

No. 17-9171

IN THE SUPREME COURT OF THE UNITED STATES

JONATHAN SANDOVAL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

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

QUESTION PRESENTED

Whether the court of appeals correctly determined that New Mexico's residential-burglary statute, N.M. Stat. Ann. § 30-16-3(A) (2004), does not cover burglary of a vehicle, watercraft, aircraft, or similar structure if used as a residence, and thus qualifies as generic "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2) (B) (ii), even if generic burglary excludes such structures.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A3) is not published in the Federal Reporter but is reprinted at 705 Fed. Appx. 773. The order of the district court (Pet. App. D1-D8) is unreported. The proposed findings and recommended disposition of the magistrate judge (Pet. App. F1-F10) is unreported but is available at 2017 WL 4271325.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2017. A petition for rehearing was denied on February 23,

2018 (Pet. App. B1). The petition for a writ of certiorari was filed on May 24, 2018. 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 District of New Mexico, petitioner was convicted on one count of unlawful possession of ammunition after a previous felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Pet. App. G1. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. Id. at G2-G3. Petitioner did not file a direct appeal.

In 2016, petitioner filed a motion to vacate his sentence pursuant to 28 U.S.C. 2255. C.A. ROA 141-142, 151-162. The district court denied the motion and denied a certificate of appealability (COA). Pet. App. D1-D8, E1. The court of appeals likewise denied a COA. Id. at A1-A3.

1. On August 24, 2011, a confidential source informed officers with the Albuquerque Police Department that a brown Toyota sedan would arrive at a particular intersection for a narcotics transaction. Presentence Investigation Report (PSR) ¶ 13. Officers conducted surveillance, observed a brown Toyota sedan's arrival, and watched petitioner emerge. PSR ¶ 14. Petitioner met another individual in the parking lot and engaged in a hand-to-

hand transaction with him. Ibid. Petitioner then placed an item in the trunk of his car. Ibid.

Officers arrested petitioner. PSR ¶ 14. During a subsequent search, officers recovered 6.4 grams of cocaine base from the pocket of petitioner's pants. PSR ¶ 15. Officers also found, in the trunk of the car, an open backpack containing 15.107 grams of cocaine and 5.7 grams of marijuana. Ibid. Next to the backpack, officers found a digital scale and 30 cartridges of .40-caliber ammunition. Ibid.

2. A federal grand jury charged petitioner with one count of unlawful possession of ammunition after a previous felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); and one count of possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). PSR ¶ 1. Petitioner and the government entered into a plea agreement pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. PSR ¶ 3. Petitioner agreed to plead guilty to the unlawful-possession-of-ammunition count and stipulated to a 180-month sentence, and the government agreed to drop the drug count. PSR ¶¶ 2-3, 10.

Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of unlawful possession of ammunition after a previous felony conviction is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), however,

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, * * * extortion [or] involves use of explosives" (the "enumerated felonies clause") "or otherwise involves conduct that presents a serious potential risk of physical injury to another" (the "residual clause"). 18 U.S.C. 924(e) (2) (B) (ii); 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 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 "substantially corresponds" to, or is narrower

than, generic burglary, the prior offense categorically qualifies as a predicate conviction under the ACCA. Id. at 602. 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 found, or the defendant admitted, the elements of generic burglary. See Mathis v. United States, 136 S. Ct. 2243, 2249 (2016) (citations omitted); Descamps v. United States, 133 S. Ct. 2276, 2284 (2013); Shepard v. United States, 544 U.S. 13, 26 (2005).

The Probation Office determined that petitioner had five prior convictions for residential burglary under N.M. Stat. Ann. § 30-16-3(A) (2004) that qualified as "violent felon[ies]" for purposes of the ACCA. PSR ¶ 30. The Probation Office accordingly determined that petitioner qualified for sentencing under the ACCA. PSR ¶¶ 30, 81. It calculated petitioner's advisory Guidelines range at 188 to 235 months, but noted that the parties had stipulated to a 180-month sentence under Federal Rule of Criminal Procedure 11(c)(1)(C). PSR ¶¶ 82-83. Petitioner did not challenge the Probation Office's determination that his prior convictions constituted "violent felonies" for purposes of the ACCA. See C.A. ROA 126-127, 130-135.

The district court accepted the Rule 11(c)(1)(C) agreement and sentenced petitioner to 180 months of imprisonment, to be followed by three years of supervised release. 2/12/14 Sent. Tr. 6, 9; Pet. App. G2-G3. Petitioner did not file a direct appeal.

3. 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, relying on Johnson, petitioner filed a pro se motion to vacate his sentence pursuant to 28 U.S.C. 2255. C.A. ROA 141-142, 151-162. Through appointed counsel, petitioner subsequently argued that his ACCA sentence was unlawful under Johnson because his New Mexico residential-burglary convictions could have counted as "violent felon[ies]" only under the now-invalidated residual clause. Pet. App. D2-D3. The government countered that the convictions qualified as convictions for "burglary" under the enumerated felonies clause. Id. at D3 (citation omitted).¹

The magistrate judge recommended that the Section 2255 motion be denied. Pet. App. F1-F10. The magistrate judge observed that petitioner was convicted of violating N.M. Stat. Ann. § 30-16-3(A) (2004), which prohibits "enter[ing] a dwelling house with intent to commit any felony or theft therein." Pet. App. F7 (brackets in

¹ The government also raised several procedural arguments; the magistrate judge rejected one of those arguments and declined to reach the others. See Pet. App. F3-F6, F9. Neither the district court nor the court of appeals addressed the government's procedural arguments. See id. at A1-A3, D8.

original). The magistrate judge found that "New Mexico's definition of 'residential burglary' contains all the elements of generic burglary," as defined in Taylor, 495 U.S. at 599, because it "requires unauthorized entry and intent to commit a felony" and "is limited to burglary of particular structures and dwellings." Pet. App. F8. Because "[p]etitioner was appropriately deemed an armed career criminal for having three previous convictions for violent felonies, namely 'burglary,'" the magistrate judge determined that his "sentence was not calculated in reliance on the residual clause." Id. at F9-F10.

The magistrate judge rejected, inter alia, petitioner's argument that New Mexico's residential-burglary statute is broader than generic "burglary" under Taylor, which was premised on the contentions that New Mexico defines "dwelling house" to include vehicles, watercraft, or other structures used as residences, and that generic burglary is limited to permanent, immovable structures. Pet. App. F8-F9; see C.A. ROA 157-159. The magistrate judge explained that petitioner's prior convictions were for "burglary of a dwelling house," whereas "[b]urglary of a vehicle, watercraft, or other structure is considered 'commercial burglary' in New Mexico." Pet. App. F9 (citing cases).

The district court adopted the magistrate judge's findings and denied petitioner's motion. Pet. App. D1-D8. Although petitioner objected to the magistrate judge's analysis of New

Mexico's residential-burglary statute in certain respects, he did not renew his contention that the statute is overbroad because it covers vehicles. See id. at D7-D8; C.A. ROA 207-209. The court also denied a COA. Pet. App. E1.

4. The court of appeals likewise denied a COA. Pet. App. A1-A3. The court cited its recent decision in United States v. Turrieta, 875 F.3d 1340, 1346-1347 (10th Cir. 2017), petition for cert. pending, No. 17-8997 (filed May 14, 2018), which "held a New Mexico conviction for residential burglary qualifies as a generic burglary under the ACCA." Pet. App. A2. In light of Turrieta, the court concluded that petitioner could not demonstrate that "reasonable jurist[s] would debate the district court's decision or debate whether [petitioner's] arguments deserve encouragement to proceed further," as required for a COA. Id. at A2-A3; see Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

ARGUMENT

Petitioner contends (Pet. 6-30) that New Mexico's residential burglary offense extends more broadly than generic "burglary" under the ACCA.² The court of appeals' order denying a COA is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

² The same question is presented in Thyberg v. United States, petition for cert. pending, No. 17-9333 (filed May 9, 2018), and Turrieta v. United States, petition for cert. pending, No. 17-8997 (filed May 14, 2018).

The court of appeals' order relied on its prior decision in United States v. Turrieta, 875 F.3d 1340, 1346-1347 (10th Cir. 2017), petition for cert. pending, No. 17-8997 (filed May 14, 2018). As the government has explained in its brief in opposition to the petition for a writ of certiorari in that case, Turrieta correctly determined that New Mexico's residential burglary statute, N.M. Stat. Ann. § 30-16-3(A) (1994 & 2004), does not criminalize the burglary of vehicles, watercraft, or aircraft used as residences. Gov't Br. in Opp. at 12-17, Turrieta, supra (No. 17-8997).³ Thus, even if generic burglary under Taylor v. United States, 495 U.S. 575 (1990), were limited to the burglary of permanent or immovable buildings and structures, as petitioner contends, petitioner's New Mexico residential-burglary convictions would remain ACCA predicates. Gov't Br. in Opp. at 11-12, Turrieta, supra (No. 17-8997).

Although petitioner disputes (Pet. 11-22) Turrieta's construction of the New Mexico statute and interpretation of relevant state court decisions, those arguments do not warrant further review, in light of this Court's "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," Bowen v. Massachusetts, 487 U.S. 879, 908 (1988), and the absence of any circuit disagreement

³ We have served petitioner with a copy of the government's brief in opposition in Turrieta.

regarding the New Mexico statute or similar state-law provisions. See Gov't Br. in Opp. at 12, Turrieta, supra (No. 17-8997).⁴

In any event, petitioner's case would make an especially poor vehicle for considering the question presented. Although petitioner now contends (e.g., Pet. 12) that the New Mexico residential-burglary statute is overbroad because it reaches "vehicles, watercraft and aircraft," he did not object to the magistrate judge's findings and recommended disposition on that ground. Instead, petitioner argued that the New Mexico statute "proscribes a broader range of conduct than the generic definition [of burglary] because [it] includes burglary of a garage attached to a home." Pet. App. D6-D7; see C.A. ROA 207-209. Petitioner, however, does not renew that argument in this Court.

⁴ For the reasons given in the brief in opposition in Turrieta, supra, no reason exists to hold the petition in this case pending the disposition of United States v. Stitt, cert. granted, No. 17-765 (oral argument scheduled for Oct. 9, 2018), and United States v. Sims, cert. granted, No. 17-766 (oral argument scheduled for Oct. 9, 2018). See Gov't Br. in Opp. at 11-12 & n.2, Turrieta, supra (No. 17-8997).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

SEPTEMBER 2018