No. 18-

IN THE

Supreme Court of the United States

JIMMY DAVID MALONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Constitution permits a federal court to conclude that a prior conviction is "generic" for ACCA purposes based on an independent interpretation of an ambiguous state statute without first surveying state case law or certifying the question to the state supreme court.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding are those appearing in the caption to this petition. Neither party is a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Malone respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *United States* v. *Malone*, 889 F.3d 310 (6th Cir. 2018) and is reproduced in the appendix to this petition at Petition Appendix ("Pet. App.") 1a. The order from the Sixth Circuit denying rehearing is reproduced at Pet. App. 7a. The judgment of the United States District Court for the Eastern District of Tennessee is reproduced at Pet. App. 8a.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2018. On July 5, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including October 10, 2018. On September 20, 2018, Justice Kagan further extended the time to and including November 9, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 18 U.S.C. § 922(g), 18 U.S.C. § 924(e), Ky. Rev. Stat. Ann § 511.010, and Ky. Rev. Stat. Ann. § 511.030, and are set forth in the appendix to this petition at Pet. App. 14a–18a.

INTRODUCTION

In the decision below, the Sixth Circuit took it upon itself to interpret an ambiguous Kentucky burglary statute as a form of generic burglary, and thereby affirm a 15-year mandatory minimum sentence under the Armed Career Criminal Act, 18 U.S.C. § 924 ("ACCA"). But that *sui generis* construction highlights a division of authority among the federal courts of appeals about the treatment of state court decisions in the ACCA analysis. This case warrants review in order to bring uniformity to the circuit courts' answer to the recurring question presented. As this Court has so often recognized, unpredictable applications of ACCA have profound consequences for criminal defendants, and the integrity of our federal system.

This Court's precedents establish that federal courts must defer to an on-point decision of a state supreme court that resolves a statutory ambiguity for purposes of the "generic offense" analysis under ACCA. See *Johnson* v. *United States,* 559 U.S. 133, 138 (2010); *Mathis* v. *United States*, 136 S. Ct. 2243, 2256 (2016). But they leave open how federal courts should proceed with only intermediate state court decisions on-point, instructive (but not on-point) state court decisions, or a collection of state court decisions that are in conflict, unclear, or confused.

The federal courts of appeal routinely confront this question but cannot agree on an answer. Some courts survey state intermediate appellate court decisions for on-point decisions, which they treat as binding. Others prefer informative state supreme court cases, even if not precisely on-point. When faced with conflicting state case law, the Ninth and Seventh Circuits have certified questions to state supreme courts. The First and Tenth Circuits have held that

unclear state law means that a conviction cannot be an ACCA predicate.

The Sixth Circuit is different. In the decision below, Petitioner Jimmy David Malone was subject to a mandatory minimum 15-year sentence based in part on a prior burglary conviction under Kentucky state law. The plain text of the statute did not establish that the elements of burglary in Kentucky match the generic offense for ACCA purposes. Nevertheless, the Sixth Circuit construed Kentucky burglary as an ACCA predicate offense by independently interpreting the ambiguous statutory language, without first conducting a survey of state law.

If the Sixth Circuit had employed one of the approaches used by the other federal courts of appeal, Mr. Malone likely would not have been subjected to the mandatory 15-year minimum. A survey of state case law indicates that Kentucky burglary, as interpreted and applied by Kentucky courts, is broader than generic burglary. At the very least, a survey would have led to doubts about whether Kentucky burglary is generic. In the Ninth and Seventh Circuits, such doubts could have required certification of the question to the state supreme court. The Tenth and First Circuits likely would have erred on the side of caution and found that Kentucky burglary was not an ACCA predicate offense.

This case is an ideal vehicle for the Court to answer the question presented. The Sixth Circuit's approach to the decision below stands in stark contrast to that of the other circuit courts, with severe consequences for criminal defendants. There are no other complicating legal issues in the case, and the question presented recurs in countless cases.

STATEMENT OF THE CASE

The decision below followed from Mr. Malone's arrest in March 2016, when Knoxville police pulled him over for driving a vehicle with unlit taillights. Pet. App. at 2a. A search of the vehicle revealed a firearm and ammunition. *Id.* The United States charged Mr. Malone with two counts of possessing a firearm and ammunition as a felon in violation of 18 U.S.C. § 922(g)(1), and later one count of witness intimidation in violation of 18 U.S.C. § 1512(b)(1) because Mr. Malone "bade his sister to lie to officers about who bought the gun." Pet. App. at 2a. In January 2017, Mr. Malone pled guilty to all three charges.

The Presentence Report classified Mr. Malone as an armed career criminal under ACCA based in part on a prior conviction for second-degree burglary under Kentucky state law. *Id.* Pursuant to ACCA, the district court sentenced him to a mandatory minimum sentence of 15 years in prison.

In the lower courts, Mr. Malone argued that his prior burglary conviction could not count as an ACCA predicate offense. A state burglary offense only constitutes an ACCA predicate offense if the elements of the state burglary statute are the same as, or narrower than, the elements of the generic version of the crime. *Descamps* v. *United States*, 570 U.S. 254, 257 (2013). Generic burglary "contains at least the following elements: 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). Mr. Malone argued that the Kentucky statute is broader than generic burglary so could not serve as an ACCA predicate.

In Kentucky, "[a] person is guilty of burglary in the second degree when, with the intent to commit a crime,

he knowingly enters or remains unlawfully in a dwelling." Ky. Rev. Stat. Ann. § 511.030(1). The accompanying definitions section provides:

> The following definitions apply in this chapter unless the context otherwise requires:
>
> (1) "Building," in addition to its ordinary meaning, means any structure, vehicle, watercraft or aircraft:
>
> (a) Where any person lives; or
>
> (b) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation.
>
> Each unit of a building consisting of two (2) or more units separately secured or occupied is a separate building.
>
> (2) "Dwelling" means a building which is usually occupied by a person lodging therein.
>
> (3) "Premises" includes the term "building" as defined herein and any real property.

Ky. Rev. Stat Ann. § 511.010. The burglary statute thus refers to "dwellings," defined to include "buildings," which are defined to include "vehicle[s], watercraft, and aircraft."

Mr. Malone explained that because the definition of "building," and therefore the definition of "dwelling," encompasses vehicles, it is broader than generic burglary and could not serve as an ACCA predicate offense. Pet. App. at 3a.

The Government offered a different interpretation of the statute. It focused on the statute's definition of "premises" and noted that it refers to a "'building' as defined herein." *Id.* at 3a–4a. The Government asserted that the absence of that phrasing in the

definition of "dwelling" must mean that "dwelling" only incorporates the "ordinary meaning" of "building," not its more expansive statutory definition. *Id.*

The Sixth Circuit resolved the ambiguity by reference to federal canons of statutory interpretation. Using these "principles of statutory construction," the Sixth Circuit independently interpreted the Kentucky burglary statute as referring to buildings in their "ordinary sense," and not the statutory definition. Pet. App. at 3a–5a (citing *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001); *Daniel* v. *Cantrell*, 375 F.3d 377, 383 (6th Cir. 2004); *Russello* v. *United States*, 464 U.S. 16, 23 (1983); *United States* v. *Detroit Med. Ctr.*, 833 F.3d 671, 678 (6th Cir. 2016); *Sanders* v. *Allison Engine Co.*, Inc., 703 F.3d 930, 938 (6th Cir. 2012)). The Sixth Circuit mentioned snippets of Kentucky case law but did not fully consider all relevant cases interpreting the statutory terms. As the Sixth Circuit acknowledged, it referenced Kentucky law that "corroborate[d]" its own independent interpretation. Pet. App. at 6a.

REASONS FOR GRANTING THE PETITION

I. THE PETITION RAISES AN IMPORTANT AND RECURRING QUESTION THAT REQUIRES AN IMMEDIATE ANSWER

A. The Federal Courts of Appeal Have No Consistent Approach to the Recurring Question Presented.

1. Most federal courts of appeal consider on-point intermediate state court decisions when they interpret ambiguous state statutes but they disagree about whether those decisions are binding in the ACCA analysis.

When interpreting a state statute for ACCA purposes, with no on-point state supreme court decisions to guide them, the Ninth and Eleventh Circuits generally treat on-point intermediate state court decisions as binding. *United States* v. *Hill*, 799 F.3d 1318, 1322 (11th Cir. 2015) (per curiam) ("[A]bsent a decision from the state supreme court on an issue of state law [the Eleventh Circuit is] bound to follow decisions of the state's intermediate appellate courts unless there is some persuasive indication that the highest court of the state would decide the issue differently.") (quoting *McMahon* v. *Toto*, 311 F.3d 1077, 1080 (11th Cir. 2012); see also *United States* v. *Vail-Bailon,* 868 F.3d 1293, 1305 (11th Cir. 2017) (en banc) (explaining, in a Sentencing Guidelines case, that "[w]e disagree that the [Florida appellate] courts reached the wrong decision or that we could disregard their decisions even if we thought them wrong. These appellate decisions are controlling as to this issue absent 'some persuasive indication that the [Florida Supreme Court] would decide the issue differently'") (quoting *Hill*, 799 F.3d at 1322), *cert. denied*, 138 S. Ct. 2620 (2018); *United States* v. *Cargill*, 706 F. App'x 580, 582 (11th Cir. 2017) (per curiam) ("[W]e are bound by a state supreme court's determination of the elements of a state offense and, absent such authority, are bound to follow decisions of the state's appellate courts, unless there is persuasive indication that the state supreme court would decide the issue differently.") (citing *Hill*, 799 F.3d at 1322); *United States* v. *Watson*, 461 F. App'x 887, 889 (11th Cir. 2012) (per curiam) (holding, in a 18 U.S.C. § 841(b)(1)(A) sentencing enhancement case, that "[i]f the state supreme court has not definitively determined a point of state law, we are bound to adhere to decisions of the state's intermediate courts, absent some indication that the state supreme court

would hold otherwise") (citing *Williams* v. *Singletary*, 78 F.3d 1510, 1515 (11th Cir. 1996)); *United States* v. *Walton*, 881 F.3d 768, 772 (9th Cir. 2018) (explaining that "[i]f a state's highest court has not ruled on the level of force required to support a conviction, we are bound by reasoned intermediate court rulings.") (citing *Poublon* v. *C.H. Robinson Co.*, 846 F.3d 1251, 1266 (9th Cir. 2017)).

The First and Third Circuits generally do not treat intermediate state appellate court cases as binding, even if directly on-point; instead, they consider those decisions evidence when making an "informed prophecy" as to what the state supreme court would decide. See *United States* v. *Warren*, 723 F. App'x 155, 164 (3d Cir. 2018) ("The intermediate-appellate court decisions on which Warren relies are not binding on us."); *id.* (explaining that absent binding precedent, the Third Circuit viewed its task as "consider[ing] all the data the highest court of the state would use in an effort to determine how the highest court of the state would decide") (quoting Richard H. Fallon, Jr., et al., *Hart and Wechsler's The Federal Courts and the Federal System* 570 (6th ed. 2009)); *United States* v. *Tavares*, 843 F.3d 1, 14 (1st Cir. 2016) (explaining in a Sentencing Guidelines case the "informed prophecy" approach); *id.* ("We are not bound by a decision of a state intermediate appellate court, though such a decision 'generally constitutes a reliable piece of evidence' concerning a state-law question.") (internal citations omitted); *id.* ("Where, as here, the state's highest court—the [Massachusetts Supreme Judicial Court]—'has not spoken directly to an issue, [we] must make an informed prophecy as to the state court's

likely stance.'" (quoting *Andrew Robinson Int'l, Inc.* v. *Hartford Fire Ins. Co.*, 547 F.3d 48, 51 (1st Cir. 2008)).[1]

2. The Second, Fourth and Eighth Circuits give substantial weight to state court decisions that are not directly on-point but can be read as suggesting how the state supreme court might resolve the statutory ambiguity.

A Second Circuit decision that applies *Mathis* in an INA case illustrates the point. There, the Second Circuit interpreted an ambiguous New York statute criminalizing drug sales by reviewing seven cases from New York's highest court and intermediate appellate courts, before concluding that two of the appellate court decisions provided the best guidance. *Harbin* v. *Sessions*, 860 F.3d 58, 66–67 (2d Cir. 2017) (citing *People* v. *Kalin*, 906 N.E.2d 381 (N.Y. 2009); *People* v. *Crisofulli*, 398 N.Y.S.2d 120, 121 (Crim. Ct. 1977); *People* v. *Douglas*, 807 N.Y.S.2d 393, 394 (App. Div. 2005); *People* v. *Miller,* 789 N.Y.S.2d 423 (App. Div. 2005); *People* v. *Martin*, 545 N.Y.S.2d 287, 288 (App. Div. 1989); *People* v. *Sanchez*, 643 N.E.2d 509 (N.Y. 1994); *People* v. *Montoya*, 664 N.Y.S.2d 106, 107 (App. Div. 1997)).

The Fourth Circuit has undertaken a similarly detailed analysis of persuasive state court cases in the

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[1] The First Circuit recently identified another distinct problem with the informed prophecy approach as a forward-looking tool for resolving ACCA cases in light of this Court's holding in *McNeill* v. *United States*, 563 U.S. 816 (2011). *See United States* v. *Faust*, 853 F.3d 39 (1st Cir. 2017). "*McNeill* v. *United States* . . . makes clear that when applying the ACCA the task for the sentencing court . . . 'is to consult the law that applied at the time of that conviction.'" *Id.* at 57 (quoting 563 U.S. at 820). "The approach that *McNeill* dictates that we take in ACCA cases thus conflicts with the 'informed prophecy' approach in *Tavares*, 843 F.3d at 14." *Id.*

absence of a directly on-point state decision. In *United States* v. *Winston*, 850 F.3d 677 (4th Cir. 2017), for example, the Fourth Circuit held that its analysis of Virginia law must be "informed by decisions of the Supreme Court of Virginia, with decisions of Virginia's intermediate appellate court constituting 'the next best indicia of what state law is.'" *Id.* at 684 (quoting *United States* v. *Gardner*, 823 F.3d 793, 803 (4th Cir. 2016)). Accordingly, the court reviewed one Virginia supreme court case and two intermediate appellate court cases and found that the cases indicated that Virginia common law robbery could be committed without the use, attempted use, or threatened use of physical force, and therefore Virginia robbery was not an ACCA predicate offense. *Id.* at 684–85 (citing *Maxwell* v. *Commonwealth*, 183 S.E. 452, 454 (Va. 1936); *Henderson v. Commonwealth*, No. 3017-99-1, 2000 WL 1808487, at *3 (Va. Ct. App. Dec. 12, 2000) (unpublished); *Jones* v. *Commonwealth*, 496 S.E.2d 668, 670 (Va. Ct. App. 1998)). See also *United States* v. *Jackson*, 713 F. App'x 172, 173–75 (4th Cir. 2017) (per curiam) (analyzing persuasive authority from the state supreme and appellate courts to determine that Georgia's robbery statute included conduct that did not qualify as a "crime of violence" under the U.S. Sentencing Guidelines, and state intermediate appellate court cases to determine that the robbery statute was not divisible) (citing *Nelson* v. *State*, 46 S.E.2d 488, 493–94 (Ga. 1948) ("crime of violence"); *Smith* v. *State*, 543 S.E.2d 434, 435 (Ga. Ct. App. 2000) (same); *King* v. *State*, 447 S.E.2d 645, 647 (Ga. Ct. App. 1994) (same); *Kilpatrick* v. *State*, 618 S.E.2d 719, 720 (Ga. Ct. App. 2005) (divisibility); *Hogan* v. *State*, 343 S.E.2d 770, 771–72 (Ga. Ct. App. 1986) (same)).

The Eighth Circuit has also relied on persuasive state supreme court and intermediate appellate court decisions (including unpublished opinions) in the absence of a directly on-point state court decision. See, *e.g.*, *United States* v. *Byas*, 871 F.3d 841, 843 (8th Cir. 2017) (per curiam) (concluding that an Illinois burglary statute was too overbroad to serve as an ACCA predicate offense based on how two Illinois Court of Appeals decisions had previously applied the statute); *United States* v. *McMillan*, 863 F.3d 1053, 1057 (8th Cir. 2017) (relying in its divisibility analysis of a state riot statute in a Sentencing Guidelines case on a persuasive Minnesota state supreme court decision and a persuasive unpublished decision from the state intermediate appellate court that "indicated that a jury need not unanimously agree on whether a 'person or property' was the object of the offense") (citing *State* v. *Winkels*, 283 N.W. 763, 764 (Minn. 1939); *State* v. *Witherspoon*, 2013 WL 3284272, at *2 (Minn. Ct. App. July 1, 2013) (unpublished)).

3. When the federal courts of appeal confront conflicting or confusing state court decisions, their approaches fracture even further.

The Seventh and Ninth Circuits have certified questions to the state supreme court rather than engage in guesswork. For example, in *United States* v. *Franklin*, the Seventh Circuit attempted to determine the divisibility of a Wisconsin burglary statute. 895 F.3d 954, 958–60 (7th Cir. 2018). "In trying to follow the method laid out in *Mathis*," the Seventh Circuit "found no definitive holding from the Wisconsin Supreme Court or other state courts, nor did [it] find unmistakable signals in the statute itself, such as different punishments." *Id.* at 959 (citation omitted). Absent "such clear signals," the Seventh Circuit decided it could not answer the question on its own and

certified the question to the Wisconsin Supreme Court. *Id.* at 959–61. And the Ninth Circuit has twice certified similar divisibility questions to state supreme courts. See *United States* v. *Lawrence,* 905 F.3d 653, 659 (9th Cir. 2018) (explaining that intermediate state court decisions "seemingly stand in conflict when considering whether [the Oregon offenses of] Robbery I and Robbery II are divisible"); *id.* (concluding that "[w]ithout further guidance, we cannot say with confidence that Oregon precedent definitively answers the question"); *United States* v. *Figueroa-Beltran*, 892 F.3d 997, 1003 (9th Cir. 2018) (finding, in a Sentencing Guidelines case, that two Nevada Supreme Court decisions "seemingly stand in conflict" regarding the divisibility of Nevada's controlled substances statute); *id.* at 1004 ("Without further guidance, we cannot say with confidence that the Nevada precedent definitively answers the question whether [the statute] is divisible as to the identity of a controlled substance.").

In contrast to the Seventh and Ninth Circuits' practice of certification, other federal courts of appeal err on the side of caution and will not find an ACCA predicate offense when state law is unclear. This approach pays heed to "*Taylor*'s demand for certainty when identifying a generic offense" under the categorical approach. *Shepard* v. *United States*, 544 U.S. 13, 21 (2005); see also *Taylor*, 495 U.S. at 600–01; *Descamps*, 570 U.S. at 269 (noting "the categorical approach's Sixth Amendment underpinnings").

The Tenth Circuit employed this "demand for certainty" approach in *United States* v. *Hamilton*, 889 F.3d 688 (10th Cir. 2018). In that case, the court found that decisions from the state's highest criminal court "[did] not address[] the distinction between elements and means" with respect to Oklahoma second-degree burglary and thus "[were] not 'binding precedent on

[that] point.'" *Id.* at 694 (quoting *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952)). Nor did other sources of state law establish the degree of certainty necessary to resolve the means-elements inquiry. *Id.* at 698–99. As such, the court held that *Taylor*'s demand for certainty had not been met. *Id.* ("Neither Oklahoma case law, the text of the Oklahoma statute, nor the record of conviction establishes with certainty whether the locational alternatives constitute elements or means. In light of the uncertainty, we must treat the Oklahoma statute as indivisible."); see also *id.* at 692 ("[U]nless we are certain that a statute's alternatives are elements rather than means, the statute isn't divisible and we must eschew the modified categorical approach.") (citing *United States* v. *Degeare*, 884 F.3d 1241, 1248 (10th Cir. 2017)); *id.* at 700 (Briscoe, J., concurring in the result) ("If these tools—statutory text, state law authority, and record documents—do not answer the means/elements question, then a court 'will not be able to satisfy *Taylor*'s demand for certainty' that the offense qualifies as an ACCA conviction.") (quoting *United States* v. *Titties*, 852 F.3d 1257, 1268 (10th Cir. 2017)).

The First Circuit conducted a similar analysis in *United States* v. *Rose*, 896 F.3d 104, 114 (1st Cir. 2018). In that case, the First Circuit concluded that unclear and perhaps inconsistent case law from the state supreme court precluded a state assault and battery offense from qualifying as an ACCA predicate. *Id.* Though the court considered an array of Rhode Island Supreme Court decisions, it found that none were clear enough on the *mens rea* required for conviction under the state statute. *Id.* ("[W]e do not think that Rhode Island case law provides any resounding certainty as to whether recklessness is

sufficient to support a conviction for A/BDW. Ultimately, Rhode Island's rather unclear (and possibly even conflicting) precedent regarding A/BDW's requisite mental state prevents us from concluding that is categorically a violent felony.").

In other words, a defendant in the Tenth or First Circuits will get the benefit of the doubt when there is no clear answer from the state courts; defendants in the Seventh and Ninth Circuits will get a definitive answer from a state supreme court more knowledgeable about state law; and defendants in other Circuits may not get either of these benefits. This alone confirms that the vast array of approaches across the federal courts of appeal carries the threat of unconstitutionally unpredictable and inconsistent results. See *Taylor*, 495 U.S. at 582, 587–89 ("[I]n terms of fundamental fairness, the Act should ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases.") (citations omitted).

B. The Sixth Circuit's Approach Cannot Be Squared With the Approach of Any Other Federal Court of Appeal or This Court's Precedents.

1. In the decision below, the Sixth Circuit immediately launched into an independent statutory analysis, using federal canons of statutory construction, without regard for state law. Pet. App. at 4a–5a (citing *TRW Inc.*, 534 U.S. at 31; *Daniel*, 375 F.3d at 383; *Russello*, 464 U.S. at 23; *Detroit Med. Ctr.*, 833 F.3d at 678; *Sanders*, 703 F.3d at 938). The Sixth Circuit's only nod to Kentucky courts was after it had conclusively decided on its own what the state statute meant. And the cases were only those cited in the

Government's brief that "mesh[ed] well with" its interpretation. Pet. App. at 5a.

2. The decision below is not an isolated case; the Sixth Circuit has demonstrated a general willingness to interpret state statutes by reference to its own modes of statutory interpretation rather than state court authorities when applying ACCA.

In *United States* v. *Quarles*, the Sixth Circuit purported to rest its ACCA analysis of a Michigan third degree home invasion statute on its plain text. 850 F.3d 836, 838–40 (6th Cir. 2017), *petition for cert. filed* (U.S. Nov. 24, 2017) (No. 17-778). The court, however, treated the "plain language" of the state statute as ambiguous, and then employed tools of statutory interpretation to conclude that the statute's definition of "dwelling" did not cover structures such as "a tree, vehicle, boat, outcropping of rock, cave, bus stop, or suspended tarp." *Id.* at 839. Instead of relying on relevant state court case law, the Sixth Circuit consulted definitions from *The American Heritage Dictionary* and "legislative intent" to determine that the purported "plain language" of the statute was too "narrow" to support the defendant's broad interpretation of "structure." *Id.*

3. The Sixth Circuit's approach cannot be squared with any of the approaches in the other federal circuits. Although the federal courts of appeal do not agree on the specific approach to use in a case like the one below, they do generally agree that state court decisions must be the starting point for the analysis. See, *e.g., Hill*, 799 F.3d at 1322; *Walton*, 881 F.3d at 772; *Tavares*, 843 F.3d at 14; *Harbin*, 860 F.3d at 66-67 (described above). These circuits recognize that this Court's ACCA jurisprudence demands adherence to state interpretations of state law. See *Johnson,* 559 U.S. at 138. The Sixth Circuit does not.

4. The Sixth Circuit's approach also cannot be squared with this Court's precedents. This Court has long held that "[t]he States possess primary authority for defining and enforcing the criminal law." *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982)); see also *Schad* v. *Arizona*, 501 U.S. 624, 638 (1991). In *Johnson*, this Court explained that it was "bound" by the Florida Supreme Court's interpretation of the elements of the state law offense. 559 U.S. at 138. And in *Mathis*, this Court explained that when "a state court decision definitively answers" an elements/means question, "a sentencing judge need only follow what it says." 136 S. Ct. at 2256. Although these decisions do not resolve the question presented, they clearly point to the primacy of state court decisions in the ACCA analysis, whether under a categorical or modified categorical approach. The Sixth Circuit's failure to acknowledge this primacy violates the spirit of this Court's ACCA jurisprudence.

C. The Lack of a Uniform Approach Among The Federal Courts of Appeal Is Constitutionally Intolerable.

1. The decision below, and the vast array of approaches in the other federal courts of appeal, raise grave federalism concerns.

"[F]ederal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design." *Kowalski* v. *Tesmer*, 543 U.S. 125, 133 (2004) (quoting *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 586 (1999)). "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government." *Patterson* v. *New York*, 432 U.S. 197, 201 (1977). For that reason, cases that

involve "state criminal statutes" must be governed by the "fundamental principle that [federal courts] are not free to substitute [their] own interpretations of state statutes for those of a State's courts." *Schad*, 501 U.S. at 636.

Consistent with that principle, this Court has made clear that in determining whether a state crime is an ACCA predicate offense, federal courts are "bound by the [state supreme court]'s interpretation of state law, including its determination of the elements of [the statute]." *Johnson*, 559 U.S. at 138 (citing *Johnson* v. *Fankell*, 520 U.S. 911, 916 (1997)). See *id.* ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state."); see also *West* v. *Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940) ("[T]he highest court of the state is the final arbiter of what is state law.") (citation omitted); *Stringer* v. *Black*, 503 U.S. 222, 235 (1992) ("It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law.") (citation omitted).

Absent an on-point state supreme court decision, however, the courts of appeal have such divergent approaches that states in some circuits will have their rights as final arbiters of their own law respected, while states in other circuits will have their rights trampled. For example, the Ninth and Seventh Circuit's recent decisions to certify questions to the state supreme courts ensure that the highest courts in those states will be the final arbiters of state law. States in the Sixth Circuit will not have the same opportunity to guide the federal court in the interpretation of state law, and the intermediate courts may have their views disregarded entirely if they are not in accord with the Sixth Circuit's views.

2. The question presented is important because of the grave consequences for criminal defendants.

"[L]eaving the lower courts to their own devices" in this context is constitutionally intolerable. *James* v. *United States*, 550 U.S. 192, 216 (Scalia, J., dissenting), *overruled by Johnson* v. *United States*, 135 S. Ct. 2551 (2017). "Imprecision and indeterminacy are particularly inappropriate in the application of a criminal statute." *Id.* "Years of prison hinge on the scope" of the state statute at issue. *Id.* Yet the means for interpreting state statutes are "ill defined." *Id.* As a result, criminal defendants have no "notice of what is covered" and may be subject to "arbitrary or discriminatory sentences." *Id.* The question is also a recurring one: If courts are free to adopt any of a number of approaches to interpreting ambiguous state statutes, this Court's ACCA decisions will have failed to "provide guidance concrete enough" to ensure that ACCA is applied "with an acceptable degree of consistency by the hundreds of district judges who impose sentences every day." *Id.* at 215.

If the Sixth Circuit had given Kentucky case law more than a superficial glance, it would have found persuasive case law indicating that the Kentucky Supreme Court would interpret the second degree burglary statute to incorporate the statutory definition of "building," rendering it overbroad for ACCA purposes. For instance, the *Soto* decision cited by the Sixth Circuit made clear that trailers were not encompassed in the "ordinary definition" of "building," but were included in the special statutory definition of "building." *Soto* v. *Commonwealth*, 139 S.W.3d 827, 870 (Ky. 2004) ("The dictionary definition ('ordinary meaning') of 'building' is: [A] constructed edifice designed to stand more or less permanently, covering a space of land, usually covered by a roof and more or

less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals or other useful structure—distinguished from structures not designed for occupancy (as fences or monuments) and from structures not intended for use in one place (as boats or trailers) even though subject to occupancy.") (quoting *Webster's Third New International Dictionary of the English Language Unabridged* 292 (Merriam-Webster 1993)); *id.* at 870 n.9 ("Note that boats and trailers subject to occupancy would fall within the definition of a 'building' in KRS 511.010(1).").

It follows that if the Kentucky second degree robbery statute incorporated only the ordinary meaning of building, it would not reach burglary of a trailer, because trailers do not fit within the ordinary meaning of building. *Id.* Yet the Kentucky Supreme Court and intermediate appellate courts have routinely applied the second degree burglary statute to burglaries of trailers. See *Cochran* v. *Commonwealth*, 114 S.W.3d 837, 838 (Ky. 2003) ("Cochran argues that the trailer was not a 'dwelling' within the meaning of the burglary statutes. We disagree."); *Riley* v. *Commonwealth*, 91 S.W.3d 560, 561 (Ky. 2002) (affirming second degree burglary conviction resulting from "a spate of trailer-home burglaries"); *Greenwade* v. *Commonwealth*, 2016 Ky. App. Unpub. LEXIS 837, at *7–8 (Ct. App. 2016) (finding sufficient evidence that "Greenwade busted in [the victim's] door and came into their trailer" and had accordingly "committed second-degree burglary by knowingly entering the dwelling"); *Skimmerhorn* v. *Commonwealth*, 998 S.W.2d 771, 775 (Ky. Ct. App. 1998) (affirming second degree burglary conviction resulting from "trailer" burglary); *Adkins* v. *Commonwealth*, 2004 Ky. App. Unpub. LEXIS 750, at *4 (Ct. App. 2004) (same); *Dauzat* v. *Commonwealth*,

2006 Ky. App. Unpub. LEXIS 17, at *2–4 (Ct. App. 2006) (same). Thus, the definition of "dwelling," as applied by Kentucky courts, must extend beyond the "ordinary meaning" of building under *Soto*. It must include the statutory definition of "building," in direct contradiction to the Sixth Circuit's conclusion. If the Sixth Circuit had undertaken the kind of searching state case law review that other federal courts of appeal have typically conducted, it could have easily reached that conclusion, and Mr. Malone would not be subject to a mandatory 15-year minimum sentence.

II. THIS IS AN IDEAL VEHICLE TO ADDRESS THE RECURRING QUESTION PRESENTED

The single-issue decision below is a clean opportunity for the Court to bring uniformity to a recurring ACCA inquiry, and provide guidance on the alternatives of certification and caution.

The certification process "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court," and thus "increase[s] the assurance of gaining an authoritative response." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 76 (1997) (citation omitted); see also *Brockett* v. *Spokane Arcades*, 472 U.S. 491, 510 (1985) (O'Connor, J. concurring) ("Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when, as is the case here, the state courts stand willing to address questions of state law on certification from a federal court."). "[P]rinciples of federalism and comity favor giving a State's high court the opportunity to answer important questions of state law, particularly when those questions implicate uniquely local matters such as law enforcement and might well require the weighing of policy considerations for their correct resolution." *Town of*

Castle Rock v. *Gonzales*, 545 U.S. 748, 777 (2005) (Stevens, J. dissenting) (citing *Elkins v. Moreno*, 435 U.S. 647, 662 n.16 (1978)); *Arizonans for Official English*, 520 U.S. at 77 ("Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save 'time, energy, and resources, and hel[p] build a cooperative judicial federalism.'" (brackets in original)).

As the Seventh Circuit explained in an analogous context, "despite the layers of federal sentencing precedent that frame this issue, this is at bottom a controlling question of State criminal law." *Franklin*, 895 F.3d at 956. There, the Seventh Circuit found that certification to the state's highest court was warranted for two reasons: "First, the question of State law is a close one. Specific guidance from State law is limited, and both sides offer good reasons for interpreting the available signs in their favor. . . . In the end, only the Wisconsin Supreme Court can decide this issue definitively." *Id* at 961. "Second, this issue of state law is important for both the federal and state court systems, and a wrong decision on our part could cause substantial uncertainty and confusion if the Wisconsin Supreme Court were to disagree with us in a later decision." *Id.* The court emphasized that the question was "decisive for [the appellants'] federal sentences, and a number of other federal defendants may be affected directly." *Id.* The reasons given by the Seventh Circuit apply equally to the decision below.

Alternatively, the Sixth Circuit could have erred on the side of caution, consistent with the approaches of the Tenth and First Circuits. "[The] demand for certainty when identifying a generic offense" using the categorical approach is a constitutional demand. *Shepard*, 544 U.S. at 21; *Descamps*, 570 U.S. at 269.

Given the strong indications in the state case law that Kentucky second degree burglary was overbroad, the demand for certainty could not be met here without certification. If the Sixth Circuit was not inclined to certify the question, it was free to err on the side of caution and find that the crime was not an ACCA predicate. It was not free, however, to apply ACCA's 15-year mandatory minimum sentence based on its own interpretation of an ambiguous Kentucky statute.

III. ALTERNATIVELY, THIS CASE SHOULD BE HELD FOR RESOLUTION IN LIGHT OF *STITT*

If this Court does not grant the petition, Mr. Malone respectfully requests that his case be held pending the resolution of *United States* v. *Stitt*, No. 17-765. In *Stitt*, this Court will resolve whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as an ACCA predicate. Kentucky state courts have repeatedly applied the second degree burglary statute to burglaries of trailers and mobile homes. See *Cochran*, 114 S.W.3d at 838; *Riley*, 91 S.W.3d at 561; *Skimmerhorn*, 998 S.W.2d at 775. If this Court decides that mobile structures, such as trailers, fall outside the scope of generic burglary, then the Kentucky second degree burglary statute is overbroad and does not qualify as an ACCA predicate offense. Contrary to the decision below, the Sixth Circuit's interpretation of the Kentucky statute does not obviate the question presented in *Stitt*. At issue in the decision below is a statute that has been interpreted by Kentucky courts to cover movable structures. Therefore, any guidance this Court provides in *Stitt* on how to interpret state burglary statutes that include movable structures is potentially relevant to the interpretation of Kentucky's burglary statute as well. Accordingly, Mr.

Malone respectfully asks this Court to hold his case until it decides *Stitt*.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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