

No.

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**In the Supreme Court of the United States**

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UNITED STATES OF AMERICA, PETITIONER

*v.*

DOMINIC LADALE WALTON

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

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**PETITION FOR A WRIT OF CERTIORARI**

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### QUESTION PRESENTED

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

**RELATED PROCEEDINGS**

United States District Court (N.D. Tex.):

*United States v. Walton*, No. 3:15-cr-364 (Feb. 2, 2017)

United States Court of Appeals (5th Cir.):

*United States v. Walton*, No. 17-10199 (Nov. 27, 2018), petition for reh'g denied, Apr. 2, 2019

**TABLE OF CONTENTS**

	Page
Opinion below.....	1
Jurisdiction.....	1
Statutory provisions involved.....	2
Statement.....	2
Reasons for granting the petition.....	6
Conclusion.....	7
Appendix A — Court of appeals opinion (Nov. 27, 2018).....	1a
Appendix B — Court of appeals order denying rehearing (Apr. 2, 2019).....	3a
Appendix C — Statutory provisions.....	5a

**TABLE OF AUTHORITIES**

Cases:

<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966) .....	2
<i>Quarles v. United States</i> , 139 S. Ct. 1872 (2019).....	6, 7
<i>Taylor v. United States</i> , 495 U.S. 575 (1990).....	3
<i>United States v. Herrold</i> , 883 F.3d 517 (5th Cir. 2018), cert. granted, No. 17-1445 (June 17, 2019), and cert. denied, No. 17-9127 (June 17, 2019).....	5, 6, 7

Statutes:

Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).....	2, 3, 6, 5a
18 U.S.C. 924(e)(1).....	3, 5a
18 U.S.C. 924(e)(2)(B)(ii) .....	3, 6a
18 U.S.C. 922(g)(1).....	2, 3
18 U.S.C. 924(a)(2).....	3

IV

Statutes—Continued:	Page
Tex. Penal Code Ann.:	
§ 30.02:	
(West Supp. 2000).....	4, 6a
(West Supp. 2017).....	4, 7a
§ 30.02(a) (West Supp. 2000) .....	4, 6a
§ 30.02(a)(1) (West Supp. 2000).....	3, 6, 6a
§ 30.02(a)(3) (West. Supp. 2017).....	5, 8a

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## **PETITION FOR A WRIT OF CERTIORARI**

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The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

### **OPINION BELOW**

The opinion of the court of appeals (App., *infra*, 1a-2a) is not published in the Federal Reporter but is reprinted at 743 Fed. Appx. 552.

### **JURISDICTION**

The judgment of the court of appeals was entered on November 27, 2018. A petition for rehearing was denied on April 2, 2019 (App., *infra*, 3a). On June 20, 2019, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 31, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATUTORY PROVISIONS INVOLVED**

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 5a-9a.

**STATEMENT**

Following a guilty plea in the United States District Court for the Northern District of Texas, respondent was convicted on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Judgment 1. The district court sentenced respondent to 24 months of imprisonment, to be followed by two years of supervised release. Judgment 2-3. The government appealed respondent's sentence, and the court of appeals affirmed. App., *infra*, 1a-2a.

1. On April 10, 2015, a traffic accident occurred involving respondent's motorcycle and another vehicle. Presentence Investigation Report (PSR) ¶ 10. As fire department personnel arrived on the scene, respondent dropped a firearm into a nearby ditch. PSR ¶ 11. Law enforcement officers then arrived and, after checking respondent's identification, learned that he had outstanding warrants. *Ibid.* An officer conducted a pat-down of respondent to ensure the safety of medical personnel. *Ibid.* When the officer explained that she was checking to see if respondent had additional weapons, he responded, "just had the one." *Ibid.* Another officer recovered the firearm, which had been reported stolen. PSR ¶ 12.

Respondent was arrested based on the outstanding warrants and his unlawful possession of a firearm. PSR ¶ 11. At the jail, detectives provided warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966), and then interviewed respondent. PSR ¶ 13. Respondent confirmed that he had purchased the firearm for \$200 on

the street and said that he possessed it for protection. *Ibid.*

A federal grand jury indicted respondent on one count of unlawful possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Respondent pleaded guilty to that offense. PSR ¶¶ 1, 6.

2. Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of unlawful possession of a firearm following a felony conviction is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(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 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* instructed courts to employ a “categorical approach” to determine whether a prior conviction meets that definition, examining “the statutory definition[]” of the previous crime in order to determine whether it substantially corresponds to the “generic” form of burglary referenced in the ACCA. *Id.* at 599-600.

In this case, the Probation Office determined that respondent had three prior “violent felony” convictions—specifically, three convictions for burglary of a habitation under Tex. Penal Code Ann. § 30.02(a)(1) (West

Supp. 2000). App., *infra*, 1a-2a;<sup>1</sup> see PSR ¶¶ 28, 36-38. The relevant statute, Tex. Penal Code Ann. § 30.02(a) (West Supp. 2000), provided 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 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.

App., *infra*, 6a-7a.

Respondent objected to the application of the ACCA. App., *infra*, 1a. As relevant here, respondent argued that the Texas burglary statute is broader than “burglary” under the ACCA, on the theory that not all of its subsections require the intent to commit a crime at the moment of initial unpermitted entry into, or remaining in, a covered structure. D. Ct. Doc. 39, at 1 (Oct. 24,

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<sup>1</sup> Although respondent’s burglary offenses were committed in 2000, see PSR ¶¶ 36-38, the court of appeals appears to have cited the 2017 version of the statute, Tex. Penal Code Ann. § 30.02 (West Supp. 2017). Both the 2000 version of the statute, *id.* § 30.02 (West Supp. 2000), which was in effect at the time of respondent’s offenses, and the 2017 version of the statute are included in the appendix to this petition. App., *infra*, 6a-9a. The changes are immaterial to the question presented.

2016). The district court sustained respondent's objection and sentenced him to 24 months of imprisonment. App., *infra*, 1a-2a.

3. The government appealed, and the Fifth Circuit stayed the appeal pending its en banc consideration of *United States v. Herrold*, 883 F.3d 517 (2018), cert. granted, No. 17-1445 (June 17, 2019), and cert. denied, No. 17-9127 (June 17, 2019). Order (July 26, 2017).

The Fifth Circuit ultimately held in *Herrold* that Texas's burglary of a habitation statute is broader than generic burglary under the ACCA, because one of its subsections, Tex. Penal Code Ann. § 30.02(a)(3) (West Supp. 2017), criminalizes unlawful entry followed by the subsequent formation of an intent to commit a crime. *Herrold*, 883 F.3d at 521-537. The Fifth Circuit acknowledged that generic burglary under *Taylor* encompasses "remaining in" a building or structure with intent to commit a crime. *Id.* at 532. But it concluded that *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." *Ibid.* (citation omitted). The government filed a petition for a writ of certiorari in *Herrold*. See *United States v. Herrold*, No. 17-1445 (filed Apr. 18, 2018).

Following the court of appeals' en banc decision in *Herrold*, the court denied the government's motion to hold the appeal in this case in abeyance pending the resolution of the government's certiorari petition in *Herrold*. The court then affirmed the district court's 24-month non-ACCA sentence in reliance on *Herrold*,

App., *infra*, 1a-2a, and denied the government’s petition for rehearing, *id.* at 3a.

4. On June 10, 2019, this Court held in *Quarles v. United States*, 139 S. Ct. 1872 (2019), that “[f]or purposes of [18 U.S.C.] 924(e), \* \* \* remaining-in burglary occurs when the defendant forms the intent to commit a crime *at any time* while unlawfully remaining in a building or structure.” *Id.* at 1875. On June 17, 2019, this Court granted the government’s petition for a writ of certiorari in *Herrold*, vacated the judgment, and remanded for further consideration in light of *Quarles*. See *Herrold*, *supra* (No. 17-1445).

#### REASONS FOR GRANTING THE PETITION

The court of appeals held that respondent’s previous convictions for burglary under Tex. Penal Code Ann. § 30.02(a)(1) (West Supp. 2000) did not qualify as generic “burglary” for purposes of the ACCA. The court’s decision was based on its prior decision in *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (en banc), cert. granted, No. 17-1445 (June 17, 2019), and cert. denied, No. 17-9127 (June 17, 2019), which held that generic burglary requires the intruder to harbor the intent to commit a crime at the precise moment of his initial unpermitted entry into, or remaining in, a covered structure.

This Court recently addressed that same issue and reached a different conclusion. In *Quarles v. United States*, 139 S. Ct. 1872 (2019), the Court held that “burglary occurs for purposes of [the ACCA] if the defendant forms the intent to commit a crime *at any time* during the continuous event of unlawfully remaining in a building or structure.” *Id.* at 1877. *Quarles* accordingly rejected the view—adopted by the Fifth Circuit in *Herrold* and in this case—that remaining-in burglary “occurs only if a person has the intent to commit a crime *at*

the exact moment when he or she first unlawfully remains in a building or structure.” *Id.* at 1875; see *Herrold*, 883 F.3d at 532; App., *infra*, 2a.

After this Court issued its decision in *Quarles*, it vacated the Fifth Circuit’s decision in *Herrold* and remanded that case for further consideration in light of *Quarles*. See *United States v. Herrold*, cert. granted, No. 17-1445 (June 17, 2019).<sup>2</sup> The same result is warranted here, where the court of appeals relied exclusively on *Herrold*’s now-abrogated interpretation of generic “burglary” under the ACCA to uphold the district court’s imposition of a non-ACCA sentence. See App., *infra*, 1a-2a.

#### CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for further consideration in light of the Court’s decision in *Quarles v. United States*, 139 S. Ct. 1872 (2019).

Respectfully submitted.

NOEL J. FRANCISCO  
*Solicitor General*  
 BRIAN A. BENCZKOWSKI  
*Assistant Attorney General*  
 ERIC J. FEIGIN  
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*Assistants to the Solicitor  
 General*  
 DAVID M. LIEBERMAN  
*Attorney*

JULY 2019

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<sup>2</sup> As of the date of this petition for a writ of certiorari, the Fifth Circuit has not resolved the proceedings on remand in *Herrold*.

**APPENDIX A**

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 17-10199  
Summary Calendar

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*v.*

DOMINIC LADALE WALTON, DEFENDANT-APPELLEE

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[Filed: Nov. 27, 2018]

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 3:15-CR-364-1

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Before: DENNIS, CLEMENT, and OWEN, Circuit  
Judges.

PER CURIAM:\*

Dominic Ladale Walton received a 24-month sentence following his guilty plea conviction for felon in possession of a firearm. The district court sustained Walton's objection to the application of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), based on his

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<sup>1</sup> Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

three prior convictions for burglary of a habitation, violations of Texas Penal Code § 30.02(a)(1). The Government timely appealed.

Upon motion by the Government, this case was held in abeyance pending a decision in *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (en banc), *petition for cert. filed* (Apr. 18, 2018) (No. 17-1445). *Herrold* has now issued and, as the Government concedes, the district court did not err in determining that Walton's three prior convictions for burglary of a habitation, in violation of Texas Penal Code § 30.02(a)(1), could not serve as predicate offenses under the ACCA. *See Herrold*, 883 F.3d at 541. Accordingly, the judgment of the district court is AFFIRMED.

**APPENDIX B**

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 17-10199

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*v.*

DOMINIC LADALE WALTON, DEFENDANT-APPELLEE

---

Appeal from the United States District Court  
for the Northern District of Texas

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**ON PETITION FOR REHEARING**

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Before: DENNIS, CLEMENT, and OWEN, Circuit  
Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is  
[DENIED.]

ENTERED FOR THE COURT

/s/ JAMES L. DENNIS  
JAMES L. DENNIS  
UNITED STATES DISTRICT JUDGE

*United States Court of Appeals*  
**FIFTH CIRCUIT**  
**OFFICE OF THE CLERK**

**LYLE W. CAYCE**  
**CLERK**

**TEL. 504-310-7700**  
**60 S. MAESTRI PLACE,**  
**Suite 115**  
**NEW ORLEANS, LA 70130**

Apr. 02, 2019

MEMORANDUM TO COUNSEL OR PARTIES  
LISTED BELOW:

No. 17-10199 USA v. Dominic Walton  
USDC No. 3:15-CR-364-1

Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

By: /s/ MELISSA B. COURSEAUULT  
MELISSA B. COURSEAUULT, Deputy Clerk  
504-310-7701

Mr. Jason Douglas Hawkins  
Ms. Gail A. Hayworth  
Mr. James Wesley Hendrix  
Mr. Kevin Joel Page

## APPENDIX C

## 1. 18 U.S.C. 924(e) provides:

**Penalties**

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term “serious drug offense” means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one 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 term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

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

(C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

2. Tex. Penal Code Ann. § 30.02 (West Supp. 2000) provides:

**Burglary**

(a) A person commits an offense 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 intent to commit a felony, theft, or an assault, in a building or habitation; or

7a

(3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

(b) For purposes of this section, “enter” means to intrude:

- (1) any part of the body; or
- (2) any physical object connected with the body.

(c) Except as provided in Subsection (d), an offense under this section is a:

- (1) state jail felony if committed in a building other than a habitation; or
- (2) felony of the second degree if committed in a habitation.

(d) An offense under this section is a felony of the first degree if:

- (1) the premises are a habitation; and
- (2) any party to the offense entered the habitation with intent to commit a felony other than felony theft or committed or attempted to commit a felony other than felony theft.

3. Tex. Penal Code Ann. § 30.02 (West Supp. 2017) provides:

**Burglary**

(a) A person commits an offense if, without the effective consent of the owner, the person:

8a

(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 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.

(b) For purposes of this section, “enter” means to intrude:

(1) any part of the body; or

(2) any physical object connected with the body.

(c) Except as provided in Subsection (c-1) or (d), an offense under this section is a:

(1) state jail felony if committed in a building other than a habitation; or

(2) felony of the second degree if committed in a habitation.

(c-1) An offense under this section is a felony of the third degree if:

(1) the premises are a commercial building in which a controlled substance is generally stored, including a pharmacy, clinic, hospital, nursing facility, or warehouse; and

(2) the person entered or remained concealed in that building with intent to commit a theft of a controlled substance.

9a

(d) An offense under this section is a felony of the first degree if:

- (1) the premises are a habitation; and
- (2) any party to the offense entered the habitation with intent to commit a felony other than felony theft or committed or attempted to commit a felony other than felony theft.