No. _____

IN THE
Supreme Court of the United States

_____

GERALD PATMON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

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

_____

PETITION FOR WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

The question presented by this case is whether the Court of Appeals for the Eleventh Circuit erroneously affirmed Mr. Patmon's sentence under USSG § 2K2.1 based on its determination that Georgia aggravated assault with a deadly weapon under O.C.G.A. § 16-5-21(b)(2) is a "crime of violence" under the enumerated offenses clause of the Sentencing Guidelines. In doing so, the Eleventh Circuit cited to its prior precedent in *United States v. Morales-Alonso*, 878 F.3d 1311 (11th Cir. 2018), rejecting the argument that the Georgia statutory definition of "deadly weapon" could be overbroad based on the plain language of the statute and a proffered hypothetical instead of a specific state case.

Thus, this case presents the following broad question:

(1) Under *Gonzales v. Duenas-Alvarez*, 549 U.S. 189 (2007), must a defendant always identify a state case to establish the least culpable conduct criminalized by a statute, or can the plain language of the statute itself establish the statute's breadth?

LIST OF PARTIES

Petitioner, Gerald Patmon, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the plaintiff in the district court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Gerald Patmon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND ORDER BELOW

The Eleventh Circuit's decision affirming Mr. Patmon's sentence in Appeal No. 18-10030 is provided in Appendix A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Patmon's case under 18 U.S.C. § 3231. The district court entered its judgment against Mr. Patmon on January 3, 2018, and he filed a timely notice of appeal. *See* Appendix B. The Eleventh Circuit affirmed his sentence on October 5, 2018. *See* Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This case involves § 2K2.1(a)(2) of the Sentencing Guidelines, which provides for an enhanced guideline range if a defendant has a prior conviction that qualifies as a "crime of violence" under either: (1) the enumerated offenses clause, or (2) the elements clause. Both clauses are defined in § 4B1.2. Here, the court below found that Mr. Patmon's 2014 Georgia aggravated assault conviction under subsection (b)(2) of O.C.G.A. § 16-5-21 satisfied the enumerated offenses clause, which lists specific generic crimes by name, including the generic crime of "aggravated assault." Generic aggravated assault has been defined below as assaults with either: (1) the intent to commit serious bodily injury, or (2) a deadly weapon. *United States v. Palomino-Garcia*, 606 F.3d 1317, 1332 (11th Cir. 2010).

At the time of Mr. Patmon's conviction, the Georgia aggravated assault statute, O.C.G.A. § 16-5-21, provided, in relevant part:

> (b) A person commits the offense of aggravated assault when he or she assaults:
>
> (1) With intent to murder, to rape, or to rob;
>
> (2) With a deadly weapon or with *any object*, device, or instrument which, when used offensively against a person, is likely to *or actually does* result in serious bodily injury;
>
> (3) With any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in strangulation; or
>
> (4) A person or persons without legal justification by discharging a firearm from within a motor vehicle toward a person or persons.
>
> The underlying Georgia simple assault statute, in turn, provides:
>
> (a) A person commits the offense of simple assault when he or she either:
>
> (1) Attempts to commit a violent injury to the person of another; or
>
> (2) Commits an act which places another in reasonable apprehension of immediately receiving a violent injury.

O.C.G.A. § 16-5-20 (2006) (emphasis added).

STATEMENT OF THE CASE

Mr. Patmon was convicted of possession of a firearm and ammunition by a convicted felon, in violation of § 922(g)(1) and 924(a)(2). On January 3, 2018, he was sentenced to 90 months' imprisonment, to be followed by three years' supervised release. His guideline range was enhanced under USSG § 2K2.1, in part, by the district court's determination that his Georgia aggravated assault conviction was a "crime of violence." Mr. Patmon timely appealed on the same day. He subsequently filed briefing in the Eleventh Circuit on whether he was sentenced under an erroneous guideline range, arguing that his Georgia aggravated assault conviction did not satisfy the enumerated offenses clause or elements clause of the "crime of violence" definition. However,

he acknowledged the Eleventh Circuit's holding to the contrary in *Morales-Alonso*, which held that this conviction met the generic definition of aggravated assault, thus satisfying the enumerated offenses clause. The Eleventh Circuit affirmed his sentence on October 5, 2018, citing *Morales-Alonso* and holding that his conviction satisfied the enumerated offenses clause.[1]

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE DIVIDED ON THE APPLICATION OF *DUENAS-ALVAREZ*.

Mr. Patmon's Georgia aggravated assault with a deadly weapon conviction is overbroad with respect to generic aggravated assault with a deadly weapon, because the "any object" way of violating O.C.G.A. § 16-5-21(b)(2) can be satisfied based solely on a resulting serious bodily injury. The statute's plain language makes clear that the offense is committed when an object is "likely to *or actually does* result in serious bodily injury." O.C.G.A. § 16-5-21(b)(2). Thus, a person may commit aggravated assault in violation of O.C.G.A. § 16-5-21(b)(2) by assaulting another person with an "object, device, or instrument" which is not a deadly weapon, and is not likely to result in serious bodily injury, but happens to result in such an injury.

Morales-Alonso rejected the notion that an object must be a *per se* deadly weapon to qualify as a generic deadly weapon, stating that an object could be a deadly weapon based on the manner in which it is used. 878 F.3d at 1318. In so holding, the court cited to the Model Penal Code definition of "deadly weapon" ("any . . . substance, which in the manner it is used . . . is *known to be capable of* producing death or serious bodily injury") and the Black's Law Dictionary definition (". . . substance that, from the manner in which it is used . . . is *calculated or likely to* produce death"). *Id.* However, an object that *does*, but is not likely to, result in serious bodily injury is not

[1] The Eleventh Circuit did not reach the issue of whether Mr. Patmon's conviction qualifies under the elements clause. *See* Appendix A at 7.

necessarily "known to be capable of" or "calculated or likely to" result in such injury. For example, a golf ball could produce such harm without being "known to be capable of" doing so. *See id.* at 1319. The court rejected this example as "legal imagination" rather than a "realistic probability" evidenced through an actual case. *Id.* at 1319–20. However, Mr. Patmon submits that because the plain language of the aggravated assault statute and its elements make clear that this conduct would be covered, a particular case need not be identified. Whether *Duenas-Alvarez* requires an actual case to establish the scope of a statute, as the Eleventh Circuit stated below, is a question that divides the Circuits.

In *Duenas-Alvarez*, this Court addressed how to identify the scope of an offense for purposes of applying the categorical approach. It cautioned that doing so "requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the [federal] definition." 549 U.S. at 193. And "[t]o show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special . . . manner for which he argues." *Id.*

Importantly, however, that passage must be read in context. In *Duenas-Alvarez*, the offender argued that California's aiding-and-abetting doctrine rendered his theft offense non-generic, because it made a defendant criminally liable for unintended conduct. *Id.* at 190-91. That argument found no support in either the statutory language or precedent establishing the scope of aiding-and-abetting liability. As a result, the Court required the offender to identify a specific case to support his novel, proposed application. *See id.* at 187, 190-91. This Court has not addressed whether that case-specific requirement of *Duenas-Alvarez* applies even where language

of the statute plainly establishes that an offense is overbroad. The courts of appeals are now divided on that question.

1. The First, Third, Sixth, Ninth, and Tenth Circuits have all held that the plain statutory language can establish that an offense is overbroad, notwithstanding the absence of any reported case. *See Swaby v. Yates*, 847 F.3d 62, 66 & n.2 (1st Cir. 2017) (the "sensible caution [in *Duenas-Alvarez*] against crediting speculative assertions regarding the potentially sweeping scope of ambiguous state law crimes has no relevance to a case [where the plain statutory language is overbroad]. The state crime at issue clearly does apply more broadly than the federally defined offense. Nothing in *Duenas-Alvarez*, therefore, indicates that this state law crime may be treated as if it is narrower than it plainly is."); *Whyte*, 807 F.3d at 468-69 (where the plain language of the statute does not require the use, attempted use, or threatened use of violent force, there is a "realistic probability" the state could punish conduct that results in physical injury without the "use of physical force;" a reported case is not required); *Jean-Louis v. U.S. Att'y Gen.*, 582 F.3d 462, 481 (3d Cir. 2009) (declining to "impose[ ] this additional step" of identifying a reported case because, unlike *Duenas-Alvarez* where the parties "vigorously disputed" the scope of the offense, "no application of 'legal imagination' to the Pennsylvania simple assault statute is necessary. The elements . . . are clear, and the ability of the government to prosecute a defendant" for certain conduct is "not disputed"); *United States v. Lara*, 590 F. App'x 574, 584 (6th Cir. 2014) ("The government is correct that there appear to be no cases in Tennessee that have applied § 39–14–403 to unattached, uninhabited structures. The meaning of the statute, however, is plain: the statute applies to structures that belong to the principal structure. We should not ignore the plain meaning of the statute;" citing as support *United States v. Aparicio-Soria*, 740 F.3d 152, 158 (4th Cir. 2014) (en banc) (where the law is clear, courts do "not need to hypothesize about whether there is a

'reasonable probability' that Maryland prosecutors will charge defendants engaged in non-violent physical contact with resisting arrest; we know that they *can*") (emphasis added);[2] *United States v. Grisel*, 488 F.3d 844, 849 (9th Cir. 2007) (en banc) ("Where, as here, a state statute explicitly defines a crime more broadly than the [federal] definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the [federal] definition . . . . The state statute's greater breadth is evident from its text.");[3] *United States v. Tittles*, 852 F.3d 1257, 1274-75 & n.23 (10th Cir. 2017) ("Where, as here, the statute lists means to commit a crime that would render the crime non-violent under the ACCA's force clause, any conviction under the statute does not count as an ACCA violent felony," and there is no "need to imagine hypothetical non-violent facts to take a statute outside the ACCA's ambit" or "require instances of actual prosecutions for the means that did not satisfy the ACCA. The disparity between the statute and the ACCA [is] enough.").

2. By contrast, the en banc Fifth and Eleventh Circuits have taken the contrary view. Dividing 8-7, the en banc Fifth Circuit held that, under *Duenas-Alvarez*, the defendant was required to identify a reported case in which "courts have *actually applied*" the statute in the way the defendant advocated. *United States v. Castillo-Rivera*, 853 F.3d 218, 222 (5th Cir. 2017) (en banc). It specifically rejected the contrary assertion that, "because the Texas statute's definition . . . is plainly broader" than the federal definition, "Castillo-Rivera is not required to point to an

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[2] *Accord United States v. McGrattan*, 504 F.3d 608, 614 (6th Cir. 2008); *Mendieta-Robles v. Gonzales*, 226 F. App'x 564, 572 (6th Cir. 2007).

[3] *Accord United States v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007) (en banc), *abrogated on other grounds, as recognized in Cardozo-Arias v. Holder*, 495 F. App'x 790, 792 n.1 (9th Cir. 2012); *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009-10 (9th Cir. 2015) (re-affirming and applying *Grisel* and *Vidal*); *United States v. Jennings*, 515 F.3d 980, 989 n.9 (9th Cir. 2008) (same); *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017) (following *Grisel*).

actual case." *Id.* at 223. That view, according to the majority, "does not comply with the Supreme Court's directive in *Duenas-Alvarez*." *Id.*

Contrary to the circuits above, the Fifth Circuit majority reasoned: "There is no exception to the actual case requirement articulated in *Duenas-Alvarez* where a court concludes a state statute is broader on its face. Indeed, the Court in *Duenas-Alvarez* emphasized that a defendant must 'at least' point to an actual state case—the implication being that even pointing to such a case may not be satisfactory. In short, without supporting state case law, interpreting a state statute's text alone is simply not enough to establish the necessary 'realistic probability.'" *Id.* (quoting *Duenas-Alvarez*, 549 U.S. at 193). The majority asserted that this requirement was consistent with prior Fifth Circuit precedents. *Id.* at 223-24. And because the defendant did not identify a reported case supporting his construction of the statute, the majority rejected his argument. *Id.* at 224-25.

The seven-member dissent in *Castillo-Rivera* disagreed that *Duenas-Alvarez* inflexibly requires a defendant to "point to a state decision . . . in all cases in order to establish a realistic probability that the state would apply its law in a way that falls outside of the scope of the relevant federal" definition. *Id.* at 238 (Dennis, J., dissenting) (citation omitted). Rather, the dissent pointed out, "*Duenas-Alvarez* is concerned with the defendant who tries to demonstrate that a statute is overbroad by hypothesizing that it might be applied in some fanciful or unlikely way—through 'the application of legal imagination.' Castillo-Rivera is not relying on 'the application of legal imagination' to establish that [the statute] is overbroad; he is relying on the statute's plain language." *Id.* at 239.

The majority's contrary conclusion, the dissent argued, also ran afoul of the categorical approach adopted in *Taylor v. United States*, 495 U.S. 575 (1990), because "state prosecutors'

discretionary decisions whether or not to prosecute an offense under certain circumstances cannot add *statutory elements* to statutes that plainly do not contain those elements." *Id.* (Emphasis in original). "Viewed in this context, it is clear that *Duenas-Alvarez* does not, as the majority opinion holds, require a defendant to disprove the inclusion of a statutory element that the statute plainly does not contain using a state case." *Id.* The dissent also argued that the majority's approach was contrary to the facts of *Taylor*, as well as numerous prior Fifth Circuit cases, which did not require the defendant to identify a case. *See id.* at 239-41.

Finally, the dissent noted that "the majority opinion [does not] address or even acknowledge that its holding directly conflicts with holdings from the First, Third, Sixth, Ninth, and Eleventh Circuits, all of which have recognized the limits of *Duenas-Alvarez*'s requirement." *Id.* at 241 (citing cases). The dissent concluded that "the majority opinion's unqualified rule that a defendant must in all cases point to a state court decision to illustrate the state statute's breadth misconstrues *Duenas-Alvarez*, directly conflicts with *Taylor*, and ignores both our established circuit precedent and the holdings of several of our sister circuits." *Id.* The Eleventh Circuit is now squarely aligned with the Fifth Circuit.

II. THE QUESTION IS RECURRING AND IMPORTANT.

The *Duenas-Alvarez* question has widespread application, and likewise necessitates resolution, since Federal courts across the nation apply the categorical approach on a daily basis. In the criminal context, they do so to determine whether a federal criminal defendant is subject to a mandatory minimum penalty or enhanced guideline range. And, in the immigration context, they do so to determine whether an alien is subject to removal. Thus, while the categorical approach represents a technical area of the law, its application has grave consequences in both the federal criminal and immigration arenas. Given the stakes, its application must be uniform.

This Court has attempted to vigilantly ensure such uniformity by repeatedly granting review to clarify the categorical approach. *See, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243 (2016) (clarifying when statutes are divisible for modified categorical approach); *Descamps v. United States*, 133 S. Ct. 2276 (2013) (holding that modified categorical approach is inapplicable to indivisible statutes); *Moncrieffe v. Holder*, 569 U.S. 184 (2013) (re-affirming and clarifying application of categorical approach in immigration context); *Nijhawan v. Holder*, 557 U.S. 29 (2009) (declining to apply categorical approach to particular immigration statute); *Shepard v. United States*, 544 U.S. 13 (2005) (limiting class of documents that may be considered under modified categorical approach). Given the uncertainty created by *Duenas-Alvarez*, and the prevalence of the categorical approach, the Court's intervention in this area is warranted yet again.

Furthermore, the minority view adopted by the en banc Fifth and Eleventh Circuits will have troubling repercussions if not corrected. Under that view, the scope of a predicate offense can be ascertained only by examining the particular facts contained in the universe of reported cases. That limited universe, however, will seldom reflect the true scope of the offense. The reported case law can be skewed or sparse due to the relative novelty of an offense, prosecutorial discretion, and—most importantly—the ubiquity of guilty pleas. *See Aparicio-Soria*, 740 F.3d at 157-158 ("It may be that Maryland prosecutors tend to charge too many offenders with resisting arrest when they could charge far more serious crimes, or it may be that we have a skewed universe of cases from the hundreds of resisting arrest convictions sustained each year."); *see also United States v. Davis*, 875 F.3d 592, 606 (11th Cir. Nov. 7, 2017) (Rosenbaum, J., concurring in part) (noting that "only a handful of the numerous cases prosecuted under § 784.041 have published opinions in them. As a result, we have no way of knowing the scope of what Florida has actually prosecuted under that statute").

The charging, plea, and appeal practices under a statute cannot change the scope of the offense, which, at bottom, derives from the statute enacted by the legislature. *See Castillo-Rivera*, 853 F.3d at 239 (Dennis, J., dissenting). And, by precluding courts from relying on the plain statutory language, that application of the categorical approach will ensure an artificial analysis—one where the least culpable conduct used by the courts does not represent the least culpable conduct actually prohibited by the statute. At the very least, such a troubling application and extension of *Duenas-Alvarez* warrants this Court's close scrutiny.

CONCLUSION

For the above reasons, Mr. Patmon's petition should be granted.

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