No. 19-151

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DOMINIC LADALE WALTON

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases: Page

Statutes:

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The court of appeals held that respondent's three previous convictions for burglary of a habitation, under Tex. Penal Code Ann. § 30.02(a)(1) (West Supp. 2000), did not qualify as generic "burglary" for purposes of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii). Pet. App. 1a-2a; see Pet. 4 n.1. The court relied exclusively on its prior decision in *United States* v. *Herrold*, 883 F.3d 517 (5th Cir. 2018) (en banc), cert. granted, vacated, and remanded, 139 S. Ct. 2712, and cert. denied, 139 S. Ct. 2712 (2019). This Court subsequently granted the petition for a writ of certiorari in *Herrold*, vacated the court of appeals' decision, and remanded for further consideration in light of its decision in *Quarles* v. *United States*, 139 S. Ct. 1872 (2019). *United States* v. *Herrold*, 139 S. Ct. 2712 (2019). Following the government's filing of the petition for a writ of certiorari in this case, the en banc court of appeals unanimously held on remand in *Herrold* that burglary

under the Texas statute does, in fact, qualify as generic burglary under the ACCA. *United States* v. *Herrold*, No. 14-11317, 2019 WL 5288154, at *7 (5th Cir. Oct. 18, 2019).

Respondent does not dispute (Br. in Opp. 7-19) that this Court's decision in *Quarles*, and the court of appeals' decision on remand in *Herrold*, eliminate the sole explicit basis for the decision below. Instead, respondent asserts (*ibid.*) that a writ of certiorari is unwarranted because, on the particular facts of his case, an ACCA sentence either is not justified or is not equitable. Because the court of appeals may address those arguments on remand, and because they lack merit in any event, this Court should—as in *Herrold*—vacate the court of appeals' judgment and remand the case for further consideration in light of *Quarles*.

1. Respondent first contends (Br. in Opp. 7-12) that remand is unwarranted on the theory that two of his prior Texas burglary convictions were not "committed on occasions different from one another," 18 U.S.C. 924(e)(1), as is necessary for them to qualify as separate ACCA predicates. But the court of appeals did not address that contention, see Pet. App. 1a-2a, which should be considered, if at all, on remand. Cf. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (This Court is "a court of review, not of first view.").

In any event, contrary to his contention, respondent's burglaries did occur "on occasions different from one another," 18 U.S.C. 924(e)(1). The courts of appeals uniformly have construed the ACCA to require that each predicate felony have arisen "out of a 'separate and distinct criminal episode.'" *United States* v. *Hudspeth*, 42 F.3d 1015, 1019 (7th Cir. 1994) (en banc) (citation and emphasis omitted) (citing decisions from nine additional

circuits), cert. denied, 515 U.S. 1105 (1995). Offenses that occurred within a short period of time occurred on different occasions if they were committed "sequentially," rather than "simultaneously." *United States* v. *Fuller*, 453 F.3d 274, 279 (5th Cir. 2006); accord, *e.g.*, *United States* v. *Pope*, 132 F.3d 684, 692 (11th Cir. 1998) (explaining that offenses are separate episodes "so long as predicate crimes are successive rather than simultaneous"); *Hudspeth*, 42 F.3d at 1021 ("Under the ACCA, the relevant inquiry as to the timing of multiple crimes is simple: were the crimes *simultaneous* or were they *sequential*?"). As the Eleventh Circuit has explained, the courts of appeals have recognized, with a "virtually unanimous voice," that "the 'successful' completion of one crime plus a subsequent conscious decision to commit another crime makes that second crime distinct from the first for the purposes of the ACCA." *Pope*, 132 F.3d at 692; see *United States* v. *Phillips*, 149 F.3d 1026, 1032 (9th Cir. 1998) ("The key is that after one crime is complete, the defendant has the opportunity to stop and not engage in a second criminal act."), cert. denied, 526 U.S. 1052 (1999).

The indictments, judgments, and signed judicial confessions that are associated with respondent's Texas burglary convictions, which the court may examine under *Shepard* v. *United States*, 544 U.S. 13 (2005), show that he committed one burglary on July 5, 2000, and two burglaries on August 22, 2000. Br. in Opp. App. A227-A228, A234-A235, A242-A243.[1] With respect to the August 2000 convictions, respondent was convicted of burglarizing two different habitations—one owned by Debra

[1] The appendices to the brief in opposition are not sequentially paginated. Page numbers reflect the last three digits of the Bates stamp on the left-hand side of each page.

Brown, and another owned by Rex Harris. *Id.* at A234-A235, A242-A243. The records demonstrate that respondent committed the August 2000 burglaries on separate occasions. In his judicial confessions, respondent admitted that "[he] did * * * intentionally and knowingly enter" each habitation, *id.* at A234, A242, and it would have been physically impossible for him to enter two different habitations simultaneously. Moreover, Texas law provides that "the allowable unit of prosecution in a burglary is the unlawful entry," such that a defendant cannot face multiple burglary charges upon committing a single unlawful entry. *Ex parte Cavazos*, 203 S.W.3d 333, 337 (Tex. Crim. App. 2006).

Respondent's reliance on the Fifth Circuit's decision in *Fuller* (Br. in Opp. 7-8), is misplaced. In *Fuller*, the defendant claimed that "he and a friend simultaneously burglarized two trailers placed next to each other, entering them 'at the same identical time.'" 453 F.3d at 276. The court stated that while the indictments supported the conclusion that the burglaries were committed sequentially, "[a] jury could have convicted Fuller of one of the burglaries on a theory of law of the parties even if he only aided the burglary * * * by acting as a lookout while he stood inside the other trailer." *Id.* at 279. "Because the record d[id] not contain the written plea agreement, the plea colloquy, or other *Shepard*-approved material that might resolve this question," the court vacated the defendant's ACCA sentence. *Id.* at 279-280. Here, by contrast, the record contains respondent's signed judicial confessions, which establish that he pleaded guilty as the principal who personally entered each of the charged habitations.[2]

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[2] Respondent's reliance (Br. in Opp. 8 & n.40, 11-12) on the unpublished decision in *United States* v. *Owens*, 753 Fed. Appx. 209

2. Respondent separately contends (Br. in Opp. 13-19) that "the equities do not favor" a remand to the Fifth Circuit. *Id.* at 14. Specifically, respondent claims (*id.* at 17-18) that the government has "deliberately extend[ed] the life of the direct appeal in hopes that the law w[ould] change."

Respondent's argument lacks merit. As his timeline reveals (Br. in Opp. 14), the district court sentenced respondent in 2017. The government filed a timely notice of appeal, objecting to the court's refusal to impose an ACCA sentence. By the time briefing was underway in the government's appeal, disputes raising similar questions had reached both this Court and the court of appeals. See *United States* v. *Stitt*, No. 17-765 (petition for cert. filed Nov. 21, 2017); *Quarles* v. *United States*, No. 17-778 (petition for cert. filed Nov. 24, 2017); *United States* v. *Herrold*, No. 14-11317 (5th Cir.) (appeal filed Dec. 12, 2014). The government accordingly sought to stay this case pending the Fifth Circuit's first en banc decision in *Herrold*, and later, the government's petition for a writ of certiorari in that case. Br. in Opp. 14-15. Following the decision below, the government sought

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(5th Cir. 2018) (per curiam), is similarly misplaced. There, the state-court records showed that the defendant committed two burglaries on the same day: he unlawfully entered both Sheila Powers' habitation and V.G.'s building. *Id.* at 211. The court found that the state-court records failed to confirm that the burglaries "arose from separate criminal transactions" because "one criminal transaction simultaneously [could have] infringed" both "victims' interests"; the state-court documents "d[id] not allow the court to understand how Sheila Powers' habitation related to V.G.'s building, nor how [the defendant's] actions related to both." *Id.* at 215. In this case, the *Shepard* materials show that respondent unlawfully entered two different *habitations*, owned by two different individuals. See Br. in Opp. App. A234-A235, A242-A243.

rehearing in the court of appeals and subsequently filed the present petition for a writ of certiorari in this Court. *Id.* at 15-16. Although the government sought to extend certain deadlines throughout that process, see *ibid.*, respondent alleges "nothing unethical" about the government's actions, *id.* at 17, and does not suggest that—given the pendency of the other matters presenting the same issue—the case realistically could have been resolved more expeditiously.

Respondent asserts (Br. in Opp. 16-17) that "he has not enjoyed any real certainty as to the basic contours of his sentence" while his case has remained pending on direct appeal. But that is necessarily true of any defendant whose conviction has not yet become final. Respondent asserts (*id.* at 17) that "[h]e has also been deprived * * * of the benefit of existing law." That statement disregards the right of each party—the defendant and the government—to seek appellate review of the district court's sentencing determinations. See 18 U.S.C. 3742(a)-(b). Finally, respondent summarizes (Br. in Opp. 18) the district court's findings at sentencing that his history, background, and offense conduct merited only a 24-month sentence. The court, however, issued those findings *after* determining that respondent was ineligible for an ACCA sentence, because his Texas convictions for burglary of a habitation did not qualify as "burglary" under the ACCA. The court's findings do not bear on that threshold legal question, which is the subject of the petition for a writ of certiorari.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition 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.

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