No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL HOLMES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

While sitting with the Tenth Circuit Court of Appeals, Associate Justice Gorsuch explained how this Court has traditionally and customarily recognized that the "knocker on the front door" normally supplies an implied license or invitation for visitors of all kinds to enter the curtilage of one's home and knock at the front door. *See United States v. Carloss*, 818 F.3d 988, 1003 (10th Cir. 2016) (Gorsuch, J., dissenting) (citing *Florida v. Jardines*, 133 S. Ct. 1409 (2013)). "But," Justice Gorsuch asked, "what happens when the homeowner manifests an obvious intention to revoke the implied license to enter the curtilage and knock at the front door? When the owner literally substitutes the knocker with a No Trespassing sign . . . . [W]hen, for good measure, [the homeowner] posts still another No Trespassing sign between the driveway and the house?" *Id.* In that same opinion, Judge Tymkovich answered the question thusly: "To me," he wrote, "the court must deploy an objective test, asking whether a reasonable person would conclude that entry onto the curtilage – the front porch here – by police or others was *categorically* barred. In other words, we look to each case's facts to determine whether the reasonable person would think the license had been revoked." *Carloss*, 818 F.3d at 999 (Tymkovich, J., concurring) (emphasis in original).

Conversely, when addressing the motion to suppress evidence filed by Mr. Holmes in this case, the district court framed the issue thusly: "When law enforcement officers, without a warrant, enter a homeowner's fenced property through a partially open gate with a 'No Trespassing' sign posted on the fence nearby, and then proceed through an unlocked screen door onto an enclosed front porch and execute a 'knock and talk' with the homeowner at the front door to his home, have they violated the Fourth Amendment?" Doc. 90, page 1. "Because the Fourth Amendment issue seemed significant and unsettled," *id.*, the district court explained in a 42-page order that "whether [Mr. Holmes] expressly revoked [any] implied license to enter his property" (*id.* at 10) hinged on a bright-line rule – "a 'No Trespassing' sign placed on or very near a *closed* gate on a homeowner's fenced property would revoke the implied license to enter." Doc. 90, pages 32-33 (emphasis in original) (footnote omitted).

Because the fence in this case was found to be "partially open," *id.* at 33, Mr. Holmes failed the lower court's bright-line test and his motion to suppress was denied, in spite of all the remaining circumstances to his case. On appeal, the Eleventh Circuit found the district court's bright-line rule sound – it affirmed the order denying the motion to suppress.

(1) Herewith, then, the issue presented is whether the Eleventh Circuit Court of Appeals violated this Court's Fourth Amendment precedence and committed reversible error by endorsing a bright-line rule to answer the question of how a homeowner may ever properly revoke the implied license to enter one's property and approach the front door. Asked differently, what is reasonably required of a private homeowner to successfully revoke any implied license or permission to enter one's property under the Fourth Amendment?

(2) As a second question, Mr. Holmes received an enhanced sentence under the Armed Career Criminal Act (the ACCA) because he suffered from a 1997 Georgia state burglary conviction. In that there is a squarely-framed circuit split addressing this state statute between the Fourth, Sixth, and Eleventh Circuits, the question presented here is whether Georgia's burglary statute from which Mr. Holmes was previously convicted is a non-generic, indivisible statute, and as such any violation can never categorically qualify as a "violent felony" for purposes of the ACCA. *Cf. United States v. Cornette*, -- F.3d --, 2019 WL 3417272 (4th Cir. July 30, 2019) (Georgia burglary statute is indivisible and cannot qualify as a "violent felony" under the ACCA), *with United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016) (Georgia burglary statute is divisible and can qualify as a "violent felony" under the ACCA), and *Richardson v. United States*, 890 F.3d 616 (6th Cir. 2018) (same).

List of Parties

Petitioner, Michael Holmes, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the plaintiff in the district court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Michael Holmes, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit's decision and opinion, which was not published, is provided in the Appendix. It can also be found at *United States v. Michael Holmes*, 770 F. App'x 1013 (11th Cir. May 29, 2019). The court's order denying a petition for rehearing and rehearing en banc was entered on July 25, 2019; with the mandate having been issued on August 2, 2019. *See* Appendix.

JURISDICTION

The Eleventh Circuit issued its unpublished panel opinion on May 29, 2019. *See* Appendix. An order denying a petition for rehearing and rehearing en banc was entered on July 25, 2019, *see* Appendix; and, the court's mandate was issued on August 2, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment has been incorporated to apply to actions in the several states by the Due Process Clause of the Fourteenth Amendment; *see, e.g., Bailey v. United States*, 568 U.S. 186, 192, 133 S. Ct. 1031 (2013). The Fourteenth Amendment provides in part:

> Section 1. No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Finally, a felon-in-possession of a firearm who has at least three prior convictions "for a violent felony or a serious drug offense, or both, committed on occasions different from one another," is subject to an enhanced statutory penalty under the Armed Career Criminal Act (the ACCA). *See* 18 U.S.C. § 924(e)(1). The ACCA defines the term "violent felony" as any crime punishable by a term of imprisonment exceeding one year that:

> (i) has as an element the use, the 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.

18 U.S.C. § 924(e)(2)(B). "The first prong of this definition is sometimes referred to as the 'elements clause,' while the second prong contains the 'enumerated crimes' and [ ] what is [also] commonly called the 'residual clause.' *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012)." *United States v. Gundy*, 842 F.3d 1156, 1160-1161 (11th Cir. 2016), *cert. denied*, 138 S. Ct. (2017).[1]

INTRODUCTION

Mr. Holmes comes to the Court with two separate and distinct issues that certainly merit this institution's time, effort, and energy. The facts are clean, the record is tight, and the legal posture clearly framed. The answer to either one of the questions presented has national impact and intimately plays in the daily function of our nation's criminal courts, prosecutions, and investigations. This Court should grant Mr. Holmes's petition.

The Fourth Amendment Issue

Firstly, in terms of law enforcements' investigative techniques, the case calls into examination this Court's recent resurgence of trespassory jurisprudence[2] and

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[1] On June 26, 2015, this Court held that the residual clause of the ACCA is unconstitutionally vague. *See Johnson v. United States*, 135 S. Ct. 2551 (2015).

[2] *See United States v. Jones*, 132 S. Ct. 945, 949 (2012) ("our Fourth Amendment jurisprudence was tied to common-law trespass"), and *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) ("when it comes to the Fourth Amendment, the home is first among equals").

the use of "knock-and-talks," that is, when police simply approach a citizen's home, knock on the front door, and wait for the resident to answer, just as any other private citizen might do.[3] It may appear at first read that this Court has already discussed "knock-and-talks" in the matter of *Florida v. Jardines*, 133 S. Ct. 1409 (2013), in which the Court held that any implied license to enter one's property does not include law enforcement's trespass to curtilage by using a drug-sniffing dog to find evidence of wrong-doing.[4] In the case-at-bar, Mr. Holmes asks the question one degree further, and that is to posit what is reasonably required of a private homeowner to successfully revoke any implied license or permission to enter one's property at all under the Fourth Amendment. Mr. Holmes

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[3] *See Jardines*, 133 S. Ct. at 1417 ("[o]ne virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy").

[4] In *Jardines*, the Court held that the officers' conduct there was outside the permission and scope of any implied license and actually fell within the definition of an "unreasonable search" for purposes of the Fourth Amendment. *See Jardines*, 133 S. Ct. at 1416 ("introducing a trained police dog" to search one's curtilage "is something else," indeed, "[t]here is no customary invitation to do *that*") (emphasis in original). Similarly, Mr. Holmes is also trying to argue here that what the police did was an "unlawful search," that is to say, Mr. Holmes argues what the police did wrong was to unlawfully trespass against and in violation of his property rights – the police had no legal right to approach the front door of Mr. Holmes because he had already successfully revoked any implied license to enter his property, a constitutionally protected area. *See id.* at 1415 (examining whether law enforcement's "investigation took place in a constitutionally protected area" and thus "was accomplished through an unlicensed physical intrusion") (footnote omitted). Therefore, the exclusionary rule would apply in hopes of deterring future bad faith conduct by the police – to prevent the police from unlawfully trespassing against private homeowners.

takes the position that he expressly and unequivocally told the world, including his neighbors, the proverbial door-to-door salesman, and especially the police to stay off his property – among other matters, Mr. Holmes had a closed-in front door, shunted by burglar bars, no doorbell to speak of, a dog in the front yard, and a chain-link fence sealing his property posted with No Trespassing and Private Property signs. Under all the surrounding circumstances to this case, Mr. Holmes would argue he did all he could to tell the world to go away.[5]

But the lower courts in the instant cause effectively (and practically for that matter) decided the case on a bright-line rule – that a chain link fence posted with a No Trespassing sign which is *closed* properly revokes any implied license to enter. That's it, however; under the lower courts' rule, all the other surrounding

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[5] In *United States v. Carloss*, 818 F.3d 988 (10th Cir.), *cert. denied*, 137 S. Ct. 231 (2016), Associate Justice Gorsuch wrote in a dissenting opinion while a member of the Tenth Circuit Court of Appeals an extensive exploration on the issue presented in this petition. Noting that "[t]he 'knock and talk' has won a prominent place in today's legal lexicon," Justice Gorsuch asked, "what happens when the homeowner manifests an obvious intention to revoke the implied license to enter the curtilage and knock at the front door?" *Id.* at 1003 (Gorsuch, J., dissenting). He asked whether "you can't help but wonder if millions of homeowners (and solicitors) might be surprised to learn that even a long line of clearly posted No Trespassing signs are insufficient to revoke the implied license to enter a home's curtilage – that No Trespassing signs have become little more than lawn art." *Id.* at 1011. Reminiscent of Justice Scalia's famed wit, Justice Gorsuch proposed a new sign to properly revoke any implied license to enter, to-wit: "The implied license discussed by the United States Supreme Court in *Breard v. Alexandria*, 341 U.S. 622 (1951) and *Florida v. Jardines*, 133 S. Ct. 1409, 185 L.Ed.2d 495 (2013) is hereby revoked." *Id.* at 1012.

circumstances do not come into play -- and because the district court found the fence encasing the house in this cause was "partially open," the facts of the case failed the rule and Mr. Holmes was denied relief. Perhaps said differently, the lower courts have established a bright-line rule that says unless a person's private property is otherwise physically inaccessible to anyone, a homeowner can never revoke the implied license to enter. This clearly is not the law, and it clearly violates this Court's teachings, tenets, and jurisprudence. *See Jardines, supra.*; *see also United States v. Jones*, 132 S. Ct. 945 (2012) (in which the Court discussed and examined the Fourth Amendment's anchor to property rights and common-law trespass).

The case of Mr. Holmes provides this Court with an excellent vehicle and wonderful opportunity to fully immerse itself in the deep waters of Fourth Amendment jurisprudence. One might reasonably suggest that the district court in the case-at-bar was prescient when it wrote in its order denying Mr. Holmes his motion to suppress:

> That law enforcement generally has an implied license to conduct a "knock and talk" at a homeowner's door is settled. However, the circumstances under which a homeowner has expressly revoked this implied license, including what role the posting of a "No Trespassing" sign plays, is the subject of much litigation and remains unsettled. Fashioning guidance to both homeowners and police through a post-hoc case-by-case approach is problematic. Nevertheless, any effort to divine more predictable rules is also subject to critique. Maybe, for example, the posting of a "No Trespassing" sign has no effect. If not, what signage (with or without

> a fence) might? What combination of signage and physical barrier is required? Do we want to make it easy or difficult for a homeowner to revoke the implied license? These issues will no doubt continue to be addressed by the appellate courts and likely one day the Supreme Court.

Doc. 90, page 35.

The Armed Career Criminal Issue

Secondly, similar to this Court's decision and opinion from last term, *see Stokeling v. United States*, 139 S. Ct. 544 (2019) (examining Florida's state robbery statute), Mr. Holmes submits the question as to how we should legally interpret Georgia's state burglary statute, i.e., whether it is divisible or indivisible. *See Mathis v. United States*, 136 S. Ct. 2243 (2016). There is a clear and express Circuit split on this issue, and it is certainly capable of repetition throughout the country. Moreover, the question bears on proper statutory context, reading, and interpretation for purposes of the Armed Career Criminal Act (the ACCA). *See id.*

Here, the Eleventh Circuit holds that Georgia's burglary statute is divisible, and as such, it may qualify as a predicate prior conviction for purposes of the ACCA. *See United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016), *cert. denied,* 138 S. Ct. (2017); *see also Richardson v. United* States, 890 F.3d 616 (6th Cir. 2018) (agreeing with the 11th Circuit that Georgia's burglary statute is divisible, and thus may qualify for ACCA treatment). Because Mr. Holmes suffers from a 1997 Georgia burglary conviction, the Eleventh Circuit upheld the lower court's

decision to sentence him as an Armed Career Criminal. *See* Appendix.

Conversely, the Fourth Circuit rendered a decision and opinion in *United States v. Cornette*, -- F.3d --, 2019 WL 3417272, at *7, n.2 (4th Cir. March 19, 2019), in which it found that Georgia's burglary statute was indivisible; hence, it could never qualify for ACCA treatment. "We recognize that our conclusion puts us at odds with the Eleventh Circuit's decision in *United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016)," as well as with "the Sixth Circuit's decision in *Richardson v. United States*, 890 F.3d 616 (6th Cir. 2018)," the Fourth Circuit declared in *Cornette*. "Respectfully, we do not find the reasoning of our sister circuits persuasive." *Cornette*, 2019 WL 3417272, at *7, n.2.

In the case of Mr. Holmes, were his Georgia state burglary conviction found to be improperly included within the ACCA's penumbra of qualifying offenses, he would not be subject to the enhanced penalties of section 924(e) (15 years to life); rather, he would be exposed to a maximum penalty of up to 10 years' imprisonment, and most likely a substantially lower Sentencing Guidelines score. This question simply turns on how properly to interpret Georgia's burglary statute for purposes of the ACCA, whether as divisible like the Sixth and Eleventh Circuits have ruled, or as indivisible according to the Fourth Circuit. Were Mr. Holmes sentenced in the Fourth Circuit, and not in the Eleventh, he would not qualify to be sentenced under the ACCA. This Court is now in the best position to

quickly, efficiently, and effectively answer this concern; thus, it should grant the instant petition.

STATEMENT OF THE CASE

More than 5 ½ years ago, Mr. Holmes was indicted for federal drug and gun crimes (the original and then superseding indictments were returned and filed in February, 2014, *see* Docs. 1 and 17). Before trial, Mr. Holmes filed a motion to suppress the evidence against him, from which blossomed a plethora of investigation, research, briefing, memoranda, hearings, and arguments. *See, e.g.,* Docs. 24 (the original motion to suppress), 26 (the government's response), 29 (a reply), 42 (minutes of the suppression hearing), 35 and 36 (supplemental briefing), 37 (transcript of the suppression hearing), 43 (the magistrate's report and recommendation), 46 (objections to the report and recommendation), 62, 63, 65, 67 (supplemental briefing), 66 (oral argument), 73 (transcript of oral argument), and 90 (order denying motion to suppress).

Following the denial of his motion to suppress, Mr. Holmes pursued a stipulated bench trial before the district court on November 12, 2015, in best fashion to frame and preserve his appellate rights. *See* Docs. 92, 93, and 94. The district court found Mr. Holmes guilty of possessing firearms while a convicted felon (a violation of 18 U.S.C. § 922(g) (Count 1)), guilty of possessing with intent to distribute cocaine base (Count 2), and guilty of possessing with intent to

distribute powder cocaine (Count 3). *See* Doc. 94 (adjudicating Mr. Holmes guilty as charged in the superseding indictment).

Subsequently, the U.S. Probation Office conducted a pre-sentence investigation and prepared a Pre-Sentence Report (PSR). As to the first count, felon-in-possession, the probation office suggested that Mr. Holmes qualified for enhanced sentencing treatment, pursuant to the Armed Career Criminal Act (the ACCA). *See* 18 U.S.C. § 924(e). In other words, rather than the applicable 10-year maximum penalty, Mr. Holmes was otherwise subject to a mandatory minimum penalty of at least 15 years' imprisonment and a new maximum exposure of up to life in prison. *See* Pre-Sentence Report (PSR), Doc. 102, page 10, ¶ 44.[6] As to the remaining two counts (Counts 2 and 3), the drug offenses, the maximum penalties were up to 20 years in prison. *See* PSR ¶ 107; *see also* 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). Over objection, the district court noted the arguments of Mr. Holmes, but found he qualified for sentencing as an Armed Career Criminal and calculated his Sentencing Guidelines with a total offense level 31, a criminal history category

[6] The PSR relied on and emphasized that Mr. Holmes suffered from two felony drug convictions in Florida, one from 1990 and a second from 1997. It also cited a Georgia state burglary conviction from 1997. The PSR found these three events to qualify as "serious drug offenses" and "violent felonies" for purposes of the ACCA, and, as such, exposed Mr. Holmes to a mandatory minimum sentence of 15 years in prison up to life. *See* PSR ¶¶ 44 and 107 ("[t]he minimum term of imprisonment is 15 years, and the maximum term is Life"). As to Counts 2 and 3, the drug counts, Mr. Holmes faced only maximum penalties of up to 20 years. *See* 21 U.S.C. §§ 841(a)(1) and (b)(1)(C).

VI, and a suggested prison range between 188 and 235 months. *See* Doc. 152, pages 6 and 37 (sentencing transcript). The court ultimately sentenced Mr. Holmes to 210 months, or 17 ½ years in prison. *See* Doc. 152, page 38; *see also* Doc. 134 (the written judgment and sentence).

On direct appeal, *see* Doc. 138, Mr. Holmes raised two issues: (1) that the district court erred when denying his motion to suppress; and (2) that the Georgia state burglary conviction he sustained in 1997 should not count as a "violent felony" for purposes of the ACCA, and, as such, he should have been exposed to a maximum sentence of only 10 years in prison, not 15 to life. In a 242-word opinion issued after oral argument, the Eleventh Circuit affirmed the district court. It wrote, in full:

> The government charged Michael Homes [sic] by indictment with possession of firearms by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e), and possession with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). Holmes moved to suppress on Fourth Amendment grounds evidence that the government obtained when law enforcement conducted a knock-and-talk investigation at Holmes's residence. The district court denied the motion to suppress. The court ruled that no Fourth Amendment violation occurred when law enforcement conducted the knock-and-talk because Holmes failed to revoke the implied license that allowed law enforcement to approach his residence and knock. After a bench trial, Holmes was found guilty. The district court enhanced Holmes's sentence pursuant to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), based in part on its ruling that his 1997 Georgia burglary conviction was for a violent felony.

> On appeal, Holmes challenges the district court's denial of his motion to suppress and its ruling that his Georgia burglary conviction was for a violent felony, qualifying him for an ACCA enhancement. After careful review and with the benefit of oral argument, we affirm the district court's well-reasoned opinion denying Holmes's motion to suppress. And we conclude, as Holmes concedes, that our decision in *United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016), forecloses his argument that his 1997 Georgia burglary conviction was not for a violent felony. Affirmed.

United States v. Michael Holmes, No. 17-15404 (11th Cir. May 29, 2019), slip op.; also reported at 770 F. App'x 1013 (11th Cir. 2019) (unpublished), *see* Appendix. Mr. Holmes petitioned for panel rehearing and rehearing en banc but was denied relief in an order entered by the appellate court on July 25, 2019. *See* Appendix. The court's mandate was issued on August 2, 2019.

REASONS FOR GRANTING THE WRIT

Mr. Holmes acknowledges that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." S. Ct. Rule 10. He would humbly submit that the issues raised by his case merit this Court's attention, time, and resources. At a minimum, the petition presents a square circuit split. Moreover, this case does not involve any "asserted error consist[ing] of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* It certainly meets all the other conventional requirements for certiorari. *See* S. Ct. Rule 10. Mr. Holmes assumes the further position that the lower courts have "decided an important question of federal law [as well as deciding] an important federal question in a way that

conflicts with relevant decisions of this Court." *Id.*[7] Thus, Mr. Holmes appeals to this Court for its merit-worthy intervention.

There are two questions presented, both of which warrant this Court's time, energy, resources, and investment. The questions invoke the daily procedural and substantive traffic driven by law enforcement, prosecutors, defense attorneys, and our federal criminal courts. The questions may very well affect thousands of federal criminal defendants, whether before and at trial or during sentencing.[8] Mr. Holmes comes to this Court after a direct criminal appeal and on two questions in the context of the Fourth Amendment and the Armed Career Criminal Act. There are no factual questions to address and the matter involves only a legal analysis and application of the Court's jurisprudence. *See Florida v. Jardines*, 133 S. Ct.

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[7] Clearly, as to his second question presented, "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]" S. Ct. Rule 10(a).

[8] For example, according to the United States Sentencing Commission's most recent report, *Overview of Federal Criminal Cases, Fiscal Year 2018*, the federal caseload increased 3.8% from the previous fiscal year; cases involving drugs, immigration, firearms, fraud, theft, and embezzlement accounted for 82.8% of all cases reported to the Commission (of which drugs and firearms offenses accounted for 38.9% of all federal cases) – to be sure, "[t]he other area of significant growth in fiscal year 2018 was in firearms cases. There were 7,512 firearms cases reported to the Commission, accounting for 10.8 percent of the caseload. This was an increase of 753 cases from the number of firearms cases reported the prior year." United States Sentencing Commission, *Overview of Federal Criminal Cases, Fiscal Year 2018* (June 2019), at page 5, and available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18_Overview_Federal_Criminal_Cases.pdf.

1409 (2013) (Fourth Amendment); *United States v. Jones*, 132 S. Ct. 945 (2012) (Fourth Amendment); *see also Mathis v. United States*, 136 S. Ct. 2243 (2016) (ACCA); *Descamps v. United* States, 133 S. Ct. 2276 (2013) (ACCA); *Shepard v. United States*, 125 S. Ct. 1254 (2005) (ACCA).

On Knock-and-Talks and the Fourth Amendment

In another unrelated case that was distributed for conference on October 1, 2019 (and then denied on October 7), the People of the State of Michigan, as Petitioner, were also asking for this Court's review on the interplay between "knock-and-talk" investigations, the Fourth Amendment, and the doctrine of the implied license to approach one's home. *See Michigan v. Michael Frederick, et al.*, No. 18-1513 (filed June 3, 2019). There, law enforcement approached a private residence at, generally speaking, between 4 and 5 o'clock a.m. in the morning. The Michigan state Supreme Court, relying on *Florida v. Jardines*, upheld the findings of the lower courts that by doing so, law enforcement exceeded the scope of any implied license to enter the property and therefore conducted an impermissible search in violation of the Fourth Amendment. In its petition for writ of certiorari, the state of Michigan discusses some of the lower and appellate court decisions and opinions exploring *Jardines* and the doctrine of implied consent when measured against Fourth Amendment jurisprudence. *See* Petition for Writ of Certiorari, *Michigan v. Frederick*, No. 18-1513, at pages 10-15 (advocating that "there is

confusion on what effect, if any, this Court's decision in *Jardines* should have on knock and talk encounters"). The petitioner there, after highlighting both state and federal cases (including, *inter alia*, *United States v. Lundin*, 817 F.3d 1151 (9th Cir. 2016), *United States v. Carloss*, 818 F.3d 988 (10th Cir. 2016), and *United States v. Walker*, 799 F.3d 1361 (11th Cir. 2015)) concluded that after *Jardines*, "courts are left to speculate on the import of dicta from that decision, and some are creating bright line rules for the time of day or officers' subjective intent in the context of a Fourth Amendment reasonableness analysis, which this Court has been loath to impose." Petition for Cert., *Michigan v. Frederick*, No. 18-1513, at page 15 (citing *Ohio v. Robinette*, 519 U.S. 33, 39; 117 S. Ct. 417 (1996) ("we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry")).[9]

And that is exactly what happened here.

Both the lower and appellate court in the case-at-bar devised and applied a bright-line rule against this Court's Fourth Amendment mandate. The district court framed the question: "When law enforcement officers, without a warrant, enter a

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[9] For lengthy examinations and discussions on "knock-and-talks" and application of this Court's precedence by the lower courts, *see, e.g.*, McLanahan, Cole, Note, *United States v. Carloss: Should the Police Act Like Good Neighbors*, 70 Okla. L. Rev. 519 (Winter, 2018), and Sikes, Skyler K., Note, *Get Off My Porch: United States v. Carloss and the Escalating Dangers of "Knock and Talks,"* 70 Okla. L. Rev. 493 (Winter, 2018).

homeowner's fenced property through a partially open gate with a 'No Trespassing' sign posted on the fence nearby, and then proceed through an unlocked screen door onto an enclosed front porch and execute a 'knock and talk' with the homeowner at the front door to his home, have they violated the Fourth Amendment?" Doc. 90, page 1. Asked differently, "the question presented is whether [Mr.] Holmes expressly revoked the implied license to enter his property." *Id.* at 10. "If he did," the court wrote, then "detectives violated [Mr.] Holmes' [sic] Fourth Amendment rights by approaching his front door to conduct a knock and talk." *Id.* at 10-11.

Though Mr. Holmes appreciates the good intentions of the court below and accepts its critiques at face value, that is to say, "the problem with a case-by-case approach is that the property owner and the police should know *beforehand* what measures are sufficient to revoke the implied license to enter property," this policy demand is simply not the law of the land. Doc. 90, page 29 (emphasis in original). Ergo, when the court devised a bright-line rule to answer the question asked, i.e., the combination of posting a No Trespassing sign when "seal[ing] the property" will always "manifest the resident's intent to revoke the implied license to enter," Doc. 90, page 32, it (wittingly or unwittingly) undermined this Court's stated and well-settled standard of Fourth Amendment analysis – "We have long held that the 'touchstone of the Fourth Amendment is reasonableness.'" *Ohio v. Robinette*, 117

S. Ct. 417, 421 (1996) (quoting *Florida v. Jimeno*, 111 S. Ct. 1801, 1803 (1991)). "Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." *Robinette*, 117 S. Ct. at 421. "In applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Id.*

Both the district court and appellate court rebuked this Court's tenets when "reviewing the knock and talk cases" and finding them "unsatisfying because they generally employ a post-hoc case-by-case 'totality of the circumstances' analysis which does not provide needed guidance to law enforcement or homeowners." Doc. 90, page 28. Recounting "dozens of factors [that] are considered relevant in determining whether the implied license has been revoked," *id.*, the courts below improperly rejected all of these circumstances,[10] declaring that "[a]n ad hoc

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[10] For example, the district court listed:

> whether the property is rural or urban; the size of the property; whether there is a guard dog, or a security guard or a security camera; whether the mail is delivered to a box on the street or at the house; whether the trash is collected on the property or at the curb; whether the meter is read remotely or at the house; whether members of a local church choose to visit; whether the house is visible from the street; whether there is a walkway or path to the door and if so, whether it is paved; whether there is a door knock or doorbell; whether there is a fence surrounding the property, whether it is in good repair, the number of fences, whether there are gaps in the fence, the height of the fence, whether the fence is chain-link, or barbed wire, or a picket fence, or a stockade fence; whether there is a gate, whether the gate is open, or closed, or ajar, or locked; whether there is a sign, whether neighbors are

approach not only makes it difficult for the policeman to discern the scope of his authority, it also creates a danger that constitutional rights will be arbitrarily and inequitably enforced." Doc. 90, page 29 (cleaned up). "Rather," the district court declared, "homeowners deserve to know beforehand whether the measures they have taken expressly revoke the implied license to enter their property; likewise, the police need to know before they enter whether they will be violating the Constitution if they do so." *Id.* (footnote omitted). In short, the district court came up with, and the appellate court endorsed, a bright-line rule that says unless a resident otherwise seals his or her property and makes such property physically inaccessible in combination and along with the posting of conspicuous No Trespassing signs, a homeowner can never successfully revoke the implied license to enter one's property. The district court explained its rule:

> aware of the sign, whether law enforcement officers saw the sign, whether it was defendant who posted the sign the age of the sign, the number of signs, the location of the signs, the size of the signs, the size of the lettering on the signs, the message on the signs, be it "No Trespassing" or "Do Not Enter" or "Beware of Dog" or "Private Property" or "Keep Out."

Doc. 90, pages 28-29. It is the contention of Mr. Holmes, as it always remains, the bulk, if not the majority of these factors, weigh in his favor; to-wit, he expressly revoked any implied license to enter, the police trespassed onto his property, thereby violating his rights under the Fourth Amendment – his motion to suppress should have been granted.

> The large number of knock and talk cases referencing "No Trespassing" signs suggests that their presence or absence is a relevant consideration. The prevailing view is that when a gate is closed (but not locked), the lack of a "No Trespassing" sign renders the closed gate ineffective to revoke the implied license, because the closed gate could merely be intended to keep children or pets inside. And, where a gate is open, the presence of a "No Trespassing" sign is likewise generally ineffective to revoke the implied license because the open gate undermines the inferences that the sign is meant to keep out all visitors instead of just those who might trespass in the traditional sense. In both of those circumstances, the homeowner's message to outsiders is ambiguous and therefore fails to provide the "express" revocation of the implied license.

Doc. 90, pages 31-32 (footnotes omitted).

"However," the court continued in drafting its bright-line rule to fit the facts of the case, "it may be inferred from these cases that the *combination* of posting a 'No Trespassing' sign along with the physical act of closing the gate *does* serve to seal the property and manifest the resident's intent to revoke the implied license to enter." *Id.* at 32 (emphasis in original). It explained: "To gain entry," then, "a 'reasonably respectful citizen' (or police officer) would have to both disregard the sign *and* physically open the gate." *Id.* (emphasis in original). In sum, "a further bright line or categorical rule could perhaps be fashioned: a 'No Trespassing' sign placed on or very near a *closed* gate on a homeowner's fenced property would revoke the implied license to enter." Doc. 90, pages 32-33 (footnotes omitted) (emphasis in original). In that the courts below found as a factual matter that the gate to the chain-link fence was "partially opened," all the remaining and

surrounding facts and circumstances were carved out of the analysis. *See* Doc. 90, page 33 ("because [Mr.] Holmes left the gate partially open, his 'No Trespassing' sign is not enough to 'expressly' and unambiguously revoke the implied license"). Mr. Holmes was denied relief because he could not satisfy and meet the district court's bright-line rule – a rule that contravenes everything this Court has taught us about the Fourth Amendment.

The Tenth Circuit majority in *Carloss* "took [a] view that government officials were free to ignore the warnings and walk up the homeowner's path and knock on the front door without a warrant." Gorsuch, Neil M., *A Republic, If You Can Keep It* 145 (Crown Forum 2019). "To me," Justice Gorsuch has commented, "this case is what originalism is all about: ensuring that the liberties the people enjoyed at the founding remain no less secure today." *Id.* So it remains with the case of Mr. Holmes. It should go without argument that "[a] person's home is at the core of the Fourth Amendment protections against unreasonable searches and seizures." Doc. 90, page 8 (citing *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013)). This matter certainly presents a question of great national significance and impact, especially for each and every one of this country's homeowners. It has been studied and written at length that this Court's "case selection decisions [ ] help [ ] define the role that the Court plays within the judicial system and

American life."[11] Moreover, just as argued in the petition for writ of certiorari in *Michigan v. Frederick*, No. 18-1513, page 23, "[t]his case does not include extraneous issues that could muddy the waters," to be sure, "[t]he factual setting of this case makes it an ideal one for the Court to decide the issue[.]" *Id.* Under this Court's Rule 10, "[a] petition for a writ of certiorari will be granted only for compelling reasons." More particularly, Rule 10 advocates the granting of case review when "a United States court of appeals has decided an important question of federal law . . . or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c). This has happened here; indeed, the case-at-bar presents with compelling national interests and legal consequences. The lower courts have adopted an impermissible bright-line rule that violates this Court's Fourth Amendment "totality of the circumstances" review – an adverse rule that this Court should not allow to stand because of its nationally adverse impact. This Court should intervene and grant certiorari.

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[11] Cordray, Richard, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 Washington University L. Rev. 389, 396 (2004).

On Circuit Splits, Georgia's Burglary Statute, and the ACCA

As to the sentencing of Mr. Holmes, it is his continued contention that he was sentenced in error. He never should have qualified for punishment under the Armed Career Criminal Act (the ACCA, 18 U.S.C. § 924(e)). He was sentenced as an Armed Career Criminal because of a certain predicate Georgia state conviction that the courts below considered a "violent felony" under the ACCA.[12] Mr. Holmes contends that his 1997 Georgia burglary conviction is not categorically a violent felony as defined by the ACCA.[13] The Eleventh Circuit has held that this Georgia burglary statute is "divisible," subject to a "modified categorical" analysis to determine whether a defendant's conviction for such otherwise qualifies for ACCA treatment. *See United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016), *cert. denied*, 136 S. Ct. 66 (2017). Were this specific conviction wiped from the vision

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[12] Particularly, the prior 1997 Georgia state burglary conviction is listed in the final form Pre-Sentence Report (PSR) that was submitted under seal to the district court for sentencing at PSR, Doc. 100, pages 10 and 15, ¶¶ 44(c) and 67; *see also* Doc. 133-1 (Exhibit 3) and Doc. 133-4 (paperwork and documents associated with the Georgia conviction).

[13] Specifically, Mr. Holmes argues that his 1997 Georgia burglary conviction is not categorically a violent felony because both the unlawful entry and location elements of Georgia burglary are overbroad when compared to the corresponding elements of generic burglary under the enumerated clause of the ACCA. *See Cornette*, 2019 WL 3417272, at *5. (In light of this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the burglary conviction can only possibly qualify under the "enumerated clause" of section 924(e) because the accompanying "residual clause" was found to be unconstitutionally vague).

of the ACCA, Mr. Holmes would be exposed to a punishment of up to 10 years' imprisonment, and not a draconian exposure between 15 years to life. His 17 ½ year prison sentence for having been convicted as a felon-in-possession of firearms would be illegal.

Rule 10 "indicate[s] the character of the reasons the Court considers" when allowing for certiorari, of which, one of these considerations includes "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." S. Ct. Rule 10(a). In the case-at-bar, we have a direct conflict between decisions of the various court of appeals: the Fourth Circuit holds that Georgia's burglary statute is "indivisible" as contemplated by this Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), *see United States v. Cornette*, -- F.3d --, 2019 WL 3417272 (4th Cir. July 30, 2019), which, the Fourth Circuit recognizes that its "conclusion puts [it] at odds with the Eleventh Circuit's decision in *United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016), and the Sixth Circuit's decision in *Richardson v. United States*, 890 F.3d 616 (6th Cir. 2018)." *Cornette*, 2019 WL 3417272, at *7 n.2. Perhaps said differently, this case presents an acknowledged circuit conflict concerning an undeniably important question arising under the Armed Career Criminal Act – and, an acknowledged circuit conflict on a matter of such material importance to our nation's criminal practitioners should constitute a

sufficient reason from which to grant certiorari. In short, the circuit split here is as squarely framed, obvious, and consequential as they come. Indeed, the question presented is also an undeniably important one that warrants this Court's considered review, wisdom, and timely intervention.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

Donna Lee Elm
Federal Defender

/s *Stephen J. Langs*
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Research and Writing Attorney
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Counsel of Record for the Petitioner

Dated: October 11, 2019

Appendix

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15404

D.C. Docket No. 3:14-cr-00021-TJC-PDB-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MICHAEL HOLMES,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(May 29, 2019)

Before WILSON, JILL PRYOR and TALLMAN,* Circuit Judges.

PER CURIAM:

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* Honorable Richard C. Tallman, United States Circuit Judge for the Ninth Circuit, sitting by designation.

The government charged Michael Homes by indictment with possession of firearms by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e), and possession with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). Holmes moved to suppress on Fourth Amendment grounds evidence that the government obtained when law enforcement conducted a knock-and-talk investigation at Holmes's residence. The district court denied the motion to suppress. The court ruled that no Fourth Amendment violation occurred when law enforcement conducted the knock-and-talk because Holmes failed to revoke the implied license that allowed law enforcement to approach his residence and knock. After a bench trial, Holmes was found guilty. The district court enhanced Holmes's sentence pursuant to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), based in part on its ruling that his 1997 Georgia burglary conviction was for a violent felony.

On appeal, Holmes challenges the district court's denial of his motion to suppress and its ruling that his Georgia burglary conviction was for a violent felony, qualifying him for an ACCA enhancement. After careful review and with the benefit of oral argument, we affirm the district court's well-reasoned opinion denying Holmes's motion to suppress. And we conclude, as Holmes concedes, that our decision in *United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016),

forecloses his argument that his 1997 Georgia burglary conviction was not for a violent felony.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

May 29, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-15404-JJ
Case Style: USA v. Michael Holmes
District Court Docket No: 3:14-cr-00021-TJC-PDB-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Tiffany A. Tucker, JJ at (404)335-6193.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna Clark
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

July 25, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-15404-JJ
Case Style: USA v. Michael Holmes
District Court Docket No: 3:14-cr-00021-TJC-PDB-1

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Tiffany A. Tucker, JJ/lt
Phone #: (404)335-6193

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15404-JJ

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MICHAEL HOLMES,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, JILL PRYOR and TALLMAN,* Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ENTERED FOR THE COURT:

/s/ Jill Pryor
UNITED STATES CIRCUIT JUDGE

*Honorable Richard C. Tallman, United States Circuit Judge for the Ninth Circuit, sitting by designation.

ORD-42

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

August 02, 2019

Clerk - Middle District of Florida
U.S. District Court
300 N HOGAN ST
JACKSONVILLE, FL 32202

Appeal Number: 17-15404-JJ
Case Style: USA v. Michael Holmes
District Court Docket No: 3:14-cr-00021-TJC-PDB-1

A copy of this letter, and the judgment form if noted above, but not a copy of the court's decision, is also being forwarded to counsel and pro se parties. A copy of the court's decision was previously forwarded to counsel and pro se parties on the date it was issued.

The enclosed copy of the judgment is hereby issued as mandate of the court. The court's opinion was previously provided on the date of issuance.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Lois Tunstall
Phone #: (404) 335-6191

Enclosure(s)

MDT-1 Letter Issuing Mandate

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 17-15404

District Court Docket No.
3:14-cr-00021-TJC-PDB-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MICHAEL HOLMES,

Defendant - Appellant.

Appeal from the United States District Court for the
Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: May 29, 2019
For the Court: DAVID J. SMITH, Clerk of Court
By: Djuanna Clark