

No. 17-9333

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW F. THYBERG, 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) (1994), does not cover burglary of a vehicle, watercraft, aircraft, or similar structure if used as a residence, and thus qualifies as generic "burglary" for purposes of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii), even if generic burglary excludes such structures.

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-9333

MATTHEW F. THYBERG, 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

OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A7) is not published in the Federal Reporter but is reprinted at 722 Fed. Appx. 847. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 411 Fed. Appx. 181. The order of the district court (Pet. App. B1) is not published in the Federal Supplement but is available at 2017 WL 2840046. The proposed findings and recommendation of the magistrate judge (Pet. App. C1-C9) is unreported but is available at 2017 WL 2839646.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 2018. The petition for a writ of certiorari was filed on May 9, 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 District of New Mexico, petitioner was convicted on one count of unlawful possession of a firearm after a previous felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Judgment 1. He was sentenced to 260 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. The court of appeals affirmed. 411 Fed. Appx. 181.

In 2016, petitioner filed a motion to vacate his sentence pursuant to 28 U.S.C. 2255. The district court denied the motion and denied a certificate of appealability (COA). Pet. App. B1-B2. The court of appeals likewise denied a COA. Id. at A7.

1. On July 18, 2008, a Roswell police officer in a marked police car observed petitioner and another man walking along the street. Petitioner briefly ducked into an alley and then tried to catch up to the other man. The officer drove around the block and returned to observe petitioner jogging slowly. The officer then saw petitioner drop a black object in an open field and continue

to jog. As petitioner left the field, the officer met him. 411 Fed. Appx. at 182.

The officer asked petitioner to come talk to him, and petitioner complied. The officer then asked petitioner for identification and patted him down. The officer further asked petitioner what he had dropped in the open field, and petitioner stated that he had not dropped anything. Petitioner, who said he was traveling to meet his probation officer, admitted that he had been using heroin. 411 Fed. Appx. at 182.

The officer asked petitioner to sit in the patrol car, and told petitioner he was not under arrest. 411 Fed. Appx. at 183. The officer and petitioner then engaged in a discussion in which petitioner admitted that he had dumped "[a] little gun" in the field. Ibid. The officer retrieved the gun and arrested petitioner. Ibid. The gun, a nine-milimeter pistol, had a loaded magazine with seven live rounds. Presentence Investigation Report (PSR) ¶ 6.

2. A federal grand jury charged petitioner with one count of unlawful possession of a firearm after a previous felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). PSR ¶ 1. A jury found petitioner guilty of that crime. PSR ¶ 2.

Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of unlawful possession of a firearm 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 necessarily found, or the defendant necessarily admitted, the elements of generic burglary. 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 three prior New Mexico convictions that qualified as "violent felon[ies]" under the ACCA: two convictions for aggravated assault with a deadly weapon, and one conviction for residential burglary. PSR ¶ 19; Pet. App. C2. It calculated petitioner's advisory Guidelines range at 235 to 293 months. PSR ¶ 65. Petitioner did not challenge the determination that his prior convictions constituted "violent felon[ies]" for purposes of the ACCA. See Sent. Tr. 2-4. The district court sentenced petitioner to 260 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

Petitioner filed a direct appeal raising issues not relevant here, and the court of appeals affirmed. 411 Fed. Appx. at 182.

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, petitioner filed a motion to vacate his sentence pursuant to 28 U.S.C. 2255. Through appointed counsel, petitioner argued that his ACCA sentence was unlawful under Johnson because his prior New Mexico aggravated assault convictions could have qualified as "violent felonies" only under the now-invalidated residual clause. D. Ct. Doc. 113, at 3 (June 20, 2016). Shortly thereafter, petitioner mailed a pro se Section 2255 petition to the court, in which he argued that his prior New Mexico residential burglary conviction also could have qualified as an ACCA predicate offense only under the residual clause. D. Ct. Doc. 118 (June 27, 2016). Petitioner's counsel subsequently sought to amend the counseled petition to add the same claim regarding his New Mexico residential burglary conviction to that petition. Pet. App. C3.

The magistrate judge recommended that the Section 2255 motion be denied. Pet. App. C1-C9. The magistrate judge observed that the court of appeals' decision in United States v. Maldonado-Palma, 839 F.3d 1244 (10th Cir. 2016), cert. denied, 137 S. Ct. 1214 (2017), had determined that New Mexico aggravated assault convictions like petitioner's qualified as "violent felonies"

under the ACCA. Pet. App. C6-C8. The magistrate judge further found that petitioner's pro se filing was "of no effect" under a local rule that generally prohibits a party who is represented by counsel from personally making filings. Id. at C3. And the magistrate judge concluded that the counseled motion to amend in order to add a claim challenging the burglary predicate should be denied as untimely. Id. at C4-C6. Finally, the magistrate judge recommended that no COA issue. Id. at C9.

Petitioner did not object to the magistrate judge's report. The district court accordingly adopted the magistrate judge's findings and recommended disposition. Pet. App. B1.

4. The court of appeals denied a COA. Pet. App. A1-A7. The court stated that petitioner could not demonstrate that reasonable jurists "would find it debatable whether the petition states a valid claim of the denial of a constitutional right." Id. at A6 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). Petitioner had conceded that the court's decision in Maldonado-Palma, supra, foreclosed his contention that his New Mexico aggravated-assault convictions no longer qualified as violent felonies under the ACCA. Pet. App. A6. And petitioner had further acknowledged that the court's 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 that New Mexico residential burglary remains a violent felony under the

ACCA's enumerated felonies clause, foreclosed his challenge to his burglary conviction. Pet. App. A6-A7. In light of that concession, the court declined to decide whether the district court's various procedural rulings, or petitioner's failure to object to the magistrate judge's report and recommendation, would in themselves lead to the denial of a COA. Ibid.

ARGUMENT

Petitioner renews (Pet. 7-11) his contention that New Mexico's residential burglary offense extends more broadly than generic "burglary" under the ACCA.¹ 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 unwarranted.

The court of appeals' order cross-referenced 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), which petitioner acknowledged was controlling. As the government has explained in its brief in opposition to the petition for a writ of certiorari in that case, Turrieta correctly concluded that New Mexico's residential burglary statute, N.M. Stat. Ann. § 30-16-3(A) (1994), does not criminalize the burglary

¹ The same question is presented in Turrieta v. United States, No. 17-8997 (filed May 14, 2018), and Sandoval v. United States, No. 17-9171 (filed May 24, 2018).

of vehicles, watercraft, or aircraft used as residences. Gov't Br. in Opp. at 12-17, Turrieta v. United States (No. 17-8997).² 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 conviction would still be an ACCA predicate. Gov't Br. in Opp. at 11-12, Turrieta, supra (No. 17-8997).

Although petitioner disputes (Pet. 9-10) Turrieta's construction of the New Mexico statute and interpretation of relevant state court decisions, that question does 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 regarding the New Mexico statute or similar state-law provisions. See Gov't Br. in Opp. at 12, Turrieta, supra (No. 17-8997). In any event, petitioner's case would make an especially poor vehicle for considering the question presented in light of the district court's multiple procedural reasons for denying a COA. See Pet. App. C3-C6.³

² We have served petitioner with a copy of the government's brief in opposition in Turrieta.

³ 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.

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

AUGUST 2018

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).

No. 17-8997

IN THE SUPREME COURT OF THE UNITED STATES

PAUL A. TURRIETA, 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) (1999 & 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.

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-8997

PAUL A. TURRIETA, 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

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 875 F.3d 1340. The opinion and order of the district court (Pet. App. C1-C8) is not published in the Federal Supplement but is available at 2016 WL 9819521.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 2017. A petition for rehearing was denied on February 12, 2018 (Pet. App. B1). The petition for a writ of certiorari was

filed on May 14, 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 a firearm and ammunition after a previous felony conviction, in violation of 18 U.S.C. 922(g)(1). Pet. App. D1. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. Id. at D2-D3. Petitioner did not file a direct appeal.

In 2016, petitioner filed a motion to vacate his sentence pursuant to 28 U.S.C. 2255. The district court denied the motion and denied a certificate of appealability (COA). Pet. App. C1-C8. The court of appeals granted a COA and affirmed. Id. at A1-A15.

1. On October 24, 2013, an Albuquerque police officer ran a license-plate check on a blue Saturn sedan and found no record on file. Presentence Investigation Report (PSR) ¶ 11. The officer conducted a traffic stop and encountered petitioner, who stated that he was driving to work and that the car lacked insurance. Ibid. The officer saw a blue glass pipe, commonly used for smoking marijuana, on the driver's side door handle. Ibid. Petitioner admitted that he had marijuana with him. Ibid.

The officer ordered the vehicle towed based on petitioner's lack of insurance. PSR ¶ 11. During an inventory search of the vehicle, the officer saw a silver revolver on top of a removable stereo. Ibid. Petitioner stated that the revolver belonged to his girlfriend. Ibid. Petitioner also told the officer that he had knowledge of the gun's presence inside the vehicle and that he was a convicted felon. Ibid.

Further investigation confirmed that petitioner was a convicted felon. PSR ¶ 12. Law enforcement obtained a search warrant for the vehicle, seizing a loaded .38-caliber revolver and a glass smoking pipe. Ibid. A National Crime Information Center check indicated that the firearm was stolen. Ibid.

2. A federal grand jury charged petitioner with one count of unlawful possession of a firearm and ammunition after a previous felony conviction, in violation of 18 U.S.C. 922(g)(1). PSR ¶ 1. Petitioner pleaded guilty to the charge pursuant to a written plea agreement. PSR ¶¶ 2-3.

Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of unlawful possession of a firearm 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 that “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. 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 (1994 & 2004) that qualified as "violent felon[ies]" for purposes of the ACCA. PSR ¶ 14. The Probation Office accordingly determined that petitioner qualified for sentencing under the ACCA. PSR ¶¶ 14, 92. It calculated petitioner's advisory Guidelines range at 180 to 210 months. PSR ¶ 93. Petitioner did not challenge the determination that his prior convictions constituted "violent felon[ies]" for purposes of the ACCA. See Addendum to PSR.

The district court sentenced petitioner to 180 months of imprisonment, to be followed by three years of supervised release. Pet. App. D2-D3. 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, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence. Petitioner argued that his ACCA sentence was unlawful under Johnson because his prior New Mexico burglary convictions could have counted as "violent felonies" only under the now-invalidated residual clause. Pet. App. C3. The government countered that the convictions qualified as convictions for "burglary" under the enumerated felonies clause. Ibid.

The district court denied relief. Pet. App. C1-C8. The court observed that the New Mexico burglary statute defines burglary as follows:

- A. Any person who, without authorization, enters a dwelling house with intent to commit any felony or theft therein is guilty of a third degree felony.
- B. Any person who, without authorization, enters any vehicle, watercraft, aircraft or other structure, moveable or immovable, with intent to commit any felony or theft therein is guilty of a fourth degree felony.

Id. at C3-C4 (quoting N.M. Stat. Ann. § 30-16-3 (1994 & 2004)).

The court concluded that the statute was divisible into two separate crimes, and that petitioner's prior convictions were for burglary of a "dwelling house" under Subsection (A). Id. at C4 & n.1.

The district court rejected 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 used as residences and that generic burglary is limited to permanent, immovable structures. Pet. App. C4-C8. The court noted that New Mexico's jury instructions define "dwelling house" to mean "any structure, any part of which is customarily used as living quarters." Id. at C4-C5 (quoting New Mexico Unif. Jury Instr. - Crim. 14-1631 (2009)). But the court rejected petitioner's argument that New Mexico law defines a "structure" to include vehicles. Id. at C6-C7. The court explained that pertinent New Mexico cases suggest that "a 'dwelling house' under New Mexico law is limited to real property and would not include vehicles." Id. at C7 (citing State v. Ruiz, 617 P.2d 160, 168 (N.M. Ct. App. 1980)).

The district court acknowledged an intermediate state appellate decision, State v. Foulenfont, 895 P.2d 1329, 1332 (N.M. Ct. App. 1995), interpreting the term "structure" to mean any "enclosure similar to a vehicle, watercraft, aircraft, or dwelling." Pet. App. C5 (citation omitted). But the court reasoned that "Foulenfont defined only the phrase 'other structure' as used in Section 30-16-3(B); it did not discuss the definition of 'dwelling house' in Section 30-16-3(A) and it did not define the term 'structure' in that context." Id. at C6-C7. The court additionally observed that "New Mexico courts have

construed the term 'structure' [in Section 30-16-3(A)] narrowly," and found it "unlikely that New Mexico would expand Section 30-16-3(A) to include vehicles as dwelling-house structures when Section 30-16-3(B) already specifically prohibits the unlawful entry of a vehicle." Id. at C8.

4. The court of appeals granted a COA and affirmed. Pet. App. A1-A15.

The court of appeals rejected petitioner's claim that burglary of a "dwelling house" under Section 30-16-3(A) applies to conduct that falls outside Taylor's generic definition. Pet. App. A5-A15. The court assumed "for the sake of argument" that generic burglary excludes "entry into an occupied vehicle, watercraft, of aircraft," and "focus[ed] on New Mexico law." Id. at A5.

Examining Section 30-16-3, the court found that petitioner's argument -- that a "dwelling house" includes a "vehicle, watercraft, or aircraft when it is occupied" -- "blurs the difference between the two forms of burglary" in Sections 30-16-3(A) and (B). Pet. App. A5-A6. In addition, the court quoted the New Mexico intermediate appellate court's decision in Ruiz, supra, which stated that "[w]hen one enters another's dwelling house, under our burglary statute, one has entered lands of another. This reasoning, of course, would not apply if the burglary was of a vehicle, watercraft, or aircraft." Pet. App. A10-A11 (quoting Ruiz, 617 P.2d at 168). The court explained that

"Ruiz distinguishes burglary of a dwelling house under [Section 30-16-3(A)] from the burglary of another structure like a vehicle, watercraft, or aircraft." Id. at A11.

Like the district court, the court of appeals dismissed petitioner's effort to "stich[] together" a broader definition of "'dwelling house'" by consulting New Mexico's uniform criminal jury instructions, which define "dwelling house" to include "'any structure, any part of which is customarily used as living quarters,'" and Foulenfont, supra, which discusses the term "structure" in the context of Section 30-16-3(B). Pet. App. A7 (citation omitted). The court explained that petitioner had "misread Foulenfont," observing that "[t]he only pertinent holding in Foulenfont" was that a fenced area "does not constitute a structure" for purposes of the New Mexico burglary statute, and that it "would make little sense to use a decision stating only what was not burglary of any kind to define what would constitute a specific form of burglary (residential burglary)." Id. at A7-A8; see id. at A8 (explaining that the court in Foulenfont "was narrowing the places that could support a burglary conviction of any kind").

The court of appeals further determined that "[e]ven if the combination of Foulenfont and a uniform jury instruction were otherwise persuasive," petitioner had failed to show "'a realistic probability * * * that the State would apply' its statute on

residential burglary when the property involves a vehicle, watercraft, or aircraft.” Pet. App. A11-A12 (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)). The court observed that petitioner did “not suggest that New Mexico authorities have ever charged someone for residential burglary based on entry into an occupied vehicle, watercraft, or aircraft.” Id. at A12. The court noted New Mexico case law involving the aggravated burglary of a mobile home or trailer, but it found that “the cited cases do not support [petitioner’s] argument because aggravated burglary” -- a different offense from the one of which petitioner was convicted -- “does not distinguish between the types of structures burgled.” Ibid. (citing N.M. Stat. Ann. § 30-16-4 (1994 & 2004)). The court also noted cases in which defendants were convicted of “shooting at a dwelling” where the dwelling was a trailer or mobile home, but it found them inapposite because “none of the cited cases addressed whether a trailer or mobile home qualified as a dwelling.” Id. at A13-A14.

ARGUMENT

Petitioner contends (Pet. 5-29) that the court of appeals erred in interpreting New Mexico’s burglary-of-a-dwelling offense not to cover burglary of a vehicle in which a person resides.¹ The court’s resolution of that state-law question is correct, and its

¹ The same question is presented in Thyberg v. United States, No. 17-9333 (filed May 9, 2018), and Sandoval v. United States, No. 17-9171 (filed May 24, 2018).

decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. a. Under Taylor v. United States, 495 U.S. 575 (1990), a state crime constitutes “burglary” for purposes of the ACCA’s enumerated felonies clause if it has “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. As petitioner points out (Pet. 4 n.1), this Court recently granted a writ of certiorari in United States v. Stitt, 138 S. Ct. 1592 (2018) (No. 17-765) (oral argument scheduled for Oct. 9, 2018), and United States v. Sims, 138 S. Ct. 1592 (2018) (No. 17-766) (oral argument scheduled for Oct. 9, 2018), which raise the question whether Taylor’s locational element of a “building or structure” includes nonpermanent or mobile structures adapted or used for overnight accommodation. As petitioner appears to acknowledge, however (see generally Pet. 5-23), this case does not implicate that question, because the lower courts held that even if Taylor’s definition of burglary excludes vehicles, watercraft, and aircraft that are used as residences, New Mexico’s burglary-of-a-dwelling offense would still satisfy that definition because it does not reach those locations. See Pet. 7-8 (noting that “the Tenth Circuit assumed generic burglary does not include entry into

vehicles, watercraft and aircraft any part of which is customarily used as living quarters"); see generally Pet. App. A4-A11, C3-C8.²

Petitioner's assertion of error in the court of appeals judgment rests on an antecedent question of state law: whether New Mexico's residential-burglary statute, N.M. Stat. Ann. § 30-16-3(A) (1994 & 2004), covers vehicles. Although federal courts may need to answer that question in the context of applying the ACCA, it does not warrant this Court's review. This Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," and petitioner provides no reason to deviate from that practice in this case. Bowen v. Massachusetts, 487 U.S. 879, 908 (1988); see also, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004). Review is particularly unwarranted where, as here, petitioner does not allege that the decision below conflicts with a decision from any other court of appeals. Indeed, no court of appeals has held that the New Mexico burglary-of-a-dwelling offense covers occupied vehicles, aircraft, or watercraft, and petitioner does not suggest that the courts of appeals are divided regarding similar state-law provisions.

b. In any event, the court of appeals' construction of state law was correct. The New Mexico burglary statute distinguishes

² Accordingly, no reasons exists to hold the petition in this case pending the disposition of Stitt, supra (No. 17-765), and Sims, supra (No. 17-766).

between burglary of a "dwelling house," which is a third degree felony prohibited by Subsection (A) of the statute, and burglary of a "vehicle, watercraft, aircraft or other structure, movable or immovable," which is a fourth degree felony prohibited by Subsection (B) of the provision. N.M. Stat. Ann. § 30-16-3(B) (1994, 2004). As the court of appeals explained, reading Subsection (A) to include "a vehicle, watercraft, or aircraft when it is occupied * * * blurs the difference between the two forms of burglary." Pet. App. A5; see id. at A6 (reasoning that as a matter of "ordinary understanding" and "the common law," the terms "house" or "dwelling house" refer to a permanent, immovable home).

The court of appeals additionally observed that an intermediate state court opinion, State v. Ruiz, 617 P.2d 160 (N.M. Ct. App. 1980), "distinguishes burglary of a dwelling house under [Subsection] (A) from the burglary of another structure like a vehicle, watercraft, or aircraft" under Subsection (B). Pet. App. A11. In particular, Ruiz stated that "[t]he offense charged was burglary of a dwelling house; thus, we are not concerned with vehicles, watercraft or aircraft, or other structures." 617 P.2d at 167. And Ruiz further explained that "[w]hen one enters another's dwelling house, under our burglary statute, one has entered lands of another. This reasoning, of course, would not apply if the burglary was of a vehicle, watercraft or aircraft." Id. at 168.

Petitioner's contrary argument rests (Pet. 12-13, 16-18) on a jury instruction that defines a "dwelling house" to include "any structure, any part of which is customarily used as living quarters," and the intermediate state court's decision in State v. Foulenfont, 895 P.2d 1332 (N.M. Ct. App. 1995). Pet. 16 (quoting New Mexico Unif. Jury Instr. - Crim. 14-1631 (2009)). Petitioner contends (Pet. 13) that Foulenfont demonstrates that "a vehicle, a watercraft, or an aircraft" is a "'structure'" for purposes of the residential-burglary statute and the relevant jury instruction. But Foulenfont concerned the requirements of Section 30-16-3(B), not Section 30-16-3(A), and so had no occasion to interpret the word "structure" as included in the definition of "dwelling house" for purposes of Section 30-16-3(A). See 895 P.2d at 1330 (noting that the parties' disagreement turned on "whether a fence comes within the definition of 'structure' in Section 30-16-3(B)"); id. at 1331 (quoting Section 30-16-3(B)); Pet. App. C6 (district court stated that "Foulenfont defined only the phrase 'other structure' as used in Section 30-16-3(B)"). Moreover, as the court of appeals correctly observed, Foulenfont held only that a fenced area did not constitute a dwelling house, vehicle, watercraft, or other structure, and thus does not support petitioner's argument that occupied vehicles are structures under the residential-burglary statute. Pet. App. A8-A10.

2. Petitioner further contends (Pet. 23-29) that, assuming that generic “burglary” may be committed only in permanent and immobile buildings and structures, the court of appeals misapplied the standard required to establish “a realistic probability” that New Mexico would apply its burglary-of-a-dwelling statute “to conduct that falls outside” such a definition. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007). That contention lacks merit and does not warrant further review.

Petitioner asserts that “if non-ACCA-predicate coverage follows clearly from a statute’s text or a precedential state case, the reasonable probability test plays no substantive role.” Pet. 26. The court of appeals’ decision does not conflict with such a principle. After examining the statutory text and relevant state-court decisions, the court determined that the term “dwelling house” in the New Mexico statute does not encompass occupied vehicles, aircraft, and watercraft. Pet. App. A5-A11. In other words, the court rejected petitioner’s contention that “non-ACCA-predicate coverage follows clearly from” the New Mexico statute’s “text or a precedential state case.” Pet. 26. Indeed, it found that state law was inconsistent with petitioner’s interpretation and noted petitioner’s failure to satisfy the “reasonable probability” standard only as an additional reason why petitioner’s claim lacked merit.

Petitioner further asserts (Pet. 27) that "this Court and other circuit courts have endorsed actual prosecutions and convictions for non-predicate conduct as satisfying the reasonable probability test," without requiring that such prosecutions or convictions specifically included consideration of whether the statute covered the non-predicate conduct. The court of appeals' decision again does not conflict with the principle that petitioner posits. As the court observed, petitioner failed to show that "New Mexico authorities have ever charged someone for residential burglary based on entry into an occupied vehicle, watercraft, or aircraft." Pet. App. A12. Instead, petitioner discussed the application of two different statutes -- aggravated burglary (N.M. Stat. Ann. § 30-16-4 (2004)) and shooting at a dwelling (N.M. Stat. Ann. § 30-3-8(A) (2004)). Petitioner thus failed to locate any "case[] in which the [New Mexico] courts in fact did apply the [burglary-of-a-dwelling] statute in the special (nongeneric) manner for which he argues." Duenas-Alvarez, 549 U.S. at 193.

Accordingly, the court of appeals' decision does not implicate any disagreement among the circuits regarding the application of Duenas-Alvarez.³ In any event, this case would

³ This Court recently denied several petitions for writs of certiorari suggesting that the courts of appeals are divided over whether Duenas-Alvarez's "realistic probability" test requires that a defendant demonstrate that the State actually prosecutes nonqualifying conduct under the relevant statute, or whether it is sufficient to show that the statute on its face defines an offense more broadly than the federal crime. See, e.g.,

present a poor vehicle for considering the proper application of Duenas-Alvarez's "reasonable probability" standard. Resolving that issue in petitioner's favor would not change the outcome here, because the court of appeals' decision rests in the first instance on a straightforward analysis of the plain language of the New Mexico burglary statute and cases applying it. See Pet. App. A5-A11.

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

AUGUST 2018

Vasquez v. Sessions, No. 17-1304, 2018 WL 3096430 (June 25, 2018) (No. 17-1304); Vail-Bailon v. United States, No. 17-7151, 2018 WL 2767792 (June 11, 2018); Robinson v. United States, No. 17-718, 2018 WL 2767816 (June 11, 2018); Green v. United States, No. 17-7299, 2018 WL 2767821 (June 11, 2018); Gathers v. United States, No. 17-7694, 2018 WL 808308; Espinoza-Bazaldua v. United States, No. 17-7490, 2018 WL 501237 (June 11, 2018). Because the court of appeals concluded that petitioner had not made either showing, Pet. App. A4-A15, any such division is not implicated here.