No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DERRICK TYRONE MOORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

/s/ Adam Nicholson

JASON HAWKINS
Federal Public Defender
Northern District of Texas
TX State Bar No. 00759763
525 Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
(214) 767-2886 Fax

Adam Nicholson **
Assistant Federal Public Defender
Northern District of Texas
TX State Bar No. 24097045
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
(214) 767-2886

INDEX TO APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

v.

DERRICK TYRONE MOORE

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:21-CR-00183-P(01)
U.S. Marshal's No.: 56521-509
Frank Gatto, Assistant U.S. Attorney
John Stickney, Attorney for the Defendant

On August 18, 2021 the defendant, DERRICK TYRONE MOORE, entered a plea of guilty as to Count One of the Indictment filed on July 14, 2021. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	Felon in Possession of Firearm	11/18/2019	One

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of $100.00 as to Count One of the Indictment filed on July 14, 2021.

Upon motion of the government, all remaining Counts are dismissed, as to this defendant only.

The defendant shall notify the United States Attorney for this district within thirty 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.

Sentence imposed December 14, 2021.

Mark T. Pittman

MARK T. PITTMAN
U.S. DISTRICT JUDGE

Signed December 14, 2021.

IMPRISONMENT

The defendant, DERRICK TYRONE MOORE, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **One Hundred Eighty (180) months** as to Count One of the Indictment filed on July 14, 2021.

The Court recommends to the Bureau of Prisons that the defendant be allowed to participate in any Vocational and Educational Classes, specifically for the defendant to be able to obtain his CDL Certificate. The Court further recommends to the BOP that the defendant be incarcerated at a facility in Fort Worth, TX, if possible.

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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **Five (5) years** as to Count One of the Indictment filed on July 14, 2021.

While on supervised release, in compliance with the standard conditions of supervision adopted by the United States Sentencing Commission, the defendant shall:

1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame;

2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed;

3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer;

4) The defendant shall answer truthfully the questions asked by the probation officer;

5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall 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, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change;

6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observed in plain view;

7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her employment (such as the position or the job responsibilities), the defendant shall 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, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change;

8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer;

9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours;

10) The defendant shall 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) The defendant shall not act or make an 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 the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk; and,

13) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

In addition the defendant shall:

not commit another federal, state, or local crime;

not possess illegal controlled substances;

not possess a firearm, destructive device, or other dangerous weapon;

cooperate in the collection of DNA as directed by the U.S. probation officer;

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;

pay the assessment imposed in accordance with 18 U.S.C. § 3013;

participate in outpatient mental health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered (copayment) at a rate of at least $25 per month; and,

participate in an outpatient program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered (copayment) at the rate of at least $25 per month.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because there is no victim other than society at large.

FORFEITURE

Pursuant to 18 U.S.C. §982(a)(1) and 28 U.S.C. § 2461(c), it is hereby ordered that the defendant's interest in the following property is condemned and forfeited to the United States: a Taurus, Model PT845, .45-caliber pistol, bearing the Serial No. NFT67100; and a Taurus, Model G2c, 9-millimeter pistol, bearing the Serial No. TMR29276.

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 Marshal

APPENDIX B

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 19, 2022
Lyle W. Cayce
Clerk

No. 21-11240
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DERRICK TYRONE MOORE,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:21-CR-183-1

Before DAVIS, SMITH, and DENNIS, *Circuit Judges*.

PER CURIAM:*

Derrick Tyrone Moore pleaded guilty to possessing a firearm as a convicted felon and was sentenced to 180 months in prison pursuant to the Armed Career Criminal Act (ACCA). He timely appealed and challenges his ACCA-enhanced sentence on two grounds. The Government has filed an

* Pursuant to 5TH CIRCUIT RULE 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 CIRCUIT RULE 47.5.4.

unopposed motion for summary affirmance or, in the alternative, for an extension of time to file a merits brief, asserting that Moore's arguments are foreclosed by circuit precedent.

On appeal, Moore renews his argument that the district court erred by treating his prior Texas Penal Code § 30.02 convictions for burglary of a habitation as violent felonies for purposes of the ACCA. In *United States v. Herrold*, 941 F.3d 173, 182 (5th Cir. 2019) (en banc), this court held that Texas burglary is generic burglary and is a violent felony under the ACCA. Moore concedes as much, but he raises the issue here to preserve it for further review.

Moore also contends that the district court erred under the Sixth Amendment by relying on *Shepard*-approved[1] documents to determine that each of his prior burglary convictions occurred on separate occasions for ACCA purposes. The Government correctly argues without opposition that this argument is foreclosed by our precedent. *See United States v. White*, 465 F.3d 250, 254 (5th Cir. 2006).

In light of the foregoing, the Government's unopposed motion for summary affirmance is GRANTED, *see Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969), the alternative motion for an extension of time in which to file a brief is DENIED, and the judgment of the district court is AFFIRMED.

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[1] *Shepard v. United States*, 544 U.S. 13 (2005).

APPENDIX C

PACER fee: Exempt

General Docket
United States Court of Appeals for the Fifth Circuit

Court of Appeals Docket #: 21-11240
USA v. Moore
Appeal From: Northern District of Texas, Fort Worth
Fee Status: In Forma Pauperis

Docketed: 12/15/2021
Termed: 09/19/2022

Case Type Information:
1) Criminal (DCRIM)
2) Direct Criminal
3)

Originating Court Information:
District: 0539-4 : 4:21-CR-183-1
Court Reporter: Monica Guzman, Court Reporter
Court Reporter: Debbie Saenz, Court Reporter
Originating Judge: Mark Timothy Pittman, U.S. District Judge
Date Filed: 07/14/2021
Date NOA Filed: 12/14/2021
Date Rec'd COA: 12/14/2021

Prior Cases:
None

Current Cases:
None

Panel Assignment: Not available

United States of America
Plaintiff - Appellee

Brian W. McKay, Esq., Assistant U.S. Attorney
Direct: 214-659-8756
Email: brian.mckay@usdoj.gov
Fax: 214-659-8802
[COR LD NTC Government]
U.S. Attorney's Office
Northern District of Texas
Suite 300
1100 Commerce Street
Dallas, TX 75242-1699

Leigha Amy Simonton, Assistant U.S. Attorney
Email: leigha.simonton@usdoj.gov
[COR NTC Government]
U.S. Attorney's Office
Northern District of Texas
1100 Commerce Street
Dallas, TX 75242-1699

v.

Derrick Tyrone Moore, also known as Derrick Moore
Defendant - Appellant

Adam Nicholson, Assistant Federal Public Defender
Direct: 214-767-2746
Email: adam_nicholson@fd.org
Fax: 214-767-2886
[COR LD NTC Fed Public Defender]
Federal Public Defender's Office
Northern District of Texas
Suite 629
525 S. Griffin Street
Dallas, TX 75202

James Matthew Wright, Assistant Federal Public Defender
Direct: 806-324-2370
Email: matthew_wright@fd.org
[COR NTC Fed Public Defender]
Federal Public Defender's Office

Northern District of Texas
Unit 110
500 S. Taylor Street
Amarillo, TX 79101-0000

United States of America,

Plaintiff - Appellee

v.

Derrick Tyrone Moore,

Defendant - Appellant

12/15/2021	1 pg, 119.67 KB	DIRECT CRIMINAL CASE docketed. NOA filed by Appellant Mr. Derrick Tyrone Moore [21-11240] (CAS) [Entered: 12/15/2021 09:37 AM]
12/15/2021	4 pg, 120.92 KB	JURISDICTIONAL REVIEW COMPLETE. Transcript order due on 12/30/2021 for Appellant Derrick Tyrone Moore [21-11240] (CAS) [Entered: 12/15/2021 09:44 AM]
12/20/2021	1 pg, 197.82 KB	APPEARANCE FORM for the court's review. Lead Counsel? Yes. [21-11240] (James Matthew Wright) [Entered: 12/20/2021 04:49 PM]
12/22/2021		APPEARANCE FORM FILED by Attorney(s) James Matthew Wright for party(s) Appellant Derrick Tyrone Moore, in case 21-11240 [21-11240] (CNF) [Entered: 12/22/2021 12:30 PM]
12/22/2021	2 pg, 176.11 KB	ATTORNEY TRANSCRIPT ORDER form filed by Appellant Mr. Derrick Tyrone Moorefor the Court to process. Date of service: 12/22/2021 via email - Attorney for Appellee: Simonton; Attorney for Appellant: Wright; US mail - Attorney for Appellant: Stickney. [21-11240] (James Matthew Wright) [Entered: 12/22/2021 01:54 PM]
12/22/2021	2 pg, 176.5 KB	ATTORNEY TRANSCRIPT ORDER form filed by Appellant Mr. Derrick Tyrone Moorefor the Court to process. Date of service: 12/22/2021 via email - Attorney for Appellee: Simonton; Attorney for Appellant: Wright; US mail - Attorney for Appellant: Stickney. [21-11240] (James Matthew Wright) [Entered: 12/22/2021 01:55 PM] .
12/23/2021		TRANSCRIPT ORDER received from Appellant Mr. Derrick Tyrone Moore. DETAILS: Transcript Order: Court Reporter: Monica Guzman, Proceeding Type and Date: Sentencing 12/14/2021. Transcript Order ddl satisfied. Ct. Reporter Acknowledgment due on 01/03/2022 for Monica Guzman, Court Reporter. Electronic Filing Processed: [9740779-2] [21-11240] (CBW) [Entered: 12/23/2021 09:13 AM]
12/23/2021		TRANSCRIPT ORDER received from Appellant Mr. Derrick Tyrone Moore. DETAILS: Transcript Order: Court Reporter: Debbie Saenz, Proceeding Type and Date: Rearraignment 08/18/2021. Ct. Reporter Acknowledgment due on 01/03/2022 for Debbie Saenz, Court Reporter. Electronic Filing Processed: [9740784-2] [21-11240] (CBW) [Entered: 12/23/2021 09:17 AM]
01/10/2022	1 pg, 132.83 KB	APPEARANCE FORM for the court's review. Lead Counsel? Yes. [21-11240] (Adam Nicholson) [Entered: 01/10/2022 03:35 PM]
01/10/2022	3 pg, 220.13 KB	NO COURT REPORTER ACKNOWLEDGMENT RECEIVED for Ms. Monica Guzman. Transcript Order: Court Reporter: Monica Guzman, Dt. Ct. Rprt. Time Begins: 12/23/2021. Transcript deadlines created - Ct. Reporter Acknowledgment deadline canceled. Transcript Due/Court Reporter Discount Date is 01/24/2022 for Monica Guzman, Court Reporter [21-11240] (CBW) [Entered: 01/10/2022 04:27 PM]
01/10/2022	3 pg, 220.41 KB	NO COURT REPORTER ACKNOWLEDGMENT RECEIVED for Ms. Debbie Saenz. Transcript Order: Court Reporter: Debbie Saenz, Dt. Ct. Rprt. Time Begins: 12/23/2021. Transcript deadlines created - Transcript Due/Court Reporter Discount Date is 01/24/2022 for Debbie Saenz, Court Reporter. Ct. Reporter Acknowledgment deadline canceled [21-11240] (CBW) [Entered: 01/10/2022 04:31 PM]
01/10/2022		ATTORNEY NOT PARTICIPATING. John J. Stickney is designated as inactive in this case. Reason:Adam Nicholson will be handling. [21-11240] (CBW) [Entered: 01/10/2022 04:35 PM]
01/11/2022		APPEARANCE FORM FILED by Attorney(s) Adam Nicholson for party(s) Appellant Derrick Tyrone Moore, in case 21-11240 [21-11240] (RSM) [Entered: 01/11/2022 09:22 AM]
01/27/2022	2 pg, 236.63 KB	NOTICE RECEIVED that the transcript ordered by Appellant Mr. Derrick Tyrone Moore is complete and has been filed in the District Court. [21-11240] (Monica Guzman) [Entered: 01/27/2022 01:18 PM]
01/27/2022		TRANSCRIPT FILED IN DISTRICT COURT. Transcript Order: Court Reporter: Monica Guzman, Dt. Filed in Dist. Ct: 01/27/2022. Transcript Due/Court Reporter Discount Date canceled. [21-11240] (SEP) [Entered: 01/27/2022 02:28 PM]
01/31/2022	1 pg, 185.94 KB	NOTICE RECEIVED that the transcript ordered by Appellant Mr. Derrick Tyrone Moore is complete and has been filed in the District Court. [21-11240] (Debbie Saenz) [Entered: 01/31/2022 08:31 PM]
02/01/2022		TRANSCRIPT FILED IN DISTRICT COURT Transcript Order: Court Reporter: Debbie Saenz, Dt. Filed in Dist. Ct: 01/31/2022 by Debbie Saenz Transcript Due/Court Reporter Discount Date canceled [21-11240] (CBW) [Entered: 02/01/2022 10:41 AM]
02/01/2022		ELECTRONIC RECORD ON APPEAL REQUESTED from District Court for 4:21-CR-183-1. Electronic ROA due on 02/16/2022. [21-11240] (CBW) [Entered: 02/01/2022 10:41 AM]
02/03/2022		ELECTRONIC RECORD ON APPEAL FILED. Admitted Exhibits on File in District Court? No. Video/Audio Exhibits on File in District Court? No Electronic ROA deadline satisfied. [21-11240] (MRW) [Entered: 02/03/2022 11:48 AM]
02/03/2022	4 pg, 134.6 KB	BRIEFING NOTICE ISSUED A/Pet's Brief Due on 03/15/2022 for Appellant Derrick Tyrone Moore. [21-11240] (MRW) [Entered: 02/03/2022 11:52 AM]

03/15/2022	4 pg, 80.69 KB	UNOPPOSED MOTION to extend time to file brief as appellant until 03/29/2022 [9797926-2]. Date of service: 03/15/2022 [21-11240] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: UNOPPOSED MOTION filed by Appellant Mr. Derrick Tyrone Moore to extend time to file brief as appellant until 03/29/2022 [9797926-2]. Date of service: 03/15/2022 via email - Attorney for Appellants: Nicholson, Wright; Attorney for Appellee: Simonton [21-11240] (Adam Nicholson) [Entered: 03/15/2022 09:35 AM]
03/15/2022	1 pg, 76.08 KB	CLERK ORDER granting Motion to extend time to file appellant's brief filed by Appellant Mr. Derrick Tyrone Moore [9797926-2] A/Pet's Brief deadline updated to 03/29/2022 for Appellant Derrick Tyrone Moore [21-11240] (CBW) [Entered: 03/15/2022 10:10 AM]
03/24/2022	4 pg, 82.59 KB	UNOPPOSED MOTION to extend time to file brief as appellant until 04/05/2022 [9806100-2]. Date of service: 03/24/2022 [21-11240] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: UNOPPOSED MOTION filed by Appellant Mr. Derrick Tyrone Moore to extend time to file brief as appellant until 04/05/2022 [9806100-2]. Date of service: 03/24/2022 via email - Attorney for Appellants: Nicholson, Wright; Attorney for Appellee: Simonton [21-11240] (Adam Nicholson) [Entered: 03/24/2022 12:53 PM]
03/24/2022	1 pg, 76.1 KB	CLERK ORDER granting Motion to extend time to file appellant's brief filed by Appellant Mr. Derrick Tyrone Moore [9806100-2] A/Pet's Brief deadline updated to 04/05/2022 for Appellant Derrick Tyrone Moore [21-11240] (CBW) [Entered: 03/24/2022 03:49 PM]
04/05/2022	4 pg, 67.69 KB	UNOPPOSED MOTION to extend time to file brief as appellant until 04/12/2022 [9815734-2]. Date of service: 04/05/2022 [21-11240] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: UNOPPOSED MOTION filed by Appellant Mr. Derrick Tyrone Moore to extend time to file brief as appellant until 04/12/2022 [9815734-2]. Date of service: 04/05/2022 via email - Attorney for Appellants: Nicholson, Wright; Attorney for Appellee: Simonton [21-11240] (Adam Nicholson) [Entered: 04/05/2022 11:35 AM]
04/05/2022	1 pg, 70.65 KB	CLERK ORDER granting Motion to extend time to file appellant's brief filed by Appellant Mr. Derrick Tyrone Moore [9815734-2] A/Pet's Brief deadline updated to 04/12/2022 for Appellant Derrick Tyrone Moore [21-11240] (CBW) [Entered: 04/05/2022 03:06 PM]
04/12/2022	39 pg, 327 KB	SUFFICIENT APPELLANT'S BRIEF FILED Sufficient Brief deadline satisfied [21-11240] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: APPELLANT'S BRIEF FILED Additionally the Brief requires INSUFFICIENT FOR: CONTENTS OUT OF ORDER. Instructions to Attorney: PLEASE READ THE ATTACHED NOTICE FOR INSTRUCTIONS ON HOW TO REMEDY THE DEFAULT. # of Copies Provided: 0 A/Pet's Brief deadline satisfied. Sufficient Brief due on 04/26/2022 for Appellant Derrick Tyrone Moore.. Appellee's Brief due on 05/12/2022 for Appellee United States of America [21-11240] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: APPELLANT'S BRIEF FILED by Mr. Derrick Tyrone Moore. Date of service: 04/12/2022 via email - Attorney for Appellants: Nicholson, Wright; Attorney for Appellee: Simonton [21-11240] (Adam Nicholson) [Entered: 04/12/2022 02:22 PM]
04/12/2022	27 pg, 1000.24 KB	RECORD EXCERPTS FILED. # of Copies Provided: 0 [21-11240] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: RECORD EXCERPTS FILED by Appellant Mr. Derrick Tyrone Moore. Date of service: 04/12/2022 via email - Attorney for Appellants: Nicholson, Wright; Attorney for Appellee: Simonton [21-11240] (Adam Nicholson) [Entered: 04/12/2022 02:23 PM]
04/13/2022	37 pg, 659.49 KB	PROPOSED SUFFICIENT BRIEF filed by Appellant Mr. Derrick Tyrone Moore [9821645-2] Date of service: 04/13/2022 via email - Attorney for Appellants: Nicholson, Wright; Attorney for Appellee: Simonton [21-11240] (Adam Nicholson) [Entered: 04/13/2022 08:44 AM]
04/22/2022	1 pg, 135.14 KB	APPEARANCE FORM for the court's review. Lead Counsel? Yes. [21-11240] (Brian W. McKay) [Entered: 04/22/2022 03:36 PM]
04/25/2022		APPEARANCE FORM FILED by Attorney(s) Brian W. McKay for party(s) Appellee USA, in case 21-11240 [21-11240] (RSM) [Entered: 04/25/2022 07:49 AM]
05/03/2022	2 pg, 159.62 KB	UNOPPOSED LEVEL 1 EXTENSION REQUESTED by Appellee USA for filing Appellee's Brief until 06/10/2022 [21-11240] (Brian W. McKay) [Entered: 05/03/2022 05:49 PM]
05/04/2022		EXTENSION RECEIVED for Appellee USA. Extension Granted to and including 06/10/2022. E/Res's Brief deadline updated to 06/10/2022 for Appellee United States of America [21-11240] (CBW) [Entered: 05/04/2022 08:42 AM]
06/04/2022	7 pg, 131.62 KB	MOTION for summary affirmance [9862634-2] Foreclosed Issues Case: YES, to extend time to file brief of appellee [9862634-3]. Response/Opposition due on 06/14/2022. [21-11240] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: UNOPPOSED MOTION filed by Appellee USA for summary affirmance [9862634-2] Foreclosed Issues Case: YES, to extend time to file brief of appellee [9862634-3]. Date of service: 06/04/2022 via email - Attorney for

		Appellees: McKay, Simonton; Attorney for Appellants: Nicholson, Wright [21-11240] (Brian W. McKay) [Entered: 06/04/2022 12:56 PM]
06/15/2022	☐	BRIEFING COMPLETE.E/Res's Brief deadline canceled [21-11240] (CBW) [Entered: 06/15/2022 10:02 AM]
09/19/2022	☐ 4 pg, 208.95 KB	UNPUBLISHED OPINION FILED. [21-11240 Affirmed] Judge: WED , Judge: JES , Judge: JLD. Mandate issue date is 10/11/2022 for Appellant Derrick Tyrone Moore; granting Motion for summary affirmance filed by Appellee USA [9862634-2]; denying Motion to extend time to file appellee's brief filed by Appellee USA [9862634-3] [21-11240] (NFD) [Entered: 09/19/2022 01:53 PM]
09/19/2022	☐ 1 pg, 56.93 KB	JUDGMENT ENTERED AND FILED. [21-11240] (NFD) [Entered: 09/19/2022 02:00 PM]
10/11/2022	☐ 4 pg, 279.3 KB	MANDATE ISSUED. Mandate issue date satisfied. [21-11240] (RSM) [Entered: 10/11/2022 07:37 AM]

Clear All

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○ **Documents Only**

☐ **Include Page Numbers**

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5th Circuit - Appellate - 12/18/2022 21:37:59			
PACER Login:	anicholsonesq	**Client Code:**	
Description:	Docket Report (full)	**Search Criteria:**	21-11240
Billable Pages:	3	**Cost:**	0.30
Exempt Flag:	Exempt	**Exempt Reason:**	Always

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DERRICK TYRONE MOORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

SUPPLEMENTAL APPENDIX

/s/ Adam Nicholson

JASON HAWKINS
Federal Public Defender
Northern District of Texas
TX State Bar No. 00759763
525 Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
(214) 767-2886 Fax

Adam Nicholson **
Assistant Federal Public Defender
Northern District of Texas
TX State Bar No. 24097045
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
(214) 767-2886

INDEX TO APPENDICES

In the United States Court of Appeals
for the Fifth Circuit

No. 21-11240

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DERRICK TYRONE MOORE,
Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
Fort Worth Division

INITIAL BRIEF OF DEFENDANT-APPELLANT

Jason D. Hawkins
Federal Public Defender

Adam Nicholson
Assistant Federal Public Defender
525 S. Griffin Street, Suite 629
Dallas, TX 75202
214.767.2746 (Tel)
214.767.2886(Fax)
Adam_Nicholson@fd.org
Texas State Bar No. 24097045

Attorneys for Defendant-Appellant

CERTIFICATE OF INTERESTED PERSONS

The number and style of this case in the court below are as follows: *United States of America v. Derrick Tyrone Moore*, case number 4:21-CR-00050-Y-1, in the United States District Court for the Northern District of Texas, Fort Worth Division. The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

District Judges:	The Hon. Mark Pittman
Magistrate Judges:	The Hon. Jeffrey L. Cureton
Appellant:	Derrick Tyrone Moore
Federal Public Defender for the Northern District of Texas:	Jason D. Hawkins
Defense Counsel:	Loui Itoh (district court) Adam Nicholson (appeal) John Stickney (district court)
Acting United States Attorney for the Northern District of Texas:	Chad Meacham
Assistant U.S. Attorneys:	Frank Gatto (district court) Leigha Simonton (appeal)

/s/ Adam Nicholson
Adam Nicholson

STATEMENT REGARDING ORAL ARGUMENT

I request oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

Constitutional Provisions

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

The district court imposed and entered its judgment and sentence on December 14, 2021. (ROA.57). Appellant filed a timely notice of appeal on that same day. (ROA.62).

ISSUES PRESENTED FOR REVIEW

I. Whether the appeal is barred by the appeal waiver?

II. Whether the district court correctly applied the provisions of the Armed Career Criminal Act ("ACCA")?

STATEMENT OF THE CASE

Appellant Derrick Tyrone Moore pleaded guilty to one count of possessing a firearm after having sustained a felony conviction. (ROA.70–52); *see also* (ROA.57). He signed a plea agreement waiving the right to appeal, but reserving, *inter alia*, the right "to bring a direct appeal of . . . a sentence exceeding the statutory maximum punishment . . . ." (ROA.188).

A Presentence Report ("PSR") determined that Appellant was properly subject to a statutory range of 15 years imprisonment to life imprisonment under the provisions of the Armed Career Criminal Act ("ACCA"), which provides enhanced penalties for defendants previously convicted of three or more "violent felonies" committed on occasions different from each other. (ROA.197, 214). The PSR cited three Texas convictions for Burglary of a Habitation as the "violent felonies" triggering the ACCA enhancement, (ROA.197), although the PSR listed four such convictions. (ROA.201–02). The PSR described these four offenses as involving four different victims and occurring on four days between November 2011 and July 2012. (ROA.201–02). The PSR alleged that Mr. Moore committed the last three of these offenses together with one Hearl Johnson during July of 2012. (ROA.201–02). At the time, however, the PSR supplied the court with no documents supporting this assertion.

Appellant objected to the application of the ACCA on four grounds. (ROA.223–25). First, he argued that the ACCA application was improper because the alleged

convictions for violent felonies were not substantiated by documents required by *Shepard v. United States*, 544 U.S. 13 (2005). (ROA.223). Second, he argued that the Texas burglary offense is not a "burglary" within the meaning of ACCA because it can be committed without the intent to commit an offense beyond trespassing and then committing a reckless offense. (ROA.223–24). On this second point, Appellant conceded that the objection was foreclosed by *Unitted States v. Herrold,* 941 F.3d 173 (5th Cir. 2019). (ROA.223–24). Third, he argued that the as-then-yet-unpresented *Shepard* documents would fail to exclude the possibility that the offenses were committed to a common criminal opportunity, although he conceded that the argument was inconsistent with *United States v. Ressler*, 54 F.3d 257 (5th Cir. 1995). Fourth, he submitted that the application of a higher maximum and minimum was inappropriate without a jury finding that the prior offenses occurred on separate occasions. (ROA.224–25).

The government supported the PSR's conclusions. (ROA.228–33). As a part of its response to Appellant's objections, the government attached the following judicial records to substantiate and identify the prior burglary convictions:

- The Indictment and Judgment in Case 1263352D, a Texas conviction for burglary of a habitation occurring on November 9, 2011;
- The Information and Judgment in Case 1297461W, a Texas conviction for burglary of a habitation occurring on July 2, 2012;
- The Information and Judgment in Case 1298878W, a Texas conviction for burglary of a habitation occurring on July 30, 2012; and

- The Information and Judgment in Case 1300033W, a Texas conviction for burglary of a habitation occurring on July 5, 2012.

(ROA.251–62).

In its addendum, Probation also rejected Appellant's objections to the ACCA enhancement. (ROA.266). To that addendum, Probation attached the following documents:

- The Information, Judgment, and Sentence in Case 1297461W, a Texas conviction for burglary of the habitation of Ivan Najera occurring on July 2, 2012;
- The Indictment, Order of Deferred Adjudication, and Judgment and Sentence in Case 1263352D, a Texas conviction for burglary of the habitation of Esperanza Barragan occurring on November 9, 2011;
- The Information and Judgment and Sentence in Case 1300033W, a Texas conviction for burglary of the habitation of Maria Vazquezaguilera occurring on July 5, 2012.

(ROA.269–83).

At sentencing, the district court invited arguments concerning the ACCA enhancement by both Appellant and the government, (ROA.158–63), before overruling Appellant's objection after concluding that the argument was foreclosed by a binding ruling of this Court. *See* (ROA.163). The court then sentenced him to 180 months, (ROA.175), which constituted the mandatory minimum sentence after the application of the ACCA but a downward variance from the ACCA-enhanced guideline range of 188 to 235 months. (ROA.178); *see also* (ROA.214, 287). Appellant objected to the

sentence, raising again his pre-sentencing objections to the application of the ACCA. *See* (ROA.179). But the district court overruled that objection. (ROA.179).

This appeal follows.

SUMMARY OF THE ARGUMENT

A. The waiver of appeal does not apply to the instant case. The waiver exempts from its scope sentences exceeding the statutory maximum. (ROA.188). Because Appellant was wrongly subjected to the provisions of ACCA, he was sentenced in excess of his statutory maximum. This Court has found similar waivers of appeal inapplicable in comparable cases. *See United States v. Harris*, 434 F.3d 767 (5th Cir. 2005); *United States v. House*, 394 F. App'x 122 (5th Cir. 2010)(unpublished).

B. The district court erred in sentencing Appellant under the provisions of ACCA. First, it violated Mr. Moore's rights under the Sixth Amendment by denying him the right to have a jury determine whether his prior Texas convictions for burglary of a habitation occurred on at least three separate occasions. Second, *United States v Herold*, 941 F.3d 173 (October 18, 2019)(en banc), held that a defendant does not violate the Texas burglary statute absent an intent to commit a crime other than trespass. But this misunderstands Texas state law. Burglary defendants can commit burglary by entering a habitation free of any criminal intent beyond trespassing and then

committing a reckless offense. This Court should recognize as much, or, at a minimum, certify the question to the Texas Court of Criminal Appeals

ARGUMENT

I. The waiver does not bar the appeal.

A. Standard of Review

Application of an appellate waiver is reviewed *de novo*. *See United States v. Baymon*, 312 F.3d 725, 727 (5th Cir. 2002). A plea agreement is construed strictly against the government. *See United States v. Baymon*, 312 F.3d 725, 727 (5th Cir. 2002).

B. Discussion

The plea agreement in this case exempts from the waiver of appeal "a direct appeal of . . . a sentence exceeding the statutory maximum punishment . . . ." (ROA.188). A person convicted of being a felon in possession of a firearm is generally subject to a statutory maximum punishment of ten years. *See* 18 U.S.C. §924(a)(2). But when the defendant is subject to the provisions of ACCA, the statutory maximum punishment is life imprisonment. *See* 18 U.S.C. §924(e). A finding by this Court that ACCA is not applicable necessarily shows that Appellant's sentence of 15 years exceeded the statutory maximum punishment. The limited issue raised in this appeal thus falls outside the waiver of appeal.

The waiver exempts sentences exceeding "the statutory maximum punishment." This cannot reasonably be read to mean an "incorrectly calculated statutory maximum punishment." Such an interpretation would contravene the principle that waivers of appeal are construed narrowly and against the government. *See Palmer*, 456 F.3d at 488; *Somner*, 127 F.3d at 408; *United States v. Farias*, 469 F.3d 393, 397, & n.4 (5th Cir. 2006). That principle honors the importance of the right to appeal, *Palmer*, 456 F.3d at 488, and the special imperative of ensuring that plea agreements are entered into knowingly and voluntarily. *See United States v. Kerdachi*, 756 F.2d 349, 352 (5th Cir. 1985). The mere possibility that the "statutory maximum punishment" might be thought to encompass an incorrectly determined maximum thus cannot carry the day for the government. This Court, moreover, exhibits a strong preference for the merits where the defendant is subject to a sentence exceeding lawful limits. *See United States v. Del Barrio*, 427 F.3d 280, 282 (5th Cir. 2005); *United States v. Sias*, 227 F.3d 244, 246 (5th Cir. 2000); *United States v. Vera*, 542 F.3d 457, 459 (5th Cir. 2008). To the extent the waiver is ambiguous, it should accordingly be construed to permit review of a sentence that exceeds the correct statutory maximum.

This Court's decisional law counsels strongly against invocation of the waiver in this case. In *United States v. Harris*, 434 F.3d 767 (5th Cir. 2005), the defendant waived the right to appeal save for "the right to appeal a sentence in excess of the Guidelines." *Harris*, 434 F.3d at 770. The government argued that the waiver precluded review of

Guideline error, absent an upward departure. *See id.* This Court rejected the government's argument, finding that the term "sentence in excess of the Guidelines" was at a minimum ambiguous. *See id.* at 770–71. It accordingly held that the waiver should be construed to refer to sentences in excess of the ***correct*** Guidelines. *See id.* Similarly, the phrase "statutory maximum punishment" must here be interpreted to refer to the ***correct*** "statutory maximum punishment." *See id.* The *Harris* opinion made precisely this analogy:

> If the appeal waiver read, "Defendant reserves the right to appeal a sentence in excess of the statutory maximum," we would not construe that waiver to mean that we are barred from considering whether the district court applied the correct statute in order to determine if the sentence the defendant received exceeded the applicable statutory maximum. Here, we must consider whether the court applied the correct guidelines in order to determine if the sentence imposed exceeded the applicable guidelines.

Id. at 771.

This Court reached substantially identical results in *United States v. House*, 394 F. App'x 122 (5th Cir. 2010)(unpublished). That case involved a collateral challenge to the application of ACCA—the defendant's waiver of appeal exempted collateral challenges to sentences in excess of the statutory maximum. *See id* at 123–24. Citing the above language in *Harris*, this Court agreed with both parties that the defendant's ACCA challenge was not foreclosed by the waiver:

> House's challenge to the ACCA enhancement is a claim that his sentence exceeds the proper statutory maximum because his sentence, with the ACCA enhancement, exceeds the statutory maximum sentence applicable

> without the enhancement. We agree it falls within the exception to House's appeal waiver.

Id. at 124.

If ACCA is not applicable to the present case, the sentence was in excess of the statutory maximum punishment, and the appeal falls outside the waiver.

II. The district court erred in applying the provisions of 18 U.S.C. §924(e).

A. Standard of Review

This Court reviews "the district court's interpretation and application of the [ACCA] *de novo*." *United States v. Harrimon*, 568 F.3d 531, 533 (5th Cir. 2009).

B. Discussion

The ACCA provides for an enhanced statutory maximum and minimum when the defendant has been convicted of three prior offenses that are either a "serious drug offense" or a "violent felony." *See* 18 U.S.C. §924(e). In order to qualify for the enhancement, all three predicate convictions must be for offenses "committed on occasions different from one another." 18 U.S.C. §924(e)(1). The Act defines "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year, or any of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives,

> or otherwise involves conduct that presents a serious potential risk of physical injury to another.

§ 924(e)(2)(b). The PSR identified three potential ACCA predicate offenses, each a conviction for burglary of a habitation in Texas. (ROA.197). Appellant had also been convicted of a fourth burglary of a habitation in Texas. (ROA.202).

The district court erred by applying the ACCA enhancement. First, the district court violated Mr. Moore's Sixth Amendment rights by relying on *Shepard* documents to determine facts that were necessary to increase his statutory maximum sentence, specifically the burglaries occurred on at least three separate occasions, where no jury had previously decided on those facts. Second, the district court erred by concluding that Mr. Moore's Texas convictions for burglary of a habitation each constituted a "violent felony" under the ACCA, although he acknowledges that this argument is foreclosed in part by *United States v. Herrold*, 941 F.3d 173, 177 (5th Cir. 2019) (en banc). Accordingly, Appellant lacked sufficient ACCA predicates to merit an enhanced sentence.

1. There was insufficient cognizable proof that the burglary of a habitation offenses occurred on separate occasions.

Prior to his commission of his federal offense, Mr. Moore had previously been convicted four times in Texas for the offense of burglary of a habitation. (ROA.201–02). In order to qualify as separate ACCA predicates, convictions must be for offenses "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). To

establish this fact, the government must prove that an ACCA defendant's prior offenses occurred on separate occasions using a limited set of judicial records or "*Shepard* documents": indictments, judicial confessions, plea colloquys, or jury instructions. *See United States v. Fuller*, 453 F.3d 274, 279 (5th Cir. 2006); (ROA.185-186). Further, those documents must conclusively exclude every legal theory by which the prior prosecuting authorities could have secured separate convictions for simultaneous offenses. *See Fuller*, 453 F.3d at 279.

This limitation to conclusive judicial records in resolving the separate occasion inquiry is recognized by both this Court, *see id.*, and by a consensus of out-of-court authority. *See United States v. Sneed*, 600 F.3d 1326, 1332-33 (11th Cir. 2010)("Based on *Shepard*, there is simply no distinction left between the scope of permissible evidence that can be used to determine if the prior convictions are violent felonies or serious drug offenses or if they were committed on different occasions under § 924(e)(1)."); *United States v. Harris*, 447 F.3d 1300, 1305-06 (10th Cir. 2006) ("[T]he district court below had sufficient evidence in light of *Shepard* to conclude that [defendant's] prior crimes were committed on separate occasions," where the court relied on defendant's "admissions as well as documents sanctioned by *Shepard*."); *United States v. Taylor*, 413 F.3d 1146, 1157 (10th Cir. 2005) (remanding because the court could not "determine whether the district court reviewed judicial records consistent with *Shepard*" in resolving the separate occasions inquiry); *United States v. Thompson*, 421 F.3d 278, 282, 286 (4th

Cir. 2005) ("[The] ACCA's use of the term 'occasion' requires recourse only to data found in conclusive judicial records . . . upon which Taylor and Shepard say we may rely . . . .").

The limitation to *Shepard*-approved sources is also required by the Sixth Amendment. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). It is now beyond serious dispute that the fact ***of*** a prior conviction does not encompass all facts ***about*** a prior conviction. *See Shepard*, 544 U.S. at 25 (Souter, J., controlling plurality op.)("While the disputed fact here can be described as a fact ***about*** a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute.")(emphasis added); *Apprendi*, 530 U.S. at 490 (referring to the prior-conviction exception as a "narrow exception."); *Nijhawan v. Holder*, 557 U.S. 29, 40 (2009)(accepting government's concession that a defendant subjected to a twenty year re-entry sentence on the basis of a prior fraud offense would be entitled to a jury trial on the amount of loss in that case); *Dretke v. Haley*, 541 U.S. 386, 395-396 (2004)(applying the doctrine of constitutional avoidance to the scope of the prior conviction exception in a case where

the sequence of a defendant's prior convictions raised his statutory maximum); *United States v. Rojas-Luna*, 522 F.3d 502, 506 (5th Cir. 2008)(plain error to treat the sequence of the defendant's prior conviction and removal date as a sentencing factor rather than an element of the offense).

The *Shepard* restrictions ensure that the district court determines only what a prior jury has previously decided, or what a defendant has previously admitted, rather than what actually happened in a prior case. *See Shepard*, 544 U.S. at 25 (Souter, J., controlling plurality op.). It thus protects a defendant's right to have a jury decide, *in some proceeding*, all factual issues that increase his statutory maximum. As no jury has ever found, and Appellant has never admitted occurred on separate occasions, it would violate the Sixth Amendment for a sentencing court to do so in connection with the instant offense.

The importance of a jury's finding concerning separate occasions is even more pronounced in light of *Wooden v. United States*, ____ U.S. ____, 142 S.Ct. 1063 (2022). In *Wooden*, the Court held that offenses are not part of separate occasions merely because they are separated by time and place; instead, "the inquiry . . . is more multi-factored in nature." *Id.* at 1070. On this analysis, the Court explained:

> Timing of course matters, though not in the split-second, elements-based way the Government proposes. Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events. Proximity of location is also important; the further

> away crimes take place, the less likely they are components of the same criminal event. And the character and relationship of the offenses may make a difference: The more similar or intertwined the conduct giving rise to the offenses—the more, for example, they share a common scheme or purpose—the more apt they are to compose one occasion.

Id. at 1071. Thus, even though the *Shepard* documents here show offenses committed on different days and involving different victims, that is not the end of the inquiry.

An unpublished authority, *United States v. Taylor*, holds that it is the government's burden to show separate commission of prior offenses by *Shepard* documents only when the defendant submits affirmative evidence of simultaneity. *United States v. Taylor*, 263 F. App'x 402 (5th Cir. 2008) (unpublished disposition). However, *Taylor*'s burden shifting analysis is not consistent with *Fuller*, which flatly holds that "[t]o determine whether two offenses occurred on different occasions, a court is permitted to examine only 'the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.'" *United States v. Fuller*, 453 F.3d at 279 (quoting *United States v. Norwood*, 155 F. App'x 784, 785-86 (5th Cir. 2005)(unpublished) (quoting *Shepard v. United States*, 544 U.S. 13, 16 (2005)). The *Fuller* opinion simply does not distinguish between an initial burden of proof and rebuttal in terms of the documents a court may consider to decide the separateness question.

B. **Texas burglary is not a violent felony. {Foreclosed in part}.**

Alternatively, this Court should affirm because the defendant's burglary convictions do not constitute "violent felonies." As noted, ACCA defines "violent felonies" to include "burglary." 18 U.S.C. § 924(e)(2)(b)(2). By "burglary," it refers to "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990). The Texas burglary statute authorizes conviction for the commission of any felony or theft at any time following an unlawful entry. *See* Tex. Penal Code § 30.02(a)(3). This Court has held this means of committing the offense indivisible from other theories of prosecution found in the statute. *See United States v. Herrold*, 941 F.3d 173, 177 (5th Cir. Oct. 18, 2019)(*en banc*). In other words, the statute is indivisible. *See id.* at 177.

In *Herrold*, a defendant argued that Texas burglary under § 30.02(a)(3) is non-generic because it required no specific intent to commit a crime other than trespassing. *See id.* at 177–78. This Court ultimately rejected the argument. It believed that Texas burglary, even burglary prosecuted under Tex. Penal Code § 30.02(a)(3), requires a specific intent to commit another crime before the burglar's exit from a burgled structure. *See id.* at 179 (citing *De Vaughn v. State*, 749 S.W.2d 62 (Tex. Crim. App. 1988)).

This is not a correct understanding of Texas law. *Herrold* overlooked a wealth of state authority demonstrating that burglary may be committed without any intent to commit a crime other than trespassing.

As the Seventh Circuit has observed in this context, "not all crimes are intentional; some require only recklessness or criminal negligence." *United States v. Van Cannon*, 890 F.3d 656, 664 (7th Cir. 2018). *United States v. Van Cannon*, 890 F.3d 656, 664 (7th Cir. 2018). This is also true in Texas. For example, in Texas a person commits assault when he "recklessly causes bodily injury" or when he knowingly "causes physical contact" with the victim when he "should reasonably believe that the other will regard the contact as offensive or provocative." Tex. Penal Code § 22.01(a)(1), (3). Neither of those assault crimes requires formation of intent. But § 30.02(a)(3) counts any assault committed after unlawful entry as "burglary."

Subsection (a)(3) also includes all felonies committed after unlawful entry. The Texas Penal Code offers several felonies that are committed without ever forming specific intent, including:

- Injury to a child / elderly person / disabled person: "A person commits" this felony if he "recklessly, or with criminal negligence" causes the victim to suffer "bodily injury";
- Endangering a child: "A person commits" the state-jail felony offense of "endangering a child" if he "recklessly, or with criminal negligence, by act or omission, engages in conduct that places a child younger than 15 years in imminent danger of . . . bodily injury, or physical or mental impairment," and
- Sexual assault / statutory rape: A person commits felony sexual assault if he has sexual contact or intercourse with someone who is younger than 17 years old, "regardless of whether the person knows the age of the child at the time of the offense."

Tex. Penal Code §§ 22.04(a), 22.041, & 22.011(a)(2); *see also May v. State*, 919 S.W.2d 422, 424 (Tex. Crim. App. 1996) (showing that under Texas law statutory rape is a "strict liability offense"). Even theft includes situations where culpable knowledge is imputed to defendants who were reckless or who failed to exercise appropriate diligence. *See, e.g.*, Tex. Penal Code § 31.03(c)(3), (6), (7), & (9).

In *Quarles v. United States*, __U.S.__, 139 S.Ct. 1872 (2019), the Supreme Court held that a defendant need not form an intent to commit a crime at the moment of entry to commit generic burglary. But as to the argument that a defendant cannot commit generic burglary if the offense committed inside the burgled structure lacks an intentional *mens rea*, "Quarles did not preserve that argument," so the Supreme Court did "not address it." *Quarles*, 139 S. Ct. at 1880 n.2. Even after *Quarles*, however, the Seventh Circuit continues to recognize that trespass-plus-crime burglaries are non-generic if they reach reckless or negligent crimes:

> What we can say with confidence is that *Quarles* did not abrogate *Van Cannon*'s conclusion that Minnesota burglary is broader than generic burglary because the state statute does not require proof of any intent at any point. Indeed, the Court expressly declined to address this issue in *Quarles*.
>
> What all of this means, then, is that Chazen's Minnesota burglary convictions no longer qualify as violent felony predicates under the reasoning of *Van Cannon*. And with there being no contrary law in the

> Eighth Circuit, we believe Chazen has done enough to show that he no longer qualifies as an armed career criminal.

Chazen v. Marske, 938 F.3d 851, 860 (7th Cir. 2019).

Though the text of Texas Penal Code § 30.02(a)(3) plainly reaches "crimes with lesser *mens rea* requirements," the *en banc* Court rejected Herrold's argument because he did not "point to any convictions matching this description, nor does he cite a single Texas case." *Herrold*, 941 F.3d at 179. Herrold filed a motion to recall the mandate citing some Texas authority, but that motion was denied.

Mr. Moore here will not make the same mistake. The following Texas cases establish "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of the crime." *Id.*

- *Daniel v. State*, 07-17-00216-CR, 2018 WL 6581507, at *3 (Tex. App.-Amarillo Dec. 13, 2018, no pet.).

Daniel was a bench-trial case, where the defendant was charged with burglary under (a)(3), with a predicate offense of aggravated assault. "The trial court, however, found Appellant guilty of the lesser-included offense of burglary by entering a habitation and committing or attempting to commit the offense of assault." *Daniel*, 2018 WL 6581507, at *1 n.1. On appeal, Daniel argued that "the State failed to prove that he subsequently formed that intent after entry into the residence." *Id.* at *3.

The state court of appeals rejected his argument, explaining that "[a]ll the

State was required to prove was that he entered the residence without consent or permission and while inside, assaulted or attempted to assault Phillips and Schwab." *Id.* And "a person commits assault when he intentionally, knowingly, or recklessly causes bodily injury to another." *Id.* at *2.

Other cases recognizing reckless assault as a predicate for liability under § 30.02(a)(3) include: *State v. Duran*, 492 S.W.3d 741, 743 (Tex. Crim. App. 2016); *Scroggs v. State*, 396 S.W.3d 1, 10 & n.3 (Tex. App.-Amarillo 2010, pet. ref'd, untimely filed); *Wingfield v. State*, 282 S.W.3d 102, 105 (Tex. App.-Fort Worth 2009, pet. ref'd); *Alacan v. State*, 03-14-00410-CR, 2016 WL 286215, at *3 (Tex. App.-Austin Jan. 21, 2016, no pet.); *Crawford v. State*, 05-13-01494-CR, 2015 WL 1243408, at *2 (Tex. App.-Dallas Mar. 16, 2015, no pet.); *Johnson v. State*, 14-10-00931-CR, 2011 WL 2791251, at *2 (Tex. App.-Houston [14th Dist.] July 14, 2011, no pet.); *Torrez v. State*, 12-05-00226-CR, 2006 WL 2005525, at *2 (Tex. App.-Tyler July 19, 2006, no pet.); and *Guzman v. State*, 2-05-096-CR, 2006 WL 743431, at *2 (Tex. App.-Fort Worth Mar. 23, 2006, no pet.); *cf. Brooks v. State*, 08-15-00208-CR, 2017 WL 6350260, at *7 (Tex. App.-El Paso Dec. 13, 2017, pet. ref'd) (listing robbery by reckless causation of injury as a way to prove § 30.02(a)(3)).

- *Battles v. State*, 13-12-00273-CR, 2013 WL 5520060, at *1 & n.1 (Tex. App.-Corpus Christi Oct. 3, 2013, pet. ref'd)

In *Battles*, the predicate crime was injury to an elderly individual under Texas Penal Code § 22.04, and the appellate court noted that the predicate offense could be committed with recklessness or with "criminal negligence." The trial court likewise instructed the jury that the predicate crime of injury-to-a-child could be committed with recklessness or criminal negligence.

- *Lomax v. State*, 233 S.W. 3d 302 (Tex. Crim. App. 2007)

Lomax is not a case about Texas Penal Code § 30.02(a); but it interprets a Texas crime with parallel structure. Like "burglary," the Texas crime of "murder" is defined in three ways:

> (b) A person commits an offense if he:
>
> (1) intentionally or knowingly causes the death of an individual;
> (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
> (3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

Texas Penal Code § 19.02(b); *compare id.* § 30.02(a).

In *Lomax*, the defendant made an argument very similar to the one the government made in *Herrold* – that there is an implied element of specific intent for the third subsection. The Texas Court rejected that argument:

> It is significant and largely dispositive that Section 19.02(b)(3) omits a culpable mental state while the other two subsections in Section 19.02(b) expressly require a culpable mental state. A person commits murder under Section 19.02(b)(1), Tex. Pen. Code, when he "knowingly and intentionally" causes a person's death. A person commits murder under Section 19.02(b)(2), Tex. Pen. Code, when he "intends to cause serious bodily injury" and commits an act clearly dangerous to human life that causes a person's death. The omission of a culpable mental state in Section 19.02(b)(3) is "a clear implication of the legislature's intent to dispense with a mental element in that [sub]section."

Lomax, 233 S.W.3d at 304 (quoting *Aguirre v. State*, 22 S.W.3d 463, 472-473 (Tex. Crim. App. 1999)). Applying the same logic here, the Texas Court of Criminal Appeals would hold that Texas Penal Code § 30.02(a)(3) plainly dispenses with the formation of specific intent, given that the other two subsections "expressly require" formation of specific intent to commit another crime. *Id.*; *see* Tex. Penal Code § 30.02(a)(1), (a)(2).

If these authorities do not clearly answer the relevant question here—whether Texas burglary may be committed without a specific intent to commit a crime other than trespassing—they have at least raised a serious question on that point. There is accordingly a serious risk that that *en banc* precedent incorrectly states the elements of a state criminal offense. That possibility interferes with the power of elected state institutions to define the law of the state, and may create confusion about the scope of a serious criminal offense. As such, if this Court is not prepared to rely on the state authority cited above, it should at least certify the question to the Texas Supreme Court.

See Clay v. Lynaugh, 846 F.2d 8, 9 (5th Cir. 1988)(certifying question as to the application of a criminal statute).

Finally, if this Court deems the analysis of Texas burglary foreclosed by *Herrold*, Mr. Moore respectfully preserves for further review the argument that *Herrold* was wrongly decided. He specifically preserves the arguments (1) that Texas Penal Code § 30.02(a)(3) is not equivalent to generic burglary because it criminalizes trespassing without a specific intent to commit another crime, and (2) that Texas Penal Code § 30.02(a)(3) is not equivalent to generic burglary when applied to habitations because it criminalizes crimes committed after a consensual entry, *see Gordon v. State*, 633 S.W.2d 872 (Tex. Crim. App. 1982), and lacks an element requiring that burgled structure be closed to the public. *See Walker v. State*, 648 S.W.2d 308, 310 (Tex. Crim. App. 1983)(*en banc*).

CONCLUSION

Mr. Moore urges the Court to vacate his ACCA-enhanced sentence and to remand for resentencing under 18 U.S.C. § 924(a)(2).

Respectfully submitted,

/s/ Adam Nicholson
Adam Nicholson
Attorney for Defendant/Appellant
Assistant Federal Public Defender
Northern District of Texas
Texas State Bar No. 24097045
525 Griffin St., Suite 629
Dallas, TX 75202
214.767.2746 (Telephone)
214.767.2886 (Fax)
Adam_Nicholson@fd.org

CERTIFICATE OF FILING AND SERVICE

I, Adam Nicholson, hereby certify that on April 13, 2022, I electronically filed the foregoing brief using the Court's ECF system. Opposing counsel has therefore been served pursuant to Fifth Circuit Rule 25.2.5. I further certify that one copy of the brief will be sent via first class mail to Mr. Derrick Tyrone Moore, No. 56521-509, Johnson County Jail, 1800 Ridgemar Drive, Cleburne, TX 76031. I further certify that: 1) any required privacy redactions have been made; 2) this electronic submission is an exact copy of the paper document; and 3) this document has been scanned for viruses by the following commercial virus scanning program: Symantec Endpoint, and it is free of viruses.

/s/Adam Nicholson
Adam Nicholson

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies this brief complies with the page limitation announced in Rule 32(a)(7)(A), because it contains 5,158 words.

This brief complies with the typeface and type style requirements because it has been prepared in Microsoft Word using the proportionally-spaced typeface Garamond style, in a 14-point font size in the body of the brief and 12-point in the footnotes.

The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the length limitations in Federal Rule of Appellate Procedure 32(a)(7), may result in the Court striking the brief and imposing sanctions against the person signing the brief.

/s/Adam Nicholson
Adam Nicholson