No. 17-778

In the Supreme Court of the United States

JAMAR ALONZO QUARLES, PETITIONER

v.

UNITED STATES OF AMERICA

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

SUPPLEMENTAL BRIEF FOR THE PETITIONER

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903

JOHN P. ELWOOD
JEREMY C. MARWELL
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jmarwell@velaw.com

MARK T. STANCIL
MATTHEW M. MADDEN
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, NW
Washington, DC 20006
(202) 775-4500

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SUPPLEMENTAL BRIEF FOR PETITIONER

Recent events confirm the urgent need for this Court to decide the important question presented here—whether generic burglary under *Taylor* v. *United States*, 495 U.S. 575 (1990), requires proof that intent to commit a crime was present at the time of unlawful entry or first unlawful remaining.

This issue was not addressed, much less resolved, by this Court's recent decision in *United States* v. *Stitt*, No. 17-765 (Dec. 10, 2018). Rather, *Stitt* concerned the distinct question whether generic "burglary" under *Taylor* includes "burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation." *Id.*, slip op. 1. This Court concluded in *Stitt* that *Taylor*'s longstanding definition of "the statutory term 'burglary,' govern[ed] * * * and determine[d] the outcome" in that case. *Id.*, slip op. 4. In applying *Taylor*'s definition of burglary to the circumstances of that case, *Stitt* did nothing to affect, never mind settle, the conflict over the definition of burglarious intent.

The latter issue, however, "has divided the courts of appeals" and remains a "frequently recurring question regarding the scope of an important [Armed Career Criminal Act ('ACCA')] predicate." U.S. Br. 7. Since petitioner filed his reply brief, *yet another* federal court of appeals weighed in on this entrenched "circuit split on the correct way to understand *Taylor*'s requirement of burglarious intent." *Van Cannon* v. *United States*, 890 F.3d 656, 665 n.2 (7th Cir. 2018). With the Seventh Circuit's recent decision, the split here is deeper than the one that warranted this

Court's review in *Stitt*. Indeed, courts accounting for approximately 80% of all federal criminal prosecutions have now joined the split.[1]

Also just during the pendency of Quarles' petition, the United States petitioned for a writ of certiorari to review an en banc Fifth Circuit decision raising the same issue. See *United States* v. *Herrold*, 883 F.3d 517, 531-536 (2018), pet. for cert. pending, No. 17-1445 (filed Apr. 18, 2018). However, of the many pending petitions on this issue, Quarles' case offers the Court the best opportunity to resolve this critical ACCA issue without unnecessary procedural complications.

1. Nothing in *Stitt* resolves or even bears on the entrenched circuit split on the burglarious intent question. In addressing the scope of the statutory term "burglary" in the Armed Career Criminal Act, this Court in *Stitt* took its rule of decision directly from *Taylor*, which "defined the elements of generic 'burglary' as 'an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.'" *Stitt*, slip op. 5 (quoting *Taylor*, 495 U.S. at 598). This Court concluded that the state laws at issue in *Stitt* "fall[] within the scope of generic burglary's definition as set forth in *Taylor*." *Ibid.* In so doing, *Stitt* applied *Taylor*'s established test to the circumstances of that case, considering (among other factors) whether a majority of state burglary statutes covered vehicles at the time of ACCA's enactment, and whether entry of vehicles

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[1] See Admin. Office of U.S. Courts, *Statistical Tables for the Federal Judiciary—June 2018*, Table D-3, http://bit.ly/2PzL6T9.

creates a risk of violent confrontation. See *Stitt*, slip op. 5-7. In so doing, this Court gave no indication of modifying *Taylor*'s basic inquiry. Compare *Stitt*, slip op. 5-7, with *Taylor*, 495 U.S. at 589 ("generic" burglary under ACCA "roughly correspond[s] to the definitions of burglary in a majority of the States' criminal codes [when ACCA was enacted]"), and with *id.* at 588 (Congress included "burglary" as ACCA predicate "because of its inherent potential for harm to persons").[2] Thus, *Stitt* did not modify or provide further guidance on the *Taylor* framework under which the burglarious intent split arose.

In addition to the language of this Court's opinion, other considerations show that *Stitt* does not resolve or bear on the *mens rea* requirement implicated here. The burglarious intent issue was not mentioned in the merits briefing or at oral argument in *Stitt*. And decisions of courts of appeals that have addressed both questions confirm that the issues are analytically distinct. For instance, in addressing the intent issue, the Seventh Circuit's recent decision in *Van Cannon* made no mention of the dwellings issue, although that court had resolved the dwellings question only five months earlier in an opinion joined by *Van Cannon*'s author (Judge Sykes). See *Van Cannon*, 890 F.3d 656;

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[2] *Stitt* also addressed other arguments that have no bearing on the intent question presented here, including issues specific to the state statutes in that case, see *Stitt*, slip op. 7, and whether this Court's references to "nontypical structures and vehicles" in *Taylor*, *Mathis* v. *United States*, 136 S. Ct. 2243, 2250 (2016), and other cases had resolved the vehicle question, see *Stitt*, slip op. 7-8.

see also *Smith* v. *United States*, 877 F.3d 720, 725 (7th Cir. 2017). The Sixth Circuit reached a similar conclusion regarding the lack of relationship between the two issues. See Pet. 15-16 & n.9.

The continuity between *Taylor* and *Stitt* is underscored by the fact that existing lower-court opinions addressing the intent question consider and apply the same *Taylor* factors this Court applied in *Stitt*. *E.g.*, *Herrold*, 883 F.3d at 533-534 & nn. 99-103, 107 (analyzing whether state-law definitions of burglary at the time of ACCA's enactment included a contemporaneous-intent requirement, and addressing potential for "danger to victims"); *United States* v. *McArthur*, 850 F.3d 925, 939 (8th Cir. 2017) (addressing contemporaneous meaning of "burglary" in same versions of treatise and Model Penal Code cited in *Taylor*). Nothing in *Stitt* affects the *Taylor* analysis in a manner that would justify deferring resolution of this entrenched circuit split—a split that continues to cause sentencing disparities nationwide.

2. Even in the short time since Quarles filed his petition, the circuit split has continued to deepen. Most recently, the Seventh Circuit in *Van Cannon* addressed whether Minnesota's second-degree burglary offense constitutes "generic burglary" and thus is an ACCA predicate offense. Endorsing the very position Quarles advocates, the court concluded it does not. Although the statute at issue there covers what is plainly "generic burglary: A person * * * 'enters a building without consent and with intent to commit a crime,'" it also encompasses an offense that "is not" generic burglary: "A person can be convicted of this

same crime if he 'enters a building without consent and commits a crime while in the building.'" 890 F.3d at 664 (quoting Minn. Stat. § 609.582(2)(a)). The Seventh Circuit explained that "[c]ontemporaneous intent was the essence of burglary at common law," and that view continued to prevail at the time of *Taylor*. *Id.* at 665 (quoting *United States* v. *Bonilla*, 687 F.3d 188, 196 (4th Cir. 2012)). The court noted that the secondary sources *Taylor* relied upon—the relevant editions of the LaFave and Scott *Substantive Criminal Law* treatise and the Model Penal Code—"both * * * explain that a key requirement of burglary is the element of contemporaneous intent to commit a crime at the moment of the * * * unlawful 'remaining in' the structure." *Id.* at 665 (citing 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(b), at 468 (1986), and Model Penal Code § 221.1 cmt. 1, 3 (1980)). Accordingly, the court concluded that "generic burglary requires intent to commit a crime *at the moment of* the unlawful entry or unlawful 'remaining in' a building or structure. That's what distinguishes burglary from simple trespass." *Id.* at 664-665.

The Seventh Circuit emphatically rejected "the government's view" that the "remaining-in variant of generic burglary" is "a continuous act." *Id.* at 665. "Rather, it is a discrete event that occurs at the moment when a perpetrator * * * exceeds his license and overstays his welcome." *Ibid.* (quoting *McArthur*, 850 F.3d at 939). The Seventh Circuit further explained that under the "continuous act" reading, "'entry' is almost superfluous: If 'remaining in' is a

continuous act, then every unlawful 'entry' would immediately become an unlawful 'remaining' as well," making the "entry" variant of the crime unnecessary. *Ibid.*[3]

Van Cannon is just the most recent case in a growing split that affects a large number of defendants. Whether defendants convicted under a statute that did not require contemporaneous intent will be eligible for an ACCA enhancement depends entirely on the happenstance of where they were sentenced. A defendant's eligibility for an ACCA enhancement should not depend on the fortuity of whether he is sentenced in one of the three circuits that require contemporaneous intent, instead of one of the four that do not. This Court should resolve the split and end the disparate application of ACCA to similarly situated defendants.[4]

3. This case provides a better vehicle than any of the other pending petitions, including *United States* v. *Herrold*, No. 17-1445, for resolving the question

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[3] *Van Cannon* will not, however, provide an alternate vehicle for this Court's review. The Government neither sought rehearing from the Seventh Circuit nor petitioned for a writ of certiorari in this Court.

[4] At oral argument in *Stitt*, the parties referred to a bill pending in Congress that would take a different approach to recidivist sentencing enhancements under 18 U.S.C. § 924(e). See, *e.g.*, S. 3335, 115th Cong., 2d Sess (2018). To date, it appears that apart from referral to relevant committees, neither chamber has taken any action on that bill. A different piece of proposed legislation, see H.R. 5682, 115th Cong., 2d Sess. (2018) ("First Step Act"), was passed by the House but, even if enacted in present form, would not address the question presented here.

presented. The government in *Herrold* asks this Court to resolve that question by granting its petition either alone or together with this case, see Pet. 10-11, *Herrold*, No. 17-1445. While it might be prudent to grant *Herrold* together with this case to allow this Court "to review the issue in the context of multiple state statutes," *id.* at 11, *Herrold* would not be a suitable vehicle on its own. First, the defendant in *Herrold* has filed a conditional cross-petition raising not only the *Stitt* issue (as the Texas statute in that case punishes burglary of vehicles), but also another independent ground. See *Herrold* v. *United States*, No. 17-9127. Second, the defendant in *Herrold* has argued that the Texas burglary statute contains additional features that make his case an inappropriate vehicle for resolving the contemporaneous-intent issue. See Br. in Opp. 12-14, *Herrold*, No. 17-1445. The government has identified no such complications in this case.

4. As the government explained, the three other petitions presenting this question are "less suitable vehicle[s]" than this case. U.S. Br. 12; see also U.S. Br. 10, *Moore* v. *United States*, No. 17-8153. *Ferguson* v. *United States*, No. 17-7496, poses several potential vehicle issues. First, Ferguson's case may be moot now that this Court has resolved *Stitt* in the government's favor. Ferguson has eight prior Tennessee convictions—five for aggravated burglary and three for burglary. Pet. 7, *Ferguson, supra.* After the "district court originally concluded" the Tennessee aggravated burglary statute qualified as generic burglary, the Sixth Circuit found that statute

overbroad based on the locational issue presented in *Stitt*, so the Sixth Circuit relied only on the three non-aggravated burglary convictions that are the subject of the *Ferguson* petition. Pet. App. 3, *Ferguson, supra*; see also Pet. 7, *Ferguson, supra*. However, given this Court's ruling in *Stitt*, Ferguson's five aggravated burglary convictions may themselves constitute generic burglary. If those aggravated burglary convictions support his ACCA sentence, it could moot the need to decide the status of his three non-aggravated burglary convictions. See Pet. 7, *Ferguson, supra*; see also Pet. App. 3. This case presents the *mens rea* issue without that complication.

Ferguson's petition also presents a further complication absent here. The district court examined Ferguson's burglary indictments, plea transcripts, and judgment orders to determine the burglary subsection to which Ferguson pleaded guilty. U.S. Br. 6, *Ferguson, supra*. It concluded that Ferguson "was convicted of a specific variant of Tennessee burglary * * * that qualifies as generic burglary under any circuit's interpretation of *Taylor*." *Id.* at 10. "Although the court of appeals resolved the case on an alternative ground," the government contends that the district court's determination means that Ferguson may not "benefit from a decision in his favor on the question presented." *Ibid.* Thus, as the government explained, "*Quarles* * * * present[s] a better vehicle for deciding the question presented." *Ibid.*

The two other petitions implicating the split, *Moore* v. *United States*, No. 17-8153, and *Secord* v. *United States*, No. 17-7224, also are poor vehicles for resolving

this question because they both arise from denials of certificates of appealability under 28 U.S.C. § 2255. U.S. Br. 2, *Moore, supra*; U.S. Br. 9, *Secord, supra*. Those cases do not squarely present the question whether the defendant's challenge to his sentence is meritorious; instead, they present the question whether the defendant is entitled to have his claim for collateral relief heard on appeal because the issue is reasonably debatable. See, *e.g.*, *Miller-El* v. *Cockrell*, 537 U.S. 322, 336-338, 348 (2003); *Slack* v. *McDaniel*, 529 U.S. 473, 483-484 (2000). Unlike Quarles' "direct appeal of the imposition of a criminal sentence," *Moore* and *Secord* would require this Court to consider whether reasonable jurists could find the district courts' decisions debatable by reviewing "unpublished order[s] denying [petitioners'] applications for [a certificate of appealability]." U.S. Br. 12, *Moore, supra*; see also U.S. Br. 9, *Secord, supra*. To avoid that procedural complication and resolve the central legal question presented here that has divided the circuits, this Court should "grant the petition in *Quarles* and hold the petition[s] in [*Secord*[5] and *Moore*] pending its disposition of *Quarles*." U.S. Br. 9, *Secord, supra*; *accord* U.S. Br. 12, *Moore, supra*.

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[5] *Secord* poses still other vehicle issues. First, Secord voluntarily withdrew his direct appeal of his initial sentence. U.S. Br. 4, *Secord*, *supra*. Second, his plea agreement contained an appeal waiver. *Id.* at 6 n.1. In addition to its finding that Secord's prior convictions constituted generic burglary, the district court also noted that waiver was an alternative reason to deny the § 2255 petition. *Ibid.*

CONCLUSION

The Court should grant Quarles' petition for a writ of certiorari.

Respectfully submitted.

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
580 Massie Road
Charlottesville, VA
22903

JOHN P. ELWOOD
JEREMY C. MARWELL
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jmarwell@velaw.com

MARK T. STANCIL
MATTHEW M. MADDEN
ROBBINS, RUSSELL,
ENGLERT, ORSECK,
UNTEREINER & SAUBER
LLP
1801 K Street, NW
Washington, DC 20006
(202) 775-4500

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