Court's clarification of Taylor's definition of ACCA burglary would present no constitutional concerns. This Court has never held that burglary of a nonpermanent or mobile structure adapted or used for overnight accommodation cannot qualify as "burglary" under the ACCA. Nor has it held that the development of intent to commit a crime following a defendant's unauthorized entry into, or initial remaining in, a building or structure, cannot satisfy generic burglary's intent requirement. And multiple courts of appeals have rejected cross-petitioner's position on those questions. See Gov't Br. at 7-10, Quarles v. United States, No. 17-778 (Mar. 30, 2018); Pet. at 18-19, Stitt, supra (No. 17-765); Pet. Reply Br. at 4-5, Stitt, supra (No. 17-765). Thus, a holding in the government's favor would not alter the established "definition of generic burglary," Cross-Pet. 14, or constitute an "unforeseeable judicial enlargement" of the statute, Marks, 430 U.S. at 192 (citation omitted). Cf. id. at 194 (finding due process notice problem where subsequent case "marked a significant departure" from prior decision of this Court interpreting obscenity statute, which "was the law" at the time of defendants' conduct).

CONCLUSION

If the Court grants the government's petition for a writ of certiorari in No. 17-1445, or holds that petition pending its resolution of another case presenting an identical question, the conditional cross-petition for a writ of certiorari should be held pending the Court's decision in United States v. Stitt, cert. granted, No. 17-765 (Apr. 23, 2018), and United States v. Sims, cert. granted, No. 17-766 (Apr. 23, 2018), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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