

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2021

RUBEN AGUILERA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

1. Can the Texas burglary statute – which the Fifth Circuit has held to be indivisible and descriptive of generic burglary – properly be the basis for an enhanced sentence under the Armed Career Criminal Act, given that a person can be convicted under the statute for doing nothing more than entering a storage building with the intent to commit theft?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ruben Aguilera respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Aguilera's sentence is styled: *United States v. Aguilera*, ___ F. App'x ___, 2022 U.S. App. LEXIS 4109 (5th Cir. 2022).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Aguilera's sentence was announced February 15, 2022 and is attached hereto as Appendix A. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the date of the judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Federal Statutes

Title 18 U.S.C. § 924(e)(1):

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court . . . of this title for a violent felony . . . , committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than 15 years[.]

Title 18 U.S.C. § 924(e)(2)(B)(ii):

The term “violent felony” means:

...

any crime punishable by imprisonment for a term exceeding one year . . . that . . . is burglary[.]

Texas Statutes

Tex. Penal Code Ann. § 30.02(a):

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

Tex. Penal Code Ann. § 30.01:

- (1) “Habitation” means a structure or vehicle that is adapted for the overnight accommodation of persons, and includes:
 - (A) each separately secured or occupied portion of the structure or vehicle; and
 - (B) each structure appurtenant to or connected with the structure or vehicle.
- (2) “Building” means any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.

Statement of the Case

Aguilera has three prior Texas burglary convictions. The district court determined (over objection) that these convictions were predicates for application of an Armed Career Criminal Act (ACCA) enhancement. The Fifth Circuit has held in *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc) that (1) the Texas burglary statute is indivisible, and (2) a violation of the Texas burglary statute constitutes generic burglary for purposes of the ACCA. Thus, under *Herrold*, *any* prior Texas burglary conviction is an ACCA predicate.

Aguilera argued on appeal that the Texas burglary statute is overly broad in that it applies to conduct that is outside the purview of generic burglary. In *United States v. Stitt*, 139 S.Ct. 399 (2018), the Supreme Court held that “burglary” for purposes of the ACCA must involve burglarizing “a structure or vehicle that has been adapted or is customarily used for overnight accommodation.” Aguilera pointed out that Texas case law is replete with burglary convictions where the structure at issue was used only for storage – not for overnight accommodation.

The Government moved for summary affirmance based on *Herrold*. Aguilera responded that *Herrold* was wrongly decided. The Fifth Circuit denied the Government's motion for summary affirmance, yet affirmed Aguilera's sentence, holding that the Court was bound by *Herrold*.

As acknowledged by Aguilera, we have held that Texas burglary is a generic burglary and is therefore a violent felony under the ACCA. *United States v. Herrold*, 941 F.3d 173, 176-82 (5th Cir. 2019) (en banc). Although he claims that *Herrold* was wrongly decided, "in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court," we are bound by our precedent.

United States v. Aguilera, 2022 U.S. App. LEXIS 4109, at *1-2 (5th Cir. 2022).

First Reason for Granting the Writ: The Fifth Circuit's en banc decision in *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) is irreconcilable with the Supreme Court's decision in *United States v. Stitt*.

(a) Generic burglary after *United States v. Stitt*

In *United States v. Stitt*, 586 U.S. __, 139 S.Ct. 399 (2018), the Supreme Court held that "burglary" for purposes of 18 U.S.C. § 924(e)(2)(B)(ii) must include burglarizing "a structure or vehicle that has

been adapted or is customarily used for overnight accommodation.” *Stitt*, 139 S.Ct. at 403-04. At issue therein were two statutes, a Tennessee burglary statute and an Arkansas burglary statute, both of which criminalized burglarizing a structure or vehicle that has been adapted or is customarily used for overnight accommodation. *Id.* at 404. The Court held that generic “burglary” for purposes of 18 U.S.C. § 924(e)(2)(B)(ii) includes such conduct. *Id.* at 403-04, 407. The Court noted the inherent danger in burglarizing a structure that is customarily used for overnight accommodation:

[A]t the time the [Armed Career Criminal] Act was passed. *Ibid.* In 1986, a majority of state burglary statutes covered vehicles *adapted or customarily used for lodging*[.] (Emphasis added.)

Id. at 406.

For another thing, Congress, as we said in *Taylor [v. United States]*, viewed burglary as an inherently dangerous crime because burglary “creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate”.. . . An offender who breaks into a mobile home, an RV, a camping tent, a vehicle, or another structure that is adapted for or customarily *used for lodging* runs a similar or greater risk of violent confrontation. (Emphasis added.)

Id.

Although, as respondents point out, the risk of violence is diminished if, for example, a vehicle is only *used for lodging* part of the time, we have no reason to believe that Congress intended to make a part-time/full-time distinction. After all, a burglary is no less a burglary because it took place at a summer home during the winter, or a commercial building during a holiday. (Emphasis added.)

Id.

The *Stitt* Court went on to distinguish its holding from its previous holdings in *Taylor v. United States*, 495 U.S. 575 (1990) and *Mathis v. United States*, 136 S.Ct. 2243 (2016) having to do with structures used only for storage:

In *Taylor* . . . we referred to a Missouri breaking and entering statute that among other things criminalized breaking and entering “*any* boat or vessel, or railroad car.” . . . We did say that that particular provision was *beyond the scope* of the federal Act. But the statute used the word “*any*”; it referred to ordinary boats and vessels often at sea (and railroad cars *often filled with cargo, not people*), *nowhere restricting its coverage, as here, to vehicles or structures customarily used or adapted for overnight accommodation*. (Emphasis added.)

Stitt, 139 S.Ct. at 407.

In *Mathis*, we considered an Iowa statute that covered “any building, structure, . . . land, water or air vehicle, or similar place adapted for overnight accommodation of persons [or used] for the storage or safekeeping of anything of value.” Courts have construed that statute to cover ordinary vehicles *because they can be used for storage or safekeeping*. . . . That is presumably why, as we wrote in our opinion, “all

parties agree[d]" that Iowa's burglary statute "covers more conduct than generic burglary does."

...
[T]he Court in *Mathis* did not decide the question now before us—that is, whether coverage of vehicles designed or *adapted for overnight use* takes the statute outside the generic burglary definition. (Emphasis added.)

Stitt, 139 S.Ct. at 407.

What is important from *Stitt* for the instant case is that structures used for storage, safekeeping, and cargo – not people – *continue to be outside the purview of generic burglary*.

(b) Texas burglary and the categorical approach

In determining whether an offender's prior convictions qualify as ACCA enhancements, courts are to generally use the "categorical approach," under which they can look only to the statutory definitions of the prior offenses. *Shular v. United States*, 140 S.Ct. 779, 783 (2020). Stated another way, a prior conviction qualifies as an ACCA predicate only if its statutory elements are the same as, or narrower than, the generic crime. *Mathis v. United States*, 136 S.Ct. 2243, 2247 (2016). If a statute consists of only one set of elements that defines the crime, it is

considered an “indivisible” statute. *Descamps v. United States*, 570 U.S. 254, 258 (2013).

In *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc), the Fifth Circuit held that the Texas burglary statute is indivisible and constitutes generic burglary. *Id.* at 175, 177. That means two things: (1) The Texas burglary statute describes only one burglary offense (with multiple manner and means of committing that one offense), and (2) only the statute – not court documents – can be looked to in determining whether the statute criminalizes conduct outside of generic burglary.

Assuming the “least of the acts criminalized” by the Texas burglary statute, suppose a person enters a building with the intent to commit theft. Again, building is defined as:

any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.

Tex. Penal Code Ann. § 30.01. Texas courts have upheld burglary of a building convictions in each of the following cases: *Warren v. State*, 2020 Tex. App. LEXIS 2473, at *6-7, 9 (Tex. App.—Tyler 2020, pet. ref’d) (unpublished) (defendant stole the victim’s lawn mower from the victim’s backyard storage shed); *Ellett v. State*, 607 S.W.2d 545, 548-49 (Tex.

Crim. App. 1980) (defendant entered former hotel that had been closed for years and was being used for storage, and had broken-out and boarded windows; Court stated, "We hold that 'storage' constitutes a 'use' within the scope of Sec. 30.01[.]"); *Wilson v. State*, 1998 Tex. App. LEXIS 6044, at *4-5 (Tex. App.—Dallas 1998) (unpublished) (Defendant took show horse bridles from tack room in victim's barn); *Ysassi v. State*, 1998 Tex. App. LEXIS 3459, at *5-6 (Tex. App.—Dallas 1998, no pet.) (unpublished) (Defendant stole gardening tools from a structure attached to a nursery used for storing fertilizer, chemicals and tools); *Batiste v. State*, 1993 Tex. App. LEXIS 3020, at *1, 6 (Tex. App.—Houston [1st Dist.] 1993, no pet.) (Defendant stole lawn mower from detached garage at the end of a long driveway, the garage being used to park the family's cars and to store tools); *In re J.T.*, 824 S.W.2d 671, 673 (Tex. App.—Fort Worth 1992, no pet.) (Defendant stole fireworks from a fireworks stand, "a small little house built on a trailer."); *Frizzell v. State*, 1987 Tex. App. LEXIS 8318, at *3 (Tex. App.—Houston [14th Dist.] 1987, no pet.) (unpublished) (Defendant attempted to take a welding machine inside a storage building); *Allen v. State*, 719 S.W.2d 258, 259 (Tex. App.—Waco 1986, no pet.) (Defendant stole tires from a trailer used to store auto supplies and

tires); *Lopez v. State*, 660 S.W.2d 592, 594 (Tex. App.—Corpus Christi 1983, pet. ref'd) (Defendant stole tools from locked office in a radiator shop); *See also Kemp v. State*, 2020 Tex. App. LEXIS 2506, at *5-9 (Tex. App.—Fort Worth Mar. 26, 2020, no pet.) (unpublished) (Defendant on trial for burglary of a habitation was entitled an instruction on the lesser included offense of burglary of a building, given that the structure appeared to be used only for storage; “brimming with trash bags, boxes, and bins full of goods.”). Not one of these cases involved a structure that was used for overnight accommodation.

According to *Stitt*, generic burglary requires evidence that the structure under consideration has “been adapted or is customarily used for overnight accommodation.” *Stitt*, 139 S.Ct. at 403-04. If the statute at issue criminalizes burglarizing a structure that is only used for storage, safekeeping, or cargo, the statute criminalizes conduct outside the generic definition of burglary. *Id.* at 407. Thus, Aguilera argues that his prior Texas burglary convictions are not ACCA predicates.

Second Reason for Granting the Writ: If the Fifth Circuit's Herrold decision goes uncorrected, some defendants that Congress never intended will be swept into armed career criminal status.

The ACCA was intended to apply to “only a particular subset of offender”, *Begay v. United States*, 553 U.S. 137, 147 (2008); the offender whose prior conduct (as evidenced by prior convictions) was such that it makes more likely that the offender, “later possessing a gun, will use that gun deliberately to harm a victim.” *Id.* at 145. Congress chose to frame the ACCA in qualitative¹ terms instead of compiling a list of covered offenses. *Sykes v. United States*, 564 U.S. 1, 15 (2011); *See also Taylor v. United States*, 495 U.S. 575, 588-89 (1990) (Congress intended that the enhancement apply to crimes having certain elements, not by labels.). The ACCA statute was to be applied in such a way as to:

insure that its rigorous sentencing provisions apply *only as intended in cases meriting such strict punishment.* (Emphasis added.)

Wooden v. United States, 142 S. Ct. 1063, 2022 U.S. LEXIS 1421, at *22 (2021).

¹ “Qualitative” means “having to do with qualities.” Webster’s New World Dictionary 1161 (2nd college ed. 1970).

One requisite of the prior conduct necessary to qualify as an ACCA predicate was that it “involve[d] conduct that presents a serious potential risk of physical injury.” *Begay*, 553 U.S. at 144. As the Supreme Court noted in *Stitt*, in the context of burglary, this serious potential risk of physical injury exists when the structure burglarized is used for overnight lodging:

An offender who breaks into a mobile home, an RV, a camping tent, a vehicle, or another structure that is adapted for or customarily used for lodging runs a similar or greater risk of violent confrontation.

Stitt, 139 S.Ct. at 406. That same risk of physical injury *does not* exist however, when the burglarized structure is used only for storage. *Id.* at 407 (E.g. “ordinary boats and vessels often at sea (and railroad cars often filled with cargo, not people)”). As the Court noted in *Begay*:

We have no reason to believe that Congress intended a 15-year mandatory prison term *where that increased likelihood does not exist.* (Emphasis added.)

Begay, 553 U.S. at 146. Yet the ten Texas burglary cases cited above (not an exhaustive list) all involve the burglary of structures used only for storage. As Aguilera noted in his response to the Government’s motion for summary affirmance:

[I]f *Herrold* is allowed to go uncorrected, a person in Texas can steal a hoe out of a shed on somebody's back forty and get himself an ACCA predicate.

Third Reason for Granting the Writ: *Other circuits are now relying on Herrold in holding Texas burglary convictions to be sentencing enhancement predicates.*

In *United States v. Hutchinson*, 2022 U.S. App. LEXIS 5610, __ F. 4th __, (8th Cir. 2022), wherein the defendant was enhanced under the ACCA, “[t]he district court relied on the Fifth Circuit’s reasoning in *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019)[.]” *Hutchinson*, 2022 U.S. App. LEXIS 5610, at *3. The Eighth Circuit affirmed, noting, “[n]either party has raised any meaningful arguments to contest this finding.” *Id.* at *5, *8.

In *United States v. Pena*, 952 F.3d 503 (4th Cir. 2020), wherein the defendant was convicted of illegal reentry (in violation 8 U.S.C. § 1326), he argued that his prior Texas burglary conviction should not have been characterized as an “aggravated felony.” *Id.* at 505. The Fourth Circuit, in affirming the sentence, relied in part on *Herrold*.

We find *Herrold I*, as reinstated by *Herrold II*, instructive as it relates to the question of whether the Texas burglary statute is indivisible[.]

Id. at 509.

[T]he Fifth Circuit in *Herrold II* held that the Texas burglary statute fell within the generic definition of burglary. Similarly, we conclude that Texas burglary qualifies as generic burglary[.]

Id. at 510.²

Conclusion

For the foregoing reasons, Petitioner Aguilera respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

² The Sixth Circuit has acknowledged *Herrold* but has yet to decide whether or not to follow the decision:

The Fifth Circuit recently decided that Texas burglary categorically corresponds to the generic definition of burglary, and thus that convictions under this state statute qualify as violent felonies under the enumerated clause. *See United States v. Herrold*, 941 F.3d 173, 177 (5th Cir. 2019) (en banc). The Fourth Circuit has come out the same way. *See United States v. Pena*, [952 F.3d 503] (4th Cir. Mar. 11, 2020) . . . Our circuit has not passed upon this question.

Overstreet v. United States, 2020 U.S. App. LEXIS 9422, at *10 (11th Cir. 2020).

Respectfully submitted,

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Certificate of Service

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 23rd day of March 2022.

/s/ John A. Kuchera
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