No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

KEVIN BATTLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respectfully submitted,

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QUESTION PRESENTED

Whether a defendant who seeks to demonstrate that a prior conviction is not a categorical match for federal sentencing purposes must point to an actual state-court prosecution illustrating the state crime's overbreadth.

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Petitioner Kevin Battle, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit rendered in this case on June 11, 2019.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at *United States v. Battle*, 927 F.3d 160 (4th Cir. 2019). The opinion is reproduced in the Appendix. App. at 1.[1]

[1] App. refers to the Appendix followed by the page number.

JURISDICTION

Jurisdiction in the United States Court of Appeals for the Fourth Circuit was based on 28 U.S.C. § 1291. The Fourth Circuit issued a decision in Mr. Battle's case on June 11, 2019 affirming his sentence. App. at 1. This Court's jurisdiction to review the decision is invoked under 28 U.S.C. § 1254(1). *See also* S. Ct. R. 10(c).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provision is the force clause of the "violent felony" definition of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(i), which provides that an offense is a "violent felony" it "has as an element the use, attempted use, or threatened use of physical force against the person of another."

STATEMENT OF THE CASE

In affirming the district court's sentence, the Fourth Circuit exacerbated a well-established circuit split regarding the application of the categorical approach to federal sentencing—specifically, whether a defendant must point to an actual state-court prosecution illustrating that a state conviction is not a categorical match to a predicate federal definition. Specifically, the issue before the court of appeals was whether Maryland assault with intent to murder (Mr. Battle's prior offense of conviction under Md. Code Ann., Art. 27, §12 (1991) (repealed by Acts 2002, c. 26, § 1, eff. Oct. 1, 2002)) constituted a "violent felony" under the ACCA force clause. Mr. Battle identified Maryland appellate decisions interpreting both the assault and murder elements of the offense, which made plain that the offense can be committed by act of omission (i.e., failure to provide food or medicine to another) rather than physical force required by the ACCA. However, the Fourth Circuit found that these decisions were not enough to disqualify the offense as an ACCA predicate because Mr. Battle did not identify an *actual* case where an individual had been

prosecuted for committing a Maryland assault with intent to murder by an act of omission. This ruling deepens a well-established circuit split. Seven circuits have found that evidence of an actual prosecution is not required where it is plain from the language of the state statute or (as here) state court precedent that the state crime is not a categorical match. Three circuits, including the Fourth Circuit below, require defendants to point to an actual prosecution of the state crime demonstrating that it is overbroad. This Court's review is necessary to resolve the circuit conflict over whether, for purposes of federal sentencing, a defendant must point to an actual prosecution illustrating that the state crime of conviction is not a categorical match.

A. Guilty plea and sentencing in federal case

On August 8, 2011, Mr. Battle pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). On November 8, 2011, the district court sentenced Mr. Battle to a mandatory minimum term of 15 years imprisonment under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B). The district court declared Mr. Battle an armed career criminal after adopting the presentence report's finding that he had three prior convictions that qualified as either "violent felonies" or "serious drug offenses" under the ACCA. Over Mr. Battle's objection, the court found that Mr. Battle had one Maryland conviction from 1991 for assault with intent to murder that qualified as a "violent felony." Further, the court found that Mr. Battle had two prior convictions from 1998 and 2006 for Maryland possession with intent to distribute cocaine that qualified as "serious drug offenses." *Id.*

The court's application of the ACCA enhancement subjected Mr. Battle to a Sentencing Guidelines range of 180 to 188 months imprisonment (corresponding to an offense level 30, criminal history category V). The court sentenced Mr. Battle to 180 months imprisonment (15 years). Without an ACCA finding, Mr. Battle's Guidelines range would have been 70 to 87 months

imprisonment (corresponding to an offense level 21, criminal history category V), and the statutory maximum would have been 10 years. 18 U.S.C. § 924(a)(2).

B. Direct appeal

On November 9, 2011, Mr. Battle filed a notice of appeal to this Court. On appeal, Mr. Battle challenged his designation as an armed career criminal, arguing that his prior conviction for Maryland assault with intent to murder failed to qualify as an ACCA "violent felony." Specifically, Mr. Battle argued that the offense did not satisfy the force clause and that the residual clause was void for vagueness. However, on October 4, 2012, the Fourth Circuit rejected Mr. Battle's arguments and affirmed his sentence upon finding that his Maryland conviction qualified as an ACCA "violent felony" under the residual clause (18 U.S.C. § 924(e)(2)(B)(ii)) (an offense which "otherwise presents a serious potential risk of physical injury to another"). *See United States v. Battle*, 494 Fed. Appx. 404, at *2 (4th Cir. Oct. 4, 2012).

C. Previous 28 U.S.C. § 2255 petition

On November 25, 2013, Mr. Battle filed his first 28 U.S.C. § 2255 petition alleging errors unrelated to the matter at issue here. On June 26, 2014, the district court denied Mr. Battle's petition on the merits.

D. *Johnson v. United States* and *Welch v. United States*

On June 26, 2015, this Court issued its decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). In that case, the Court invalidated the ACCA's residual clause as too vague to provide adequate notice under the Due Process Clause. In *Welch v. United States*, 136 S. Ct. 1257 (2016), the Court subsequently held that *Johnson* announced a new rule of constitutional law that was retroactive to cases on collateral review.

E. Second 28 U.S.C. § 2255 petition

In light of *Johnson* and *Welch*, on April 29, 2016, Mr. Battle filed a motion for authorization to file a successive § 2255 petition. On June 1, 2016, the Fourth Circuit granted the motion after finding that he made a prima facie showing satisfying the successive petition requirements under 28 U.S.C. § 2255(h)(2).[2]

Thereafter, on June 2, 2016, Mr. Battle filed his § 2255 petition. In that petition, he argued that in light of *Johnson*, he no longer had the requisite number of prior convictions to qualify him as an armed career criminal. Specifically, he argued that post-*Johnson*, his Maryland assault with intent to murder conviction can no longer qualify as an ACCA "violent felony" under the unconstitutional residual clause. Additionally, he argued that the offense is not a "violent felony" under the remaining ACCA force clause because it can be committed by acts of omission and affirmative acts that cause physical injury but do not require violent physical force.

Nonetheless, the district court denied Mr. Battle's § 2255 petition upon finding that Maryland assault with intent to murder has an element of violent physical force. *Battle v. United States,* 2018 WL 1992412 (D. Md. Apr. 26, 2018). In concluding as such, the district court overlooked this Court's precedent as well as that of other federal courts holding that acts of omission categorically fail to constitute physical force required under the ACCA force clause.

Although the district court denied Mr. Battle's § 2255 petition, it issued a certificate of appealability after noting that "jurisprudence" is "evolving" on "issues such as the one presented here." *Id.* at *12.

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[2] Section 2255(h)(2) provides that "[a] second or successive petition must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

F. Fourth Circuit appeal of denial of second § 2255 petition

Mr. Battle appealed the district court's decision. On appeal, Mr. Battle continued to argue that Maryland assault with intent to murder can be violated by an act of omission; therefore, it does not have an element of physical force required under the ACCA force clause.

To begin, Mr. Battle explained that the Fourth Circuit as well other circuits have held that an offense which can be violated by an act of omission (for example, by failing to provide food or medicine) does not require an element of physical force. *See United States v. Gomez*, 690 F.3d 194, 201 (4th Cir. 2012); *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018); *United States v. Resendiz-Moreno*, 705 F.3d 203, 204-05 (5th Cir. 2013).

Under this law, Mr. Battle argued that Maryland assault with intent to murder categorically fails to qualify as an ACCA "violent felony." Specifically, Mr. Battle argued that Maryland assault with intent to murder can be violated by an act of omission. He explained that "[a]ssault with intent to murder is an assault under circumstances such that if the victim should die, the resulting crime would be murder." *Glenn v. State*, 511 A.2d 1110, 1112 (Md. Ct. Spec. App. 1986). In other words, Maryland assault with intent to murder is a lesser included offense of either first degree or second degree murder. If the defendant commits the assault with premeditated intent to kill, then it is a lesser included offense of first degree murder. *Id.* at 1120. If the defendant commits the assault with an intent to kill (but no premeditation), then it is a lesser included offense of second degree murder.[1] *Id.*; *see also Sifrit v. State*, 857 A.2d 88, 100-01 (Md. 2004) (holding

[1] Second degree murder can be committed with four different types of mens rea – "(1) the intent to kill, (2) the intent to do grievous bodily harm, (3) the intent to do an act under circumstances manifesting extreme indifference to the value of human life (depraved heart) or (4) the intent to commit a dangerous felony." *Simpkins v. State*, 596 A.2d 655, 657 (Md. Ct. Spec. App. 1991). But assault with intent to kill (of the second degree murder type) only incorporates the intent to kill mens rea. *Glenn*, 511 A.2d at 1120.

that Maryland first degree assault statute – which is today's statutory equivalent of assault with intent to murder – is a lesser included offense of second degree murder).

Mr. Battle argued that under these parameters, if either first or second degree murder can be committed by acts of omission, then it follows that assault with intent to murder (which is embedded in first or second degree murder) can also be violated by an act of omission. And in fact, the Maryland Court of Special Appeals has explicitly said that second degree murder convictions can be predicated on acts of omission; therefore, Mr. Battle explained that if follows that Maryland assault with intent to murder can also be based on acts of omission.[2]

Specifically, in *Simpkins v. State*, 596 A.2d at 656, 661, the Maryland Court of Special Appeals upheld a second degree murder conviction in which the parents killed the child by failing to provide food and care to their child for five days. If in the same case, the child did not die but the parents deprived their child of food and water with an intent to kill, the parents would have been guilty of the lesser included offense of assault with intent to murder.[3] Thus, under Maryland

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[2] Also, to be clear, Maryland "assault," which criminalizes "physical harm" to another can be accomplished by a "simple omission to act where there is a duty to act." *Lamb v. State*, 613 A.2d 402, 415 (Md. Ct. Spec. App. 1993).

[3] In *Simpkins*, 596 A.2d at 661-62, the second degree murder offense happened to be a depraved heart murder with a reckless mens rea; however, as previously mentioned, it is well settled under Maryland law that a second degree murder conviction may also rest on a mens rea of "intent to kill" – the same intent to kill incorporated in an assault with intent to murder offense. *Id.* at 657; *Glenn*, 511 A.2d at 1120. Thus, if the same acts of omission in *Simpkins* were coupled with an intent to kill, they would have undoubtedly constituted an assault with intent to kill and second degree murder (if the child died). Indeed, in *Simpkins*, the Court of Special Appeals approvingly cited to cases in which courts upheld murder convictions based on acts of omission combined with an intent to kill. *See Simpkins*, 596 A.2d at 660 (citing *Harrington v. State*, 547 S.W.2d 616, 620 (Tex. Cr. App. 1977) (upholding murder conviction predicated on starvation with intent to kill); *Harrington v. State*, 547 S.W.2d 621, 624 (Tex. Cr. App. 1977) (upholding murder conviction because "evidence [was] sufficient to show that the appellant caused his daughter's death by his failure to perform his parental duty of support. The evidence is also sufficient for the

law, a realistic probability exists that Maryland assault with intent to kill can be accomplished by an act of omission.

Nonetheless, the Fourth Circuit affirmed the district court's decision upon holding that no realistic probability exists that Maryland assault with intent to kill could be violated by an act of omission because Mr. Battle did not cite to a case in which anyone has *actually* been prosecuted for Maryland assault with intent to murder by act of omission. *See Battle,* 927 F.3d at 167. The Court so held even though Mr. Battle cited to Maryland appellate decisions which make plain that both assault and murder in Maryland can be committed by acts of omission.

REASONS FOR GRANTING PETITION

There is a direct and acknowledged circuit split on whether defendants must identify an actual prosecution to demonstrate that a state conviction is not a categorical match with the relevant federal definition.

The circuits are squarely split on whether this Court's precedent, namely the "realistic probability" test, requires—in all instances—defendants to identify an actual prosecution of nongeneric conduct to prove that a prior state conviction is not a categorical match to a federal predicate offense. Seven circuits have found that evidence of an actual prosecution of overbroad conduct is not necessary where the standard tools of interpretation—analysis of statutory text and state case law—resolve the issue. Three circuits, including the Fourth Circuit below, require defendants to point to an actual prosecution to demonstrate the breadth of the state crime.

Not only is this split well established, it presents an important issue of federal law—ignoring the plain meaning of a statute or state court decisions because of the absence of an actual

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jury to find that the appellant's failure to perform his duty was willful, intentional, and with malice aforethought"). Therefore, the bottom line is that under Maryland law, murder and its "junior partner," assault with intent to kill, can be violated by acts of omission. *Glenn*, 596 A.2d at 1118.

prosecution runs afoul of this Court's precedent. The categorical approach requires an analysis of the elements of the state crime, not the underlying facts of conviction. Further, the rule adopted by the Fourth Circuit below (in concert with the Fifth and D.C. Circuits) places an unfair and often insurmountable burden upon defendants because the majority of prosecutions never make it into an opinion. This Court should grant review to resolve this circuit conflict.

A. This Court's precedent does not require defendants in all instances to identify an actual prosecution applying a state case in a nongeneric manner.

In *Taylor v. United States*, 495 U.S. 575, 601-02 (1990), this Court set out the "categorical approach" requiring that—for a federal sentencing enhancement to be imposed—the elements of a state offense for which the defendant was previously convicted be the same as, or narrower than, the elements of the corresponding ("generic") federal offense. Following *Taylor*, sentencing courts compare the elements of the defendant's state offense against the federal predicate to determine the propriety of an enhancement. *Id.*

In *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), this Court outlined the "realistic probability" test. The defendant in *Duenas-Alvarez* argued that California case law demonstrated that his state offense fell "outside the generic definition." *Id.* at 193-94. The Court disagreed with the defendant's interpretation of California precedent. *Id.* But it added:

> [T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute 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 generic definition of a crime. To 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 (nongeneric) manner for which he argues.

Id. at 193. The defendant in *Duenas-Alvarez* made no "such showing." *Id.*

This Court revisited the "realistic probability" test in *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013). There, the Court affirmed *Duenas-Alvarez* and reiterated that *Taylor*'s "focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense." *Id.* (quoting *Duenas-Alvarez*, 549 U.S. at 193); *see also id.* at 205-06. Thus, the Court explained that where federal law excludes trafficking in "antique firearm[s]," 18 U.S.C. § 921(a)(3), from its definition of a violent felony, 8 U.S.C. § 1101(a)(43)(C), "a conviction under any state firearms law that lacks such an exception" would not automatically "be deemed to fail the categorical inquiry." 569 U.S. at 205. Instead, "[t]o defeat the categorical comparison in this manner, a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms." *Id.* at 206. This language from *Moncrieffe*, together with this Court's reference in *Duenas-Alvarez* to cases "in which the state courts did in fact apply" the law in the manner urged by the defendant, has led several circuits (including the Fourth Circuit below) to hold that a defendant must point to an actual prosecution of a state crime in a nongeneric manner to prove that a defendant's prior state crime of conviction is not a match to the generic, federal predicate. *See infra* Part B.

In more recent cases, however, this Court has not required defendants to provide examples of specific prosecutions, demonstrating that the Court's earlier references to actual prosecutions were intended merely to drive home the point that the "realistic probability" test is designed to rule out contrived hypotheticals unfounded in the language of the statute or state-court decisions. In *Mathis v. United States*, 136 S. Ct. 2243 (2016), this Court outlined the modified categorical approach without "apply[ing]—or even mention[ing]—the 'realistic probability' test," *United States v. Titties*, 852 F.3d 1257, 1275 (10th Cir. 2017). *Mathis* instead affirmed that the focus under *Taylor* is on "'the elements of the statute of conviction,'" not the "'particular facts

underlying [the prior] convictions.'" 136 S. Ct. at 2251 (alteration in original) (quoting *Taylor*, 495 U.S. at 600-01).

Thus, to analyze whether state statutes match the generic offense under the modified categorical approach, *Mathis* explained that sentencing courts should consider "state court decision[s]" and the statutory scheme and structure. 136 S. Ct. at 2256. Only "if state law fails to provide clear answers" can sentencing courts look at charging documents and jury instructions (i.e., the record of actual prosecutions) to determine whether statutory alternatives are treated as "elements or means." *Id.* at 2256-57.

And in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), this Court relied on the plain language of the California statute at issue to conclude that petitioner had "'show[n] something *special* about California's version of the [statutory rape] doctrine'—that the age of consent is 18, rather 16." *Id.* at 1568, 1572 (first alteration in original) (quoting *Duenas-Alvarez*, 549 U.S. at 191). Given the clarity of the statutory language, it was not necessary to consider whether there was a "reasonable probability" that a 21-year-old would actually be prosecuted for having consensual sexual intercourse with a 17-year-old. *See id*. at 1572.[2]

Consistent with this Court's decisions, the majority of circuit courts have rejected the requirement of an actual prosecution when the statutory language or state court decisions make plain that the state crime is broader than the generic offense. *See infra* Part B.

[2] Similarly, when construing the scope of the generic offense of statutory rape *in Esquivel-Quintana*, this Court applied the same interpretive tools, focusing on the text of the federal statute and looking to dictionaries without considering actual prosecutions.

B. There is a direct and acknowledged circuit split on the scope of the "realistic probability" test.

Because the circuits are divided on whether a defendant must identify an *actual prosecution* of his prior state offense in the proposed nongeneric manner, review is warranted.

1. The Tenth Circuit has expressly rejected the argument that the defendant "[could] not prevail" because "he ha[d] not supplied 'any case in which [the state] has prosecuted someone'" in the proposed nongeneric manner. *Titties*, 852 F.3d at 1274. The court saw "no persuasive reason" to "ignore th[e] plain language" of the state offense or "to pretend the statute is narrower than it is." *Id.* Instead, it found *Mathis* "instructive." *Id.* at 1275. *Mathis* "did not seek or require instances of actual prosecutions for the [state statutory] means that did not satisfy the ACCA." *Id.* (citing *Mathis*, 136 S. Ct. at 2251). "The disparity between the statute and the ACCA was enough." *Id.* Applying "the *Mathis* tools" of interpretation—the plain text—the Tenth Circuit held that the defendant's prior conviction did not qualify as a "violent felony" under the very same provision of the ACCA at issue here, 18 U.S.C. § 924(e)(2)(B)(i). *Id.* at 1269, 1272, 1275.

The Third Circuit has also repeatedly rejected the requirement of an actual prosecution. *See, e.g.*, *Salmoran v. Att'y Gen.*, 909 F.3d 73, 82 (3d Cir. 2018) ("Salmoran does not need to identify cases in which New Jersey actually prosecuted overbroad conduct."); *see also Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 481-82 (3d Cir. 2009); *Singh v. Att'y Gen.*, 839 F.3d 273, 286 n.10 (3d Cir. 2016). Recently, in *Zhi Fei Liao v. Attorney General*, 910 F.3d 714 (3d Cir. 2018), the Third Circuit held "that it is unnecessary to apply the realistic probability test where the elements of the offense, whether as *set forth in a statute or case law*, do not match the generic federal crime." *Id.* at 723 n.9 (emphasis added). Noting the many "sister circuit[s]" that had reached similar conclusions, the court rejected the government's argument that it must examine actual "convictions

under the state statute"; Pennsylvania courts had already provided "guidance as to how the statute applies" (and it was apparently irrelevant that this guidance did not arise in the context of actual prosecutions of nongeneric conduct). *Id.* at 723, 724 n.11.

The First, Second, Sixth, Ninth, and Eleventh Circuits have all reached similar conclusions. These courts hold that a defendant need not point to an actual prosecution where the statutory language is plain or state courts have definitively addressed its interpretation. Thus, in *Swaby v. Yates*, 847 F.3d 62, 65 (1st Cir. 2017), the First Circuit rejected the BIA's reasoning that the defendant was required "to show that there was a realistic probability that Rhode Island would actually prosecute [nongeneric] offenses under [the statute at issue]." The state crime—a controlled substance offense—"clearly" applied "more broadly than the federally defined offense," and "[n]othing in *Duenas-Alvarez* … indicates that this state law crime may be treated as if it is narrower than it plainly is." *Id.* at 66.

In *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018), the Second Circuit concluded that "[t]here is no … requirement" that the defendant "'point to … cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues,'" where the "'statutory language itself … creates the realistic probability that a state would apply the statute to conduct beyond the generic definition.'" *Id.* at 63 (quoting *Duenas-Alvarez*, 549 U.S. at 193; *Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066, 1072 (11th Cir. 2013)).

And in *United States v. McGrattan*, 504 F.3d 608, 614-15 (6th Cir. 2007), the Sixth Circuit looked to both the language of Ohio law and the pronouncements of Ohio courts to find "a 'realistic probability' that the statute would be applied [in a nongeneric manner]." Although the Sixth Circuit was "not aware of any cases in which the Ohio Supreme Court ha[d] explicitly addressed [the] situation … or where Ohio ha[d] prosecuted someone *entirely* [on the basis of nongeneric

conduct]," the "analysis … performed by several other Ohio courts ma[de] it clear that such a possibility [wa]s contemplated by the law." *Id.* at 614. According to the Sixth Circuit, it did "not matter what precedential weight Ohio state courts give these decisions." *Id.* at 615. "In the absence of binding Ohio precedent indicating that [the statute] does *not* apply in such situations," nonbinding analysis of lower Ohio courts was sufficient to show "a 'realistic probability' that someone could be prosecuted." *Id.*; *see also United States v. Lara*, 590 F. App'x 574, 584 (6th Cir. 2014) (rejecting argument that defendant must point to actual prosecutions where the "meaning of the statute" is "plain" or "state-court cases … suggest that a statute applies to non-generic conduct").

The Ninth Circuit has also repeatedly held that defendants "need not point to an actual case applying the statute of conviction in a nongeneric manner." *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1010 (9th Cir. 2015). Instead, a defendant "may simply 'rely on the statutory language to establish the statute as overly inclusive.'" *Id.* (quoting *United States v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007)); *see also United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) ("Where, as here, a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination,' *Duenas-Alvarez*, [549 U.S. at 193], is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime."), *abrogated on other grounds by United States v. Stitt*, 139 S. Ct. 399 (2018).

And the Eleventh Circuit too has rejected the argument that defendants must demonstrate actual prosecutions of nongeneric conduct to prevail. "*Duenas-Alvarez* does not require this showing when the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition." *Ramos*, 709 F.3d at 1071-72.

In sum, the majority of circuits have rejected the requirement of an actual prosecution where a state statute or case law makes it plain that a state crime is not a categorical match to the federal predicate.

2. In contrast, the Fourth Circuit below joined the Fifth and D.C. Circuits in requiring defendants to point to an actual prosecution of nongeneric conduct to satisfy the realistic probability test. The Fourth Circuit faulted Petitioner for failing to point to any Maryland assault with intent to murder case in which the offense was committed by an act of omission. *Battle*, 927 F.3d at 167. As a result, the court concluded that Petitioner had failed to show a "realistic probability" that the Maryland offense would be applied to acts of mere omission. *Id.* at 167.

The Fourth Circuit's adoption of an actual prosecution requirement bears resemblance to an earlier case where the D.C. Circuit evaluated whether Maryland armed robbery qualified as a violent felony. *United States v. Redrick*, 841 F.3d 478 (D.C. Cir. 2016). The court in *Redrick* also faulted the defendant for failing to point to any "Maryland case in which … a conviction [for nonviolent conduct] ha[d] been obtained." *Id.* at 485. Instead, the D.C. Circuit dismissed as "dicta" Maryland case law cited by the defendant stating that armed robbery could be committed by threats to property. *Id.*

Similarly, in *United States v. Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017) (en banc), the Fifth Circuit held (over strong dissent) that the "realistic probability" test requires a defendant to "provide actual cases where state courts have applied the statute in [the nongeneric] way." According to the court, "[t]here is *no exception* to the actual case requirement articulated in *Duenas-Alvarez*" even "where a court concludes a state statute is broader on its face." *Id.* (emphasis added). And the Fifth Circuit went so far as to reason that *Duenas-Alvarez*'s statement "that a defendant must 'at least' point to an actual state case" led to "the implication … that *even*

pointing to such a case may not be satisfactory." *Id.* (emphasis added) (quoting *Duenas-Alvarez*, 549 U.S. at 193).

* * *

The circuits are squarely divided over whether the "realistic probability" test always requires a defendant to identify an actual case prosecuting a state offense in the proposed nongeneric manner, and they have repeatedly acknowledged their disagreement. *See, e.g.*, *Vazquez v. Sessions*, 885 F.3d 862, 873 & n.4 (5th Cir. 2018) (recognizing that "[o]ther circuits have held that a statute's plain meaning is dispositive" without requiring an actual prosecution); *Castillo-Rivera*, 853 F.3d at 241 (Dennis, J., dissenting) ("[T]he 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" ignores "the holdings of several of our sister circuits."); *Salmoran*, 909 F.3d at 81 ("[W]e recognize that [the language of *Duenas-Alvarez*] has caused some confusion in the courts of appeals."). Because the holdings of the Fourth, Fifth, and D.C. Circuits are irreconcilable with the conclusions of the First, Second, Third, Sixth, Ninth, Tenth, and Eleventh Circuits, this Court should grant review to resolve the confusion.

C. Requiring defendants to identify an actual prosecution of nongeneric conduct contravenes this Court's precedent and unjustifiedly creates a herculean hurdle.

Reading the "realistic probability" test to require a defendant to point to an actual prosecution of nongeneric conduct in all cases, as the Fourth, Fifth, and D.C. Circuits have done, contravenes this Court's precedent and imposes an unrealistic and unfair burden on defendants.

1. This Court has repeatedly held that the categorical approach requires a comparison of the *elements* of the state statute to the generic crime. *Taylor*, 495 U.S. at 600-01. The question is not the underlying factual conduct for which the defendant was convicted, nor the factual conduct

undergirding the prosecutions of others, but what conduct the state statute criminalizes as a whole. *Id.*; *Mathis*, 136 S. Ct. at 2251.

Answering this question—that is, construing the state crime—typically begins with the text of any relevant statute. *See, e.g.*, *Descamps v. United States*, 570 U.S. 254, 275 (2013) ("[I]n determining a crime's elements, a sentencing court should take account … of the relevant statute's text[.]"). It would be entirely anomalous, if not a grave miscarriage of justice, for federal courts to "ignore the statutory text and construct a narrower statute than the plain language supports" because a defendant has not happened to unearth a conviction involving nongeneric conduct that is clearly encompassed by the text. *United States v. O'Connor*, 874 F.3d 1147, 1154 (10th Cir. 2017); *see also Titties*, 852 F.3d at 1274; *Swaby*, 847 F.3d at 66. Demanding that a defendant "produce old state cases to illustrate what the statute makes punishable by its text … 'misses the point of the categorical approach and "wrenches … [this] Court's language in *Duenas-Alvarez* from its context."'" *Hylton*, 897 F.3d at 64 (citation omitted).

Likewise, it is state courts who are the ultimate arbiters of state law. *See Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither [the Supreme] Court nor any other federal tribunal has any authority to place a construction on a state statute different from one rendered by the highest court of the State."). Whether a crime is enshrined in statute or created by common law (as in this case), it is just as inappropriate to ignore state court constructions of state law as it is to ignore the plain meaning of statutory text. Courts cannot close their eyes—as the Fourth Circuit did below—to state precedent broadly construing a state crime merely because the facts underlying the conviction in that case did not involve nongeneric conduct.[3]

[3] Indeed, circuit courts (including the Fifth Circuit) have had no problem relying on so-called "dicta" from state courts to construe a state crime against a defendant; these statements

To place actual prosecutions of nongeneric conduct over and above these interpretive tools—"state court decisions" and the statutory text—conflicts with this Court's precedent. *Mathis*, 136 S. Ct. at 2256. Moreover, requiring defendants to point to actual prosecutions shifts the focus away from the elements of the state statute to the underlying facts of conviction (whether of the defendant or others) in contravention of *Taylor*. *See id.* at 2251; *Taylor*, 495 U.S. at 600-01. Thus, an "actual prosecution" regime turns on the vagaries of a prosecutor's decision to charge unlawful conduct, rather than on a comparison of the elements of the state and federal offenses. But "where the text of a statute" or state court precedent "is clear," courts should not "rely on the forbearance of prosecutors to prevent an offense from qualifying as a crime of violence." *Villanueva v. United States*, 893 F.3d 123, 138 n.2 (2d Cir. 2018) (Pooler, J., dissenting); *cf. Jean-Louis*, 582 F.3d at 482 ("[T]he issue is not whether potential offenders have been prosecuted; rather, the issue is whether everyone [who could be] prosecuted under that statute has necessarily committed a [federally punishable offense].").

2. Further, requiring a defendant to identify an actual prosecution of a state offense in a nongeneric manner is an impractical, if not impossible, burden.

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of state law should be given the same consideration whether they support or undermine a defendant's position. *E.g.*, *United States v. Reyes*, 866 F.3d 316, 321 (5th Cir. 2017) (explaining that "a federal court tasked with interpreting state law must give state supreme court dicta great weight" and relying on such dicta to find that prior conviction was a match under the modified categorical approach); *United States v. Smith*, 582 F. App'x 590, 596 n.5 (6th Cir. 2014) ("defer[ring] to the North Carolina Supreme Court on the interpretation of North Carolina law" to find that state crime of robbery was a categorical match), *vacated on other grounds*, 135 S. Ct. 2930 (2015); *see also United States v. Vail-Bailon*, 868 F.3d 1293, 1302-04 (11th Cir. 2017) (en banc); *contra id*. at 1321-23 (Rosenbaum, J., dissenting) (challenging majority's reliance on "dicta" from state intermediate appellate courts).

According to the most recent data from the Department of Justice, ninety-four percent of state felons plead guilty. Sean Rosenmerkel et al., U.S. Dep't of Justice, *Felony Sentences in State Courts, 2006 Statistical Tables*, Nat'l Jud. Reporting Program at 1, 25 tbl.4.1 (Dec. 2009), https://www.bjs.gov/content/pub/pdf/fssc06st.pdf; *see also Missouri v. Frye*, 566 U.S. 136, 143 (2012). "[I]n [such] a system … we can hardly expect a judicial opinion to have issued on each available fact pattern." *Villanueva*, 893 F.3d at 137 (Pooler, J., dissenting). The vast majority of prosecutions will never be discussed in a trial court opinion, let alone a published, appellate opinion, and "may thus be unavailable" to defendants. *Castillo-Rivera*, 853 F.3d at 244-45 (Higginson, J., dissenting); *see also United States v. Davis*, 875 F.3d 592, 606 (11th Cir. 2017) (Rosenbaum, J., concurring) ("[O]nly a handful of the numerous cases prosecuted under [Fla. Stat.] § 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."). Cases appealed through a state court system constitute a "small fraction of total cases." Doug Keller, *Causing Mischief for Taylor's Categorical Approach: Applying Legal Imagination* to Duenas-Alvarez, 18 Geo. Mason L. Rev. 625, 660-61 (2011). The likelihood that there will be state precedent addressing the array of possible prosecutions is further diminished "for defendants whose prior convictions occurred in small states (which have fewer prosecutions and thus fewer appellate decisions for any given statute) and defendants whose prior convictions occurred under a relatively new statute." *Id.* at 660, 661 n.237 (providing example of state statute cited only twenty-nine times in forty-one years, and of those times, only nine cases discussed the facts underlying the prosecution).

When appellate decisions are unavailable, asking defendants to comb through unpublished trial court orders or charging documents to find an "actual prosecution" of nongeneric conduct is a nearly insurmountable burden, especially where many of these records will not be widely

accessible. *Cf. Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1005 (9th Cir. 2008) ("[I]t cannot be that the presence of a 'realistic probability' under *Duenas-Alvarez* depends on whether a conviction is described in an unpublished rather than a published opinion."), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009).

In sum, "[a] defendant's inability to find a case illustrating a particular type of conviction does not necessarily indicate that such cases do not exist." *Villanueva*, 893 F.3d at 137 (Pooler, J., dissenting). Instead, "it may well reflect the fact that finding such a case would require onerous and unwieldy research into the filings of individual cases, to ascertain whether the particular facts might fit the mold obviously encompassed by the statutory language." *Id.* at 137-38. And "[e]ven if there truly were *no* cases to have ever been charged under such a fact pattern, this could be attributable more to the preferences of prosecutors than a lack of a legal element." *Id.* at 138 n.3. Where state law is plain, it is inappropriate to require defendants to find a needle in a haystack.

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This Court's review is necessary to eliminate the confusion among the courts of appeals over whether evidence of an actual prosecution of nongeneric conduct is required to demonstrate that a state crime is not a categorical match. This Court should grant certiorari to prevent defendants from having to shoulder the immense burden of unearthing this evidence where state law addresses the issue.

CONCLUSION

For the foregoing reasons, Mr. Battle respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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APPENDIX