

No. 22-6578

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

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there is a reasonable probability of different result if the court below is directed to reconsider its judgment in light of *Wooden v. United States*, __ U.S. __, 142 S.Ct. 1063 (June 21, 2022)?
2. When evaluating whether a state-law offense satisfies the Armed Career Criminal Act's definition of a "violent felony," 18 U.S.C. § 924(e)(2)(B), federal courts often have to interpret and apply state court decisions.

Where state-law sources conflict with one another, does the ACCA's "demand for certainty" constrain a federal court's interpretation of state criminal law?

3. Mr. Moore was previously convicted of burglary under Texas Penal Code § 30.02(c)(2), which relies on Texas Penal Code § 30.02(a), a statute which allows conviction where a trespasser commits any "felony, theft, or assault" inside the premises. Many of those offenses allow conviction with a *mens rea* of recklessness, negligence, or even strict liability.

Is Texas Penal Code § 30.02(a) a generic "burglary" offense, 18 U.S.C. § 924(e)(2)(B)(ii)?

PARTIES TO THE PROCEEDING

Petitioner is Derrick Tyrone Moore, who was the Defendant-Petitioner in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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I. This Court should grant the petition, vacate the judgment of the court below, and remand for reconsideration (“GVR”) in light of *Wooden v. United States*, ___ U.S. ___, 142 S.Ct. 1063 (2022).

The government wrongly argues against Petitioner’s request that the Court grant his petition for certiorari, vacate the judgment below, and remand the case (“GVR”). The government takes this position not because of the merits its case but, rather, because Petitioner “forfeited his claim that this Court’s decision in *Wooden v. United States*, ___ U.S. ___, 142 S.Ct. 1063 (2022), renders his ACCA classification invalid,” when, in June of 2022, Petitioner’s counsel acquiesced to the government’s motion for summary affirmance. Br. in Opp. at 3. Despite any procedural infirmities, “the particularities” of this case “merit a GVR.” *Stutson v. United States*, 516 U.S. 193, 194(1996) (per curiam). The government’s argument against GVR is unavailing for three reasons.

First, the government does not suggest that the opinion of the Fifth Circuit was correct. In fact, the government cites its own concession to the contrary. Br. in Opp. at 3 (citing Br. in Opp., *v. United States* (No. 22-336) (filed Dec. 12, 2022)). This, of course, is proper, given that the government continues to concede that the “separate occasions” question is one for the jury, rather than the judge. *See, e.g.*, Supp. Br. for the United States, *United States v. Stowell*, No. 21-2234, at 5–10 (8th Cir.) (filed March 22, 2023) (App. A). Despite the Government’s current concessions, it made no such concession in its motion to the court below, and the opinion of the court of appeals predates the government’s concession in *Reed* by almost three months.

Second, the government does not suggest that the Fifth Circuit’s opinion addressed the question of whether, after this Court’s opinion in *Wooden*, the “separate occasions” requirement under the Armed Career Criminal Act (“ACCA”) requires a jury finding. And this is rightly so, as the two-page opinion of the court of appeals below failed even to mention *Wooden*. Instead, it relied on its opinion in *United States v. White*, 465 F.3d 250, 254 (5th Cir. 2006), which predated *Wooden* by sixteen years.

Third, the government cements its argument for GVR denial by citation to *Lawrence v. Chater*, 516 U.S. 163 (1996) (per curiam), a case in which this Court granted a petition for GVR despite a prior summary judgment in a Social Security benefits case. *Id.* at 174–75. Certainly, in *Lawrence*, the Court explained that its GVR power “should be exercised sparingly,” *Id.* at 173. Nonetheless, the Court recognized that “the equities and legal uncertainties” of a case can “merit a GVR order.” *Id.* at 175.

Moreover, on the same day the Court issued the opinion in *Lawrence*, it also granted GVR after a court of appeals granted summary affirmance against a criminal defendant in *Stutson v. United States*. In *Stutson*, this Court recognized the importance of using its GVR authority when appropriate in the criminal context:

[I]t is not insignificant that this is a criminal case. When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated.

Id. at 196.

This case presents “equities and legal uncertainties” that should “merit a GVR order.” Here, (1) the government relies on an opinion below that stands for a proposition that the government now repudiates; (2) “the only opinion below did not consider the import of a recent Supreme Court precedent” that is applicable to Petitioner’s case, *see id.* at 195; (3) and “the petitioner is in [prison] having, through no fault of his own, had no plenary consideration of his appeal.” *Id.* Such an “exceptional combination of circumstances presents ample justification for a GVR order.” *Id.* at 196.

CONCLUSION

This Court should grant certiorari, vacate the judgment below and remand for reconsideration in light of *Wooden*. Alternatively, Petitioner respectfully continues to submit that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit and vacate the judgment below on each of the grounds proposed in his initial Petition.

Respectfully submitted this 5th day of April, 2023.

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