

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID LEE GARRETT,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX

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APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

June 25, 2020

No. 17-10516
Summary Calendar

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellant Cross-Appellee

v.

DAVID LEE GARRETT,

Defendant - Appellee Cross-Appellant

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CR-107-1

Before JOLLY, JONES, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

David Lee Garrett pleaded guilty to possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1) and was sentenced under 18 U.S.C. § 924(a)(2) to 84 months of imprisonment and three years of supervised release. Although the district court determined that Garrett's two prior convictions for burglary of a habitation under Texas Penal Code § 30.02(a) qualified as violent felonies under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), the court

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

agreed with Garrett that his prior conviction for robbery under Texas Penal Code § 29.02 did not meet the statutory definition of “violent felony.”

On appeal, the Government contends that Garrett’s sentence should be vacated and the case remanded for resentencing because now-binding precedent holds that Texas robbery is a violent felony under § 924(e). *See United States v. Burris*, 920 F.3d 942, 945, 948 & n.31 (5th Cir. 2019), *petition for cert. filed* (U.S. Oct. 3, 2019) (No. 19-6186). Garrett cross-appeals, arguing that his conviction should be reversed because § 922(g)(1) is facially unconstitutional and further that Texas robbery does not qualify as a violent felony under the ACCA. Alternatively, Garrett argues that his non-ACCA sentence should be affirmed because Texas burglary is not generic burglary and thus does not qualify as a violent felony. *See* § 924(e)(2)(B)(ii). He concedes that his first two arguments are foreclosed, and he raises those arguments to preserve them for further review. The Government, in turn, moves for summary affirmance as to the judgment of conviction, and it moves for summary disposition, or vacatur, as to the sentence imposed.

Summary affirmance or disposition is proper where, among other instances, “the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case.” *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). Garrett’s argument that § 922(g)(1) is unconstitutional because it exceeds the scope of Congress’s power under the Commerce Clause is foreclosed. *See United States v. Alcantar*, 733 F.3d 143, 146 (5th Cir. 2013); *United States v. De Leon*, 170 F.3d 494, 499 (5th Cir. 1999). Accordingly, summary affirmance of his conviction is proper. *See Groendyke Transp., Inc.*, 406 F.2d at 1162.

In addition, the sentencing issues presented on appeal and cross-appeal are foreclosed by *United States v. Herrold*, 941 F.3d 173, 182 (5th Cir. 2019)

(en banc), *petition for cert. filed* (U.S. Feb. 18, 2020) (No. 19-7731), and *Burris*, 920 F.3d at 945, 948 & n.31. In *Burris*, this court concluded that robbery-by-threat and robbery-by-injury under Texas Penal Code § 29.02 both require the “use, attempted use, or threatened use of physical force” and are violent felonies under § 924(e)(2)(B)(i)’s force clause. *Burris*, 920 F.3d at 945, 948 & n.31 (quotation at 945) (internal quotation marks omitted). In *Herrold*, this court held that Texas burglary is “generic burglary” and is a violent felony under the ACCA. *Herrold*, 941 F.3d at 182. Thus, the argument that Garrett’s Texas robbery and burglary convictions are not violent felonies is foreclosed by current circuit precedent, and summary disposition, or vacatur, is appropriate. *See Groendyke Transp., Inc.*, 406 F.2d at 1162.

In light of the foregoing, the Government’s motion for summary affirmance and for summary disposition is GRANTED. The Government’s alternative motion for an extension of time to file a brief is DENIED. Garrett’s conviction is AFFIRMED, his sentence is VACATED, and the case is REMANDED for resentencing.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

DAVID LEE GARRETTCase Number: **3:16-CR-00107-L(1)**USM Number: **54061-177****Stephen James Green**

Defendant's Attorney

THE DEFENDANT:

<input type="checkbox"/>	pleaded guilty to count(s)	
<input checked="" type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	Count 1 of the Indictment filed March 23, 2016.
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
18:922(g)(1) and 924(e) Felon In Possession Of A Firearm	12/31/2015	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- The defendant has been found not guilty on count(s)
- Count(s) is are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

April 27, 2017

Date of Imposition of Judgment


Sam A. Lindsay, United States District Judge

Name and Title of Judge

April 28, 2017

Date

DEFENDANT: DAVID LEE GARRETT
CASE NUMBER: 3:16-CR-00107-L(1)

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of: **Eighty-four (84) months as to Count 1. This sentence shall run concurrently with any sentences imposed in Case Nos. F-1518376, F-1518378, and F-1518377, pending in District Court 2 of Dallas County. This sentence shall run consecutively to any sentences imposed for parole revocations in Case Nos. F-1162737-T and F-1059262, in the 283rd Judicial District Court of Dallas County.**

The court makes the following recommendations to the Bureau of Prisons:

The court recommends that Defendant be allowed to serve his sentence at FCI, Seagoville, if he is eligible.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at a.m. p.m. on

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DAVID LEE GARRETT
CASE NUMBER: 3:16-CR-00107-L(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **Three (3) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
5. You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
6. You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: DAVID LEE GARRETT
CASE NUMBER: 3:16-CR-00107-L(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: DAVID LEE GARRETT
CASE NUMBER: 3:16-CR-00107-L(1)

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in mental health treatment services as directed by the probation officer until successfully discharged. These services may include medications prescribed by a licensed physician. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$10 per month.

The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$10 per month.

DEFENDANT: DAVID LEE GARRETT
 CASE NUMBER: 3:16-CR-00107-L(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$0.00	\$0.00	\$0.00

The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Restitution amount ordered pursuant to plea agreement \$

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

<input type="checkbox"/> the interest requirement is waived for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution
<input type="checkbox"/> the interest requirement for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A** Lump sum payments of \$ _____ due immediately, balance due
 - not later than _____, or
 - in accordance C, D, E, or F below; or
- B** Payment to begin immediately (may be combined with C, D, or F below); or
- C** Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D** Payment in equal 20 (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E** Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F** Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of \$100.00 for Count 1 which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- Joint and Several

See above for Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

 - Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
 - The defendant shall pay the cost of prosecution.
 - The defendant shall pay the following court cost(s):
 - The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

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ADDITIONAL FORFEITED PROPERTY

Pursuant to 18 U.S.C. §924(d) and 28 U.S.C. §2461(c), the following property is forfeited to the United States of America:

a Smith and Wesson, Model SW40V, .40 caliber handgun, bearing serial number PAU0721, and all ammunition recovered.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

§

§

v.

§ Criminal No. 3:16-CR-107-L

§

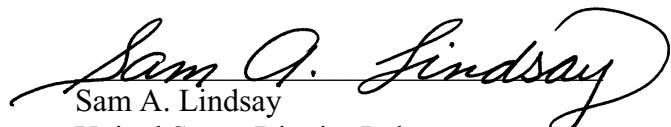
DAVID LEE GARRETT

§

ORDER

Before the court is Defendant's Motion to Stay Resentencing Proceedings (Doc. 66), filed August 21, 2020. In response, the Government indicates its opposition in part to Defendant's motion. The Government objects to Defendant's motion to the extent it is based on *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019), but it does not object to the motion to the extent the requested stay is based on *United States v Burris*, 920 F.3d 942 (5th Cir. 2019), because an issue related to Texas's robbery statute is under review by the Supreme Court and may affect resentencing in this case. As both parties agree that there an outstanding legal issue that may affect Defendant's resentencing, the court **grants** Defendant's Motion to Stay Resentencing Proceedings (Doc. 66) and **stays** the resentencing of Defendant pending resolution of the appeal in *Burris*.

It is so ordered this 2nd day of October, 2020.



Sam A. Lindsay
United States District Judge