
NO. 17-7496

IN THE SUPREME COURT OF THE UNITED STATES

SHANNON FERGUSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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Shannon Ferguson files this supplemental brief to highlight two recent developments relevant to the disposition of his petition.

First, the Court's holding in *Quarles v. United States*, No. 17-778, does not reach all of the issues presented by Mr. Ferguson's case, so does not dictate that his petition should be denied. Specifically, Mr. Ferguson argues that subsection (a)(3) of the Tennessee burglary statute, Tenn. Code Ann. § 39-14-402, does not require proof that a defendant *ever* developed an intent to commit a further crime. (Pet. 32-34; Reply, 5-9.) The Court specifically withheld addressing a similar claim made by Mr. Quarles regarding the Michigan statute, because "Quarles offers no support for his suggestion that there is no *mens rea* requirement. In any event, Quarles did not preserve that argument, and we do not address it." *Quarles v. United States*, ___ S. Ct. ___, 2019 WL 2412905, *6 n.2 (June 10, 2019).

Unlike in *Quarles*, here Mr. Ferguson has supported this position, as he has presented both statutory and case law showing that the further crime can be committed recklessly. Further, while the government argues to the contrary (BIO 11-12), Mr. Ferguson preserved this claim. (See argument, Reply 5-9). While it was raised first in the Sixth Circuit Court of Appeals, it was raised in response to the government's argument (as detailed in Mr. Ferguson's Reply 5-9). It is also a purely legal argument which the appellate courts address *de novo*, and can consider in the first instance. *Turner v. United States*, 885 F.3d 949, 954 (6th Cir. 2018) (en banc),

petition for cert. filed, Turner v. United States (U.S. July 24, 2018, No. 18-106) (“where a newly-raised issue is ‘purely one of law requiring no new or amplified factual determination’ and has been ‘fully briefed and argued,’ we may exercise our discretion to deviate from the general waiver rule”).

Second, the Sixth Circuit recently aligned itself with other Circuits when it issued an opinion confirming that the district court erred by relying solely upon indictments charging one crime (aggravated burglary) when he pled guilty to a separate crime (burglary), as Mr. Ferguson has always maintained (Pet. 34-37). *Dillard v. United States*, No. 17-5716, 2019 WL 1579694, at *8 (6th Cir. Apr. 12, 2019) (collecting cases) (“We therefore agree with Dillard that, because he pleaded guilty to crimes not charged in the indictments and no other *Shepard* documents indicate the crime of conviction, his indictments cannot be considered as *Shepard* documents under the modified categorical approach.”).

Thus, the government’s argument that the *Shepard* documents were properly relied upon by the district court is not supported by current Sixth Circuit law. The government concedes that the Sixth Circuit did not reach this question, but instead argues that a ruling in Mr. Ferguson’s favor would not likely benefit him because of the *Shepard* documents. Mr. Ferguson refuted this argument in his Reply (3-5), and notifies the Court of *Dillard* as additional confirmation that the district court’s

reliance on the respective indictments was clear error which will likely be resolved in his favor when addressed by the Sixth Circuit on remand.

The Tennessee burglary statute at issue is overbroad, and does not qualify as a generic burglary because it does not require that the defendant ever develop an intent to commit a further crime—whether at the time of entry or at any time while “remaining in.” The petition should be granted.

Respectfully submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing Reply has been served upon Noel J. Francisco, Counsel of Record with the Solicitor General, Department of Justice, 10th Street and Constitution Avenue, Washington, D.C., 20530, by placing a true and exact copy of same with Federal Express, with sufficient postage thereon to carry the same to its destination, and via e-mail.

This the 12th day of June, 2019.

A handwritten signature in black ink, appearing to read "ERIN RUST", written over a horizontal line.

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