No. 17-1445

In the

Supreme Court of the United States

UNITED STATES OF AMERICA,
PETITIONER,

v.

MICHAEL HERROLD,
RESPONDENT,

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

SUPPLEMENT TO BRIEF IN OPPOSITION

J. MATTHEW WRIGHT
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SUPPLEMENT TO BRIEF IN OPPOSITION

The Government petitioned for certiorari in this case arguing that Texas Penal Code § 30.02(a)(3) describes a generic burglary. Respondent Michael Herrold raised several arguments against certiorari. Respondent also filed a conditional cross-petition arguing that retroactive application of intervening adverse decisions would violate his constitutional right to fair warning. *Cf. United States v. Lanier*, 520 U.S. 259, 267 (The "touchstone" of the fair warning requirement "is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct" was covered.). This is particularly significant in a case where the change in statutory interpretation would result in Mr. Herrold's re-imprisonment.[1]

The Government's argument here and in *Quarles v. United States*, No. 17-778, focuses entirely on state statutes that criminalize "continued unpermitted presence in a [structure] *following the formation of intent to commit a crime*." Pet. at I (emphasis added). But Texas—like a small handful of other states—does not require *formation of intent* to commit another crime. These states define "burglary" to include reckless, negligent, and strict liability crimes committed while trespassing. *See* Tex. Penal Code § 30.02(a)(3). These trespass-plus-crime burglaries do not "require proof of intent to commit a crime *at all*—not at *any* point during the offense conduct." *Van Cannon v. United States*, 890 F.3d 656, 664 (7th Cir. 2018).

[1] The lower courts refused to stay the mandate or execution of the decision below. Mr. Herrold was re-sentenced without ACCA and released on April 10, 2018.

In reply to this particular argument, the Government erroneously asserts that Mr. Herrold "did not make that argument in the court of appeals." U.S. Reply Br. 5. That is wrong. The Fifth Circuit held long ago that generic burglary required proof of contemporaneous intent *at the moment* an offender first trespassed. *See, e.g., United States v. Constante*, 544 F.3d 584, 586 (5th Cir. 2008); *accord United States v. Herrera-Montes*, 490 F.3d 390, 391–392 (5th Cir. 2007); *United States v. Castro,* 272 F. App'x 385, 386 (5th Cir.2008); and *United States v. Beltran-Ramirez,* 266 F. App'x 371, 372 (5th Cir.2008).

The first time the Government challenged that longstanding substantive principle was in its September 2017 Supplemental Brief. *See* U.S. Supp. En Banc Brief 50–57 (5th Cir. filed Sept. 6, 2017). The Fifth Circuit's en banc briefing order (July 10, 2017), did not allow a Reply to that supplemental brief.

On September 20, 2017, during the oral argument, Mr. Herrold argued that there were "other reasons" (in addition to the lack of *contemporaneous* intent) why § 30.02(a)(3) was "non-generic." Rec. of Sept. 20, 2017 Oral Arg. at 55:14–55:40.[2] Counsel suggested the court might want "supplemental briefs" on that question, but the Chief Judge responded that those reasons should be presented at oral argument: "This is your main shot." *Id.* at 55:40–42. Mr. Herrold specifically argued that Subsection

> (a)(3) obviously includes non-intentional felonies. Classic burglary, you have to have the plan. It has to be purposeful. .But reckless felonies,

[2] The oral argument recording is available on the Fifth Circuit's website: http://www.ca5.uscourts.gov/OralArgRecordings/14/14-11317_9-20-2017.mp3

> injury-to-a-child, even felony murder which is possibly a strict liability offense, there is no intent in the sense of classic burglary.

Id. at 56:14–56:31. In other words, Mr. Herrold pressed *exactly* the same argument he raised in the Brief in Opposition. And the Government has yet to argue (here or in *Quarles*) that a reckless, negligent, or strict-liability crime committed while trespassing is a generic burglary.

Thus, no matter how this Court rules in *Quarles*, it would be appropriate to deny the Government's petition in this case.

CONCLUSION

For all the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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