NO. _____

In the Supreme Court of the United States

MICHAEL HERROLD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION APPENDIX, VOLUME II
(App. 76a-118a)

J. Carl Cecere
CECERE PC
6035 McCommas Blvd.
Dallas, Texas 75206
(469) 600-9455
ccecere@cecerepc.com

J. Matthew Wright
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
500 South Taylor Street
Unit 110.
Amarillo, Texas 79101
(806) 324-2370
Matthew_Wright@fd.org

Counsel for Petitioner

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ANN. § 76-6-202 (1973); WASH. REV. CODE § 9A.52.020 (1986); WYO. STAT. ANN. § 6-3-301 (1985)); *see also* 11 DEL. CODE ANN. tit. 11, § 825 (1981) (second-degree burglary occurs where person knowingly enters or remains unlawfully in a building and when, in effecting entry or while in the building or in immediate flight therefrom, causes physical injury to any person who is not a participant in the crime); *see generally* Ohio Rev. Code Ann. § 2911.12 (1974) (burglary statute prohibited, "by force, stealth, or deception, . . . trespass in an occupied structure," while defining "trespass" to include "knowingly enter[ing] *or remain[ing]* on the land or premises of another" (emphasis added)).

The majority opinion particularly relies on the New York Court of Appeals decision in *People v. Gaines*, 74 N.Y.2d 358 (1989) for its interpretation of the New York "remaining in" statute. Maj. Op. at 24. This reliance is undue. As an initial point, I do not today address the manner in which each individual state has defined "remaining in" within its statute. But as to *Gaines* specifically, it was not decided until 1989. To say that Congress meant burglary to encompass only the view expressed in *Gaines* is not logical, because *Gaines* was not written until after 1986, which is when the ACCA was amended. Also important is that the statute interpreted in *Gaines* was different from the Texas statute in question as it lacked the requirement that the Texas statute has of unlawful entry coupled with actual commission or attempted commission of a crime.

[4] *See* ALA. CODE § 13A-7-5; ALASKA STAT. § 11.46.310; ARIZ. REV. STAT. § 13-1506; ARK. CODE ANN. § 5-39-201; COLO. REV. STAT. § 18-4-202; CONN. GEN. STAT. § 53a-101; DEL. CODE ANN. tit. 11, § 824; FLA. STAT. ANN. § 810.02; GA. CODE ANN. § 16-7-1; HAW. REV. STAT. ANN. § 708-810; 720 ILL. COMP. STAT. ANN. 5/19-1; IOWA CODE ANN. § 713.1; KAN. STAT. ANN. § 21-5807; KY. REV. STAT. ANN. § 511.020; ME. REV. STAT. ANN. tit. 17-A, § 401; MICH. COMP. LAWS SERV. ANN. § 750.110a; MINN. STAT. ANN. § 609.582; MO. REV. STAT. § 569.160; MONT. CODE ANN. § 45-6-204; N.H. REV. STAT. ANN. § 635:1; N.J. STAT. ANN. § 2C:18-2; N.D. CENT. CODE § 12.1-22-02; OR. REV. STAT. ANN. § 164.215; S.D. CODIFIED LAWS § 22-32-1; TENN. CODE ANN. § 39-14-402; TEX. PENAL CODE ANN. § 30.02; UTAH CODE ANN. § 76-6-202; VT. STAT. ANN. tit. 13, § 1201;

and (a)(3) fit firmly within the ambit of the "remaining in" statutes that constitute generic burglary.

None of the above matters, of course, if clear Supreme Court precedent binds us to the outcome described in the majority opinion. Our role as a lower court is to faithfully apply the law as interpreted by the Supreme Court. However, I conclude that the majority opinion goes awry in deciding that § 30.02(a)(3) is not "generic burglary." I also conclude that defining "habitation" to include vehicles adapted for overnight accommodation does not remove this subsection from the class of "generic burglary." Accordingly, Herrold's convictions should count for ACCA purposes.

I begin with § 30.02(a)(3). We have longstanding precedent holding that this subsection is not "generic burglary." *See United States v. Emeary*, 794 F.3d 526 (5th Cir. 2015); *United States v. Castaneda*, 740 F.3d 169 (5th Cir. 2013) (per curiam); *United States v. Constante*, 544 F.3d 584 (5th Cir. 2008) (per curiam). However, since the majority of the en banc court has determined to reassess precedent concerning § 30.02(a), we can and should reassess this particular precedent as well.

Subsection (a)(3) provides: "(a) A person commits an offense if, without the effective consent of the owner, the person: . . . (3) enters a building or habitation and

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WASH. REV. CODE ANN. § 9A.52.020; WYO. STAT. ANN. § 6-3-301.

The statutes of Michigan and Minnesota, like Texas Penal Code § 30.02(a)(3), provide that a person may commit a "home invasion" or "burglary," respectively, by entering without consent and committing a crime while inside.

commits or attempts to commit a felony, theft, or an assault." Thus, (a)(3) requires unprivileged entry into the building or habitation, as required for "generic burglary." Herrold argues, however, that (a)(3) differs from "generic burglary" because it does not require the intent to commit the "felony, theft, or assault" to have been formed before or at the time of the unprivileged entry. Our court agreed with this overall argument in *United States v. Herrera-Montes*, 490 F.3d 390, 392 (5th Cir. 2007) (analyzing Tenn. Code Ann. § 39-14-402), and in *Constante* we applied it to (a)(3), *see* 544 F.3d at 587.

As subsequent decisions from other circuits have demonstrated, the analysis of *Constante* wholly overlooks that unlawfully "remaining in" a building with intent to commit a crime also qualifies as "generic burglary." *United States v. Priddy*, 808 F.3d 676, 684–85 (6th Cir. 2015), *abrogated on other grounds by United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017) (en banc), *petition for cert. filed*, (U.S. Nov. 24, 2017) (No.17-765) (analyzing the same Tennessee burglary statute as *Herrera-Montes* and coming to a different result); *United States v. Bonilla*, 687 F.3d 188, 193–94 (4th Cir. 2012); *see also United States v. Reina-Rodriguez*, 468 F.3d 1147, 1155–56 (9th Cir. 2006), *overruled on other grounds by United States v. Grisel*, 488 F.3d 844, 851 n.5 (9th Cir. 2007) (en banc). *Bonilla* explained that excluding statutes such as (a)(3) is based upon a "too rigid" reading of *Taylor* "given that a defendant convicted under [§] (a)(3) necessarily developed the intent to commit the crime while remaining in the building, if he did not have it at the moment he entered." 687 F.3d at 194.

In *Taylor*, the Court determined that the restrictive common-law definition of burglary could not have been what Congress intended when it deleted a definition of burglary from the ACCA. 495 U.S. at 593–95. The Court reasoned that many states had moved beyond the common-law definition, and "construing 'burglary' to mean common-law burglary would come close to nullifying that term's effect in the statute, because few of the crimes now generally recognized as burglaries would fall within the common-law definition." *Id.* at 594. Instead, the Court explained that "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." *Id.* at 598 (emphasis added). In light of the Court's express rejection of the common-law definition, and the criminal codes of nearly half the states at the time, the *Taylor* definition plainly does not require intent to commit an additional crime at the time of entry, as at common law.

In adopting this generic definition, the Court recognized that "exact formulations" of the elements may vary among the states, and so for ACCA purposes, a state statute need only correspond "in substance to the generic meaning of burglary." *Id.* at 598–99. *Taylor* is therefore not concerned with definitional technicalities but, rather, with substantively enforcing Congress's policy of singling out a property crime that bears "inherent potential for harm to persons." *Id.* at 588. Indeed, the omission of a definition for burglary following the 1986 ACCA amendments suggests "that Congress did not wish to specify an exact formulation

that an offense must meet in order to count as 'burglary' for enhancement purposes." *Id.* at 598–99.

The Fourth and Sixth Circuits have accordingly concluded that unlawful entry combined with an attempted or completed felony or theft therein qualifies as generic burglary under *Taylor*.[5] Indeed, the only other federal circuit to determine whether a prior conviction under (a)(3) constitutes generic burglary has come to the opposite conclusion than this court has today. *See Bonilla*, 687 F.3d at 193. In doing so, the Fourth Circuit reasoned that because (a)(3) only applies where a defendant's presence in a building is unlawful, a completed or attempted felony therein necessarily requires intent to commit the felony either prior to unlawful entry or while unlawfully remaining in the building, which is all *Taylor* requires. *Id.* In other words, (a)(3) substantively contains the requisite

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[5] The Eighth Circuit appears to have issued conflicting decisions on this issue. *Compare United States v. McArthur*, 836 F.3d 931, 943–44 (8th Cir. 2016) (concluding that the Minnesota provision is not generic burglary where it defined burglary as including entering without consent and stealing or committing a felony or gross misdemeanor inside), *with United States v. Pledge*, 821 F.3d 1035, 1037 (8th Cir. 2016) (concluding that burglary under TENN. CODE. ANN. § 39-14-403, which is "burglary of a habitation as defined in §§ 39-14-401 and 39-14-402" qualifies as generic burglary, where § 39-14-402 defines burglary as including entry without consent and committing or attempting a felony, theft, or assault) and *United States v. Eason*, 643 F.3d 622, 624 (8th Cir. 2011) (concluding that the TENN. CODE. ANN. § 39-14-402 subpart defining burglary as an entry without consent and committing or attempting a felony, theft, or assault "plainly set[s] forth the elements of generic burglary as defined by the Supreme Court in *Taylor*").

intent element because to attempt or complete a crime requires intent to commit the crime. Similarly, in *Priddy*, the Sixth Circuit considered a Tennessee statute essentially identical to (a)(3) and found that it substantially corresponds to *Taylor's* definition of generic burglary. 808 F.3d at 684–85; *see also United States v. Ferguson*, 868 F.3d 514, 515–16 (6th Cir. 2017) (affirming the continued vitality of *Priddy*). The Sixth Circuit reasoned that unlawful entry combined with an attempted or committed felony or theft therein is a "'remaining-in' variant of generic burglary because someone who enters a building or structure and, while inside, commits or attempts to commit a felony will necessarily have remained inside the building or structure to do so." *Priddy*, 808 F.3d at 685. Even though the statute does not use the words "remaining in," it nonetheless contains that element because a person must remain in a building to commit a crime inside of it.

Bonilla, *Priddy*, and this case each illuminate an important aspect of § 30.02(a)(3): It actually requires more than the minimum described by the Court in *Taylor* in that it requires an unlawful or unprivileged entry AND the actual *commission or attempted commission* of a crime; mere intent is not enough.[6] There is nothing overbroad or overblown about considering as "generic burglary" an offense that involves an unlawful entry into a structure, plus the

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[6] By stating this, I do not imply that having a more severe requirement in one part can make up a deficit in another part and "add up" to generic burglary. I am simply making the point that the Texas statute meets and exceeds the *Taylor* definition.

intent to commit a crime formed while remaining in the structure as evidenced by the actual commission or attempted commission of the crime. These are not mere irrelevancies a defendant would have no reason to challenge. *Cf. Mathis*, 136 S. Ct. at 2253 (explaining one of the reasons for an "elements-focus approach" is to avoid the unfairness to defendants who had no reason to dispute facts that were unnecessary to sustain the prior conviction). Thus, the "basic elements" of burglary as established in *Taylor* are present: 1) unlawful or unprivileged entry into, or remaining in, 2) a building or structure, 3) with intent to commit a crime – here as evidenced by the actual commission or attempted commission of the crime, not mere intent. *Taylor*, 495 U.S. at 598. A contrary reading undercuts the very concept of "generic" burglary adopted in *Taylor*, where the Court said Congress aimed to prevent "offenders from invoking the arcane technicalities of the common-law definition of burglary to evade the [ACCA's] sentence-enhancement provision." *Id.* at 589.

The majority opinion contends that defining "remaining in" broadly both "involve[s] a less culpable mental state on the part of the defendant" and "presents less danger to victims." Maj. Op. at 24. I respectfully disagree on both counts. The timing of when intent was formed implicates neither the culpability of the perpetrator nor the extent of danger to victims. If a perpetrator forms intent prior to entering a home but, once inside, discovers nothing worth taking, is he or she somehow less culpable or

dangerous than a perpetrator who initially *unlawfully*[7] enters without intent to commit an additional crime but, once inside, discovers something worth taking or, surprised by a resident in the home, commits an assault? The fact that (a)(3) requires commission or attempted commission of the crime implicates an even higher degree of culpability than one who commits burglary simply by forming the requisite intent prior to physical entry.

Consequently, because (a)(3) represents "generic burglary," its inclusion in § 30.02 does not render the statute overbroad, even assuming arguendo § 30.02(a) is indivisible.

This conclusion leads me to turn to an issue addressed, but not decided, in the majority opinion, which Herrold asserts – whether the definition of "habitation" is overbroad because it includes "a vehicle that is adapted for the overnight accommodation of persons." TEX. PENAL CODE § 30.01(1). The majority opinion ultimately does not decide the issue, noting there are "powerful arguments" on both sides of the debate. Maj. Op. at 35. However, because my outcome does not depend on the divisibility of § 30.02(a), I engage in such debate. Herrold appears to argue that a vehicle, regardless of purpose, is overbroad under §30.02(a). This leaves open the potentially drastic outcome that generic burglary excludes all vehicles. Thus, I carefully consider the practical limitations and real-world applications of Texas's statute in analyzing

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[7] Thus, there is already a crime committed upon entry, not merely a decision to commit a crime later.

whether a "vehicle adapted for overnight accommodation" is overbroad.

As an initial note, it is important to remember that Texas draws a distinction between burglary of vehicles that become "habitations" and ordinary "vehicles." *See* TEX. PENAL CODE §§ 30.01(3), 30.02, 30.04. Texas Penal Code § 30.04 criminalizes "burglary of vehicles," which a person violates when, "without the effective consent of the owner, he breaks into or enters a vehicle or any part of a vehicle with intent to commit any felony or theft." A "vehicle" is defined as "any device in, on, or by which any person or property is or may be propelled, moved, or drawn in the normal course of commerce or transportation, *except such devices as are classified as 'habitation*.'" TEX. PENAL CODE § 30.01(3) (emphasis added). Texas draws a clear line between ordinary "vehicles," which are prosecuted under § 30.04 and defined by § 30.01(3), and a "vehicle that is adapted for the overnight accommodation of persons," as defined under § 30.01(1) and prosecuted under § 30.02. Thus, a person who burglarizes an ordinary vehicle not adapted for overnight accommodation of persons cannot be prosecuted under § 30.02.

Despite these distinct statutes, Herrold argues that § 30.02(a) is prosecuted in Texas "to its full, non-generic extent." To find that application of a state statute is applied in a non-generic manner, we require "that a defendant must 'at least' point to an actual state case." *United States v. Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017) (en banc) (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). But "even pointing to [a case where a statute has been applied

non-generically] may not be satisfactory." *Id.* Herrold brings to our attention an indictment, sentencing documents, and news articles related to a single case where charges were brought against multiple defendants under § 30.02 relating to mobile homes Herrold claims were "warehoused." Frankly, that Herrold searched high and low among hundreds of thousands of Texas burglary convictions over the years and could find only this example supports rather than contradicts the position that the statute is applied only generically. In any event, as the case involves a plea of guilty to the offense after indictment with little facts and no precedential opinion, this case is not an example of a non-generic application of § 30.02, even assuming arguendo that the "warehousing" point matters.[8] To the extent Herrold argues other hypothetical scenarios will be non-generically treated, it is well-established that "clever hypotheticals" are not the basis upon which to judge a statute in question. *Id.* at 224. Stated simply, a Texas prosecutor bears the burden of proving that a "habitation" was burglarized; if insufficient or incredible evidence is put forward that a vehicle is a "habitation" as Texas defines it, the vehicle will not be treated as such. *See Blankenship v.*

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[8] The determination of whether a building or structure qualifies as a "habitation" is a fact-intensive, multifactor inquiry. *Blankenship v. State*, 780 S.W.2d 198, 209 (Tex. Crim. App. 1988) (en banc). The factors in *Blankenship*, such as considering whether "someone was using the . . . vehicle as a residence at the time" and "whether the . . . vehicle contained bedding, furniture, utilities, or other belongings common to a residential structure," indicate to a reasonable juror the important considerations in determining whether a vehicle is adapted for overnight accommodation under § 30.02. *Id.*

State, 780 S.W.2d 198, 209 (Tex. Crim. App. 1988) (en banc). Therefore, I focus on the non-hypothetical, practical applications of (a)(1) rather than implausible and unlikely "what ifs."

The Supreme Court in discussing "automobiles" in *Taylor* or generic "vehicles" in the Iowa statute in *Mathis* was not faced with and did not address the question of whether, for purposes of determining what "generic burglary" involves, Congress would have intended to exclude mobile homes or similar vehicles adapted for overnight use. Rather, *Taylor* expressed concern about generic burglary encompassing crimes such as "shoplifting and theft of goods from a 'locked' but unoccupied automobile," which were not clearly violent felonies, and subjecting citizens of different states to different sentencing enhancement requirements under the ACCA. 495 U.S. at 591 (citing CAL. PENAL CODE ANN. § 459 (1990)). Therefore, the Court determined the three elements of generic burglary, described above, to standardize the definition of generic burglary. *Id.* at 598. The Court never expressly considered a vehicle that is not only used as a home but particularly adapted for that use and, therefore, did not foreclose debate on the issue.

An understanding of *Taylor* is critical to resolving this issue. That being said, the term "vehicle" does not appear in the ACCA and only becomes an issue as the statute was interpreted by *Taylor* and applied to state

statutes.[9] We do not read cases like statutes,[10] and therefore, we take "vehicle adapted for overnight accommodation" to mean "the interpretation that best fits within" *Taylor*'s framework. *See Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2446 (2013); *Stitt*, 860 F.3d at 881 (Sutton, J., dissenting). Herrold focuses on the use of the term "vehicles," arguing that in *Taylor*, the Court concluded that "vehicles" are outside the definition of the generic burglary, so, he says, that's it. The Government, on the other hand, points out that the Texas statute distinguishes between "vehicles" and "habitations" and that the latter—defined to encompass brick and mortar as well as mobile homes—is in keeping with the majority of state statutes protecting structures. The Government provided an appendix describing at least 25 states where, at the time of the ACCA's enactment, structural burglary would have included vehicles expressly adapted for overnight accommodation of persons, like the Texas statute.[11]

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[9] Interestingly, *Taylor* actually used the term "automobiles" and never used the word "vehicle." Nonetheless, for purposes of this analysis, I take the terms to be interchangeable.

[10] Of course, we carefully read Supreme Court precedents and follow their clear meaning. My point is simply that the notion of "textualism" is a statutory interpretation concept, not a case-application concept. Here, we lack clear Supreme Court precedent on the particular question, so we strive to apply the Court's precedents to this situation.

[11] *See, e.g.*, ARK. CODE ANN. §§ 5-39-101, 5-39-201 (1987) (burglary includes an "occupiable structure" such as "a vehicle . . . where any person lives or . . . which is customarily used for overnight accommodation of persons"); GA. CODE ANN. § 16-7-1 (1984) (burglary includes any "vehicle . . . designed for use as the dwelling

Combining those statutes with statutes that include vehicles broadly (which would thus be considered non-generic for ACCA purposes), occupied vehicles would have been included in the burglary statutes of at least 43 states.[12] As noted earlier, *Taylor* explicitly stated that what Congress "meant by 'burglary' [is] the generic sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598. *Taylor* also repeatedly spoke of a "building or structure," capturing the idea that the location of the burglary could be a "structure" that was not a "building." That idea captures well the "vehicle adapted for overnight accommodation of persons," which Texas includes within its definition of a habitation, as distinct from "automobiles," which are not included.

The *Taylor* Court's understanding of Congress's intent when enacting the ACCA further supports the conclusion that burglary of a "vehicle adapted for

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of another"); ME. REV. STAT. ANN. tit. 17-A, §§ 2(24), 401 (1980) (burglary does not include "vehicles and other conveyances whose primary purpose is transportation of persons or property unless such vehicle or conveyance, or a section thereof, is also a dwelling place").

[12] *See, e.g.*, CONN. GEN. STAT. §§ 53a-100, 53a-103 (1979) (burglary includes any building, "watercraft, aircraft, trailer, sleeping car, railroad car, other structure or vehicle"); LA. REV. STAT. ANN. § 14:62 (1980) (burglary includes "any dwelling, vehicle, watercraft, or other structure, movable or immovable"); S.D. CODIFIED LAWS §§ 22-1-2, 22-32-1, 22-32-3, 22-32-8 (1976) (defining burglary to involve a "structure," which includes "any house, building, outbuilding, motor vehicle, watercraft, aircraft, railroad car, trailer, tent, or other edifice, vehicle or shelter, or any portion thereof").

overnight accommodation" is generic burglary. The Court noted that Congress did not limit ACCA predicate offense burglaries to those that may be especially dangerous, as "Congress apparently thought that all burglaries serious enough to be punishable by imprisonment for more than a year" were potentially violent and "likely to be committed by career criminals." *Taylor*, 495 U.S. at 588. Congress included burglary "because of its inherent *potential* for harm to persons." *Id.* (emphasis added). A person would likely be present where the person is living, irrespective of whether that is a traditional home or a "vehicle adapted for overnight accommodation." Any other understanding could lead to anomalies, such as a sentencing enhancement for burglarizing an unoccupied building, but no sentencing enhancement if an occupied mobile home is burglarized. This would be inconsistent with Congress's intent to protect individuals from harm. Again, there will be some structures of any kind that are unoccupied, but it is the potential for harm that the *Taylor* court addressed; the burglar may have no way to know whether the particular structure is currently occupied so including both occupied and unoccupied structures in the definition makes sense.

Further, Congress desired to prevent criminals from "invoking the arcane technicalities of the common-law definition of burglary to evade the sentence-enhancement provision." *Id.* at 589. Would excluding a dwelling on the basis of whether it has (or, at some time, had) wheels not be invoking one of those very "arcane technicalities"? *Taylor* drew the line at the

potential presence of people, not wheels.[13] To say a traditional home is protected by ACCA enhancements whereas a mobile home is not simply does not comport with Congress's intent and *Taylor*'s reasoning.

In determining the "contemporary meaning of burglary," the Government notes that the *Taylor* Court relied on Model Penal Code provisions that explicitly included "vehicles adapted for overnight accommodation" as an ACCA predicate crime. *See id.* at 598 n.8. At that time, the Model Penal Code stated that "[a] person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein." *Id.* (quoting MODEL PENAL CODE § 221.1 (AM. LAW INST. 1980)). The Model Penal Code defined an "occupied structure" as "any structure, *vehicle*, or place *adapted for overnight accommodation of persons*, or for carrying on business therein, whether or not a person is actually present." MODEL PENAL CODE § 221.0 (AM. LAW INST. 1980) (emphasis added); *see also* § 221.1 cmt. 3 at 73. Notably, this definition mirrors the language in the Texas burglary statute, and numerous other states' burglary statutes. *See* TEX. PENAL CODE ANN. § 30.01. The identity of definitions shows that the *Taylor* Court understood the exact language at issue today to constitute generic burglary, and Herrold's argument

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[13] The analysis here is limited to the statutory construction question under the circumstances of ACCA enhancement. There are other areas of the law where distinguishing on the basis of whether a dwelling is mobile may be appropriate, but we need not address such situations here.

would narrow *Taylor* and the Model Penal Code definition on which it based its holding.

Subsequent Supreme Court decisions have not contradicted this understanding. In *Shepard v. United States*, 544 U.S. 13 (2005), the Court addressed a Massachusetts burglary statute that included vehicles and vessels in general. *Id.* at 15–16. The *Shepard* Court was principally faced with determining the permissible documents to be used to narrow a statute of conviction following a guilty plea, and therefore was not presented with, and did not address, the narrow subset of "vehicles adapted for overnight accommodation." *Id.* at 26. Indeed, the Massachusetts statutes said nothing about "overnight accommodation." *See* MASS. GEN. LAWS ANN., ch. 266, §§ 16, 18 (2000). Meanwhile, in *Mathis*, the Court analyzed an Iowa burglary statute that included two prongs, one of which criminalized, inter alia, burglary of any "land, water, or air vehicle," and the second which focused on its use – "overnight accommodation, business or other activity, or the storage or safekeeping of anything of value." *See State v. Dixon*, 826 N.W.2d 516, 2012 Iowa App. LEXIS 1043 *6 (Iowa App. 2012) (not designated for publication) (citing *State v. Pace*, 602 N.W.2d 764, 769 (Iowa 1999)); *see also State v. Rooney*, 862 N.W.2d 367, 376–78 (Iowa 2015) (discussing the two prongs). Because it concluded that statute was indivisible, it did not have to determine whether a vehicle adapted for overnight use as an accommodation by itself would qualify, as the Iowa statute also included vehicles used for storage and,

thus, encompassed more than generic burglary.[14] *See Mathis*, 136 S. Ct. at 2250 (emphasis omitted).

Because the Supreme Court's precedents do not answer the question directly, we are left to analyze whether burglary of a "vehicle adapted for overnight accommodation" in a state distinguishing such burglaries from those of regular vehicles is more like "generic burglary" of a habitation, which is an ACCA burglary, or more like a burglary of a regular vehicle, which is not.

Our sister circuits have divided on this issue while analyzing the versions of their statutes in effect at the time of the case. The Tenth Circuit has directly assessed the Texas burglary statute at issue here, holding that it encompasses only generic burglary. *United States v. Spring*, 80 F.3d 1450, 1461–62 (10th Cir. 1996) (noting that Texas's statute was "not analogous to the theft of an automobile or to the other property crimes whose relative lack of severity the *Taylor* Court (and presumably, Congress) meant to exclude from its generic definition" (quoting *United States v. Sweeten*, 933 F.2d 765, 771 (9th Cir. 1991), *overruled by Grisel*, 488 F.3d at 851 n.5 (en banc)). Most recently, the Seventh Circuit construed the Illinois residential burglary statute to determine that the inclusion of burglary of a "mobile home [or] trailer

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[14] Indeed, the Solicitor General in that case had conceded the non-generic character of Iowa's statute and argued only statutory divisibility to the Court. *See Mathis*, 136 S. Ct. at 2250. Therefore, *Mathis* does not help us determine whether breaking and entering a "vehicle adapted for overnight accommodation" as a standalone definition is generic burglary.

. . . in which at the time of the alleged offense the owners or occupants actually reside" did not preclude the statute from being considered generic burglary. *Smith v. United States*, 877 F.3d 720, 722, 724 (7th Cir. 2017). Regarding a mobile home, the court noted that, under Illinois law, a "mobile home" is nothing more than a "prefabricated house," easily dismissing the argument that a mobile home is not a "building or structure." *Id.* at 722–23. Although including the word "trailer" was a closer call, the court looked to the purposes of *Taylor* to hold that the Illinois residential burglary statute defined generic burglary, despite the fact that it included "[t]railers used as dwellings." *Id.* at 724–25 ("We think it unlikely that the Justices set out in *Taylor* to adopt a definition of generic burglary that is satisfied by no more than a handful of states—if by any. Statutes should be read to have consequences rather than to set the stage for semantic exercises.").

While other circuits have held that statutes with language akin to "vehicle adapted for overnight accommodation" do not encompass generic burglary, this determination has not been without debate and dissent. *See, e.g.*, *Grisel*, 488 F.3d at 849–51 (holding that the Oregon burglary statute was broader than generic burglary, based upon the assumption, questioned by the dissent, that "in the criminal codes of most states, the term 'building or structure' does not encompass objects that could be described loosely as structures but that are either not designed for occupancy or not intended for use in one place"). Some of these circuits did not entertain much, if any, debate on the issue. *See, e.g.*, *United States v. Sims*, 854 F.3d 1037, 1040 (8th Cir. 2017), *petition for cert. filed*, (U.S.

Nov. 24, 2017) (No. 17-766); *United States v. Lamb*, 847 F.3d 928, 931 (8th Cir. 2017), *petition for cert. filed*, (U.S. July 10, 2017) (No. 17-5152); *United States v. Gundy*, 842 F.3d 1156, 1165 (11th Cir. 2016), *cert. denied*, 138 S. Ct. 66 (2017); *United States v. White*, 836 F.3d 437, 445–46 (4th Cir. 2016).

An excellent example of the debate associated with this issue is *Stitt*. In *Stitt*, the court concluded that *Taylor* proscribed "*all* things mobile or transitory" from generic burglary. 860 F.3d at 859. Judge Sutton, writing for himself and five other judges in dissent, disagreed with this characterization of *Taylor*. *Id.* at 876 (Sutton, J., dissenting). Judge Sutton replied that the "no-vehicles-or-tents rule implies that *every state's basic burglary statute is non-generic*," essentially "render[ing] generic burglary a null set." *Id.* at 880–81. He argued that this result is not required; "we should give the Court and Congress more credit" than understanding *Taylor* and the ACCA to mandate an essentially toothless statute. *Id.* at 881. As Judge Sutton so aptly put it, "[i]t's a strange genus that doesn't include any species." *Id.* at 880.

Lacking a clear consensus, we are thus brought back to our analysis of *Taylor*, mindful that we need not leave common sense at the door. Both Congress's and *Taylor*'s intent seem clear – to protect the public from career criminals that commit or have committed potentially violent felonies. Even setting aside the statutes that (a) are likely considered overbroad due to the inclusion of routine vehicles or (b) are potentially divisible, 25 states' statutes include provisions

protecting vehicles adapted or used for habitation.[15] The number mushrooms when you add back in the potentially divisible statutes (7 states[16]) and the statutes already overbroad due to the inclusion of vehicles, or a state court's reading of the statute in a way that is overbroad (9 states[17]). This is not, of course, a binding declaration as to whether those statutes are non-generic or divisible; additional analysis would have to be done. But that so many states' statutes would be in question ought to give us pause. We should not impute to Congress such a jarring outcome in the absence of a clear requirement under the law to do so. Careful consideration of Supreme Court precedent plus common sense dictate that this cannot be the result.

Accordingly, I would affirm, and I respectfully dissent from the court's determination not to do so.

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[15] Alabama, Alaska, Arkansas, Colorado, Florida, Hawaii, Illinois, Kentucky, Maine, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, and Virginia.

[16] Arizona, Georgia, Kansas, South Carolina, Washington, West Virginia, and Wisconsin.

[17] California, Connecticut, Delaware, Idaho, Iowa, Louisiana, Mississippi, Oklahoma, and Wyoming.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-11317

[Filed April 11, 2017]

UNITED STATES OF AMERICA,	)
	)
Plaintiff - Appellee	)
	)
v.	)
	)
MICHAEL HERROLD,	)
	)
Defendant - Appellant	)
	)

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:13-CR-225-1

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

Before HIGGINBOTHAM, SOUTHWICK, and HIGGINSON, Circuit Judges.

PER CURIAM:[*]

On November 5, 2012, Dallas police pulled over Michael Herrold as part of a routine traffic stop. During the encounter, the officers observed a handgun in plain view. Because he was a convicted felon, Herrold's possession of the firearm was illegal under 18 U.S.C. § 922(g)(1), a charge to which he subsequently pled guilty without a plea agreement. Under the enhanced penalty provisions of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), Herrold faced a statutory minimum of fifteen years' imprisonment.

Herrold's previous felony offenses were: (1) possession of lysergic acid diethylamide ("LSD") with intent to deliver, (2) burglary of a habitation, and (3) burglary of a building, all under Texas law. Herrold argued to the district court that none of his prior convictions qualified as predicate offenses under the ACCA. The district judge disagreed and sentenced Herrold to 211 months in prison. Without the enhancement, Herrold would have faced a maximum penalty of ten years.[1] He timely appealed his sentence.

We held that all three of Herrold's convictions qualified as ACCA predicates and affirmed his

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[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] 18 U.S.C. § 924(a)(2).

sentence.[2] Herrold appealed to the United States Supreme Court, which granted certiorari, vacated our judgment, and remanded for reconsideration in light of *Mathis v. United States*.[3] On remand, we will affirm.

Herrold's supplemental briefing on remand concedes that his conviction for possession of LSD with intent to deliver is unaffected by *Mathis*. His argument instead centers on his two prior burglary convictions. First, he argues that his conviction for burglary of a habitation is not an ACCA predicate because *Mathis* makes clear that burglary statutes like Texas's, which define "habitation" to include recreational vehicles,[4] are broader than generic burglary. Second, he argues neither of his burglary convictions is an ACCA predicate because *Mathis* compels the conclusion that Texas's burglary provision, Texas Penal Code § 30.02(a), is indivisible.

Herrold's arguments are foreclosed. In *United States v. Uribe*, this court held that Texas Penal Code § 30.02(a) remained divisible after *Mathis*.[5] Herrold admits that *Uribe* forecloses his second argument. With respect to his first argument, *Uribe* concerned a conviction for Texas burglary of a habitation, and the court held that such a conviction continued to support

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[2] *United States v. Herrold*, 813 F.3d 595 (5th Cir. 2016).

[3] *Herrold v. United States*, 137 S. Ct. 310 (2016) (citing 136 S. Ct. 2243 (2016)).

[4] Tex. Penal Code § 30.01(1).

[5] 838 F.3d 667, 671 (5th Cir. 2016).

a Sentencing Guidelines enhancement as generic burglary after *Mathis*, which means that Texas burglary of a habitation also continues to support an ACCA enhancement as generic burglary after *Mathis*.[6] This forecloses Herrold's first argument.

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Upon remand, we find that *Uribe* mandates the result that we originally reached.[7] We again affirm the sentence of the district court.

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[6] *Id.*

[7] Uribe's petition for rehearing en banc was denied without a poll, and the Supreme Court denied his petition for certiorari. *Uribe v. United States*, No. 16-7969, 2017 WL 661924 (U.S. Mar. 20, 2017).

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-11317

[Filed February 12, 2016]

UNITED STATES OF AMERICA,	)
	)
Plaintiff–Appellee	)
	)
v.	)
	)
MICHAEL HERROLD,	)
	)
Defendant - Appellant	)
	)

Appeal from the United States District Court
for the Northern District of Texas

Before HIGGINBOTHAM, SOUTHWICK, and HIGGINSON, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

On November 5, 2012, Dallas law enforcement pulled over Michael Herrold as part of a routine traffic stop. During the encounter, the officers observed a handgun in plain view. Because he was a convicted felon, Herrold's possession of the firearm was illegal

under 18 U.S.C. § 922(g)(1), a charge to which he subsequently pled guilty without a plea agreement. Under the enhanced penalty provisions of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), Herrold faced a statutory minimum of fifteen years imprisonment.

Herrold's previous felony offenses included: (1) possession of lysergic acid diethylamide ("LSD") with intent to deliver, (2) burglary of a building, and (3) burglary of a habitation. In the court below, Herrold argued that none of his prior convictions qualify as predicate offenses under the ACCA. The district judge disagreed, and sentenced Herrold to 211 months in prison. Without the enhancement, Herrold would have faced a maximum penalty of ten years.[1] He timely appealed his sentence.

This Court reviews the application of an ACCA sentencing enhancement de novo.[2] Because we hold that each of Herrold's prior offenses qualify as predicate offenses under ACCA, we affirm.

I.

First, Herrold argues that his conviction for burglary of a building[3] should not qualify as generic

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[1] 18 U.S.C. § 924 (a)(2).

[2] *United States v. Constante*, 544 F.3d 584, 585 (5th Cir. 2008); *see also United States v. Fuller*, 453 F.3d 274, 278 (5th Cir. 2006); *United States v. Munoz,* 150 F.3d 401, 419 (5th Cir. 1998).

[3] In 1992, he confessed to "knowingly and intentionally enter[ing] a building. . . with intent to commit theft" under Texas Penal Code

burglary, one of the enumerated predicate offenses in ACCA.[4] But his argument is foreclosed by our holding in *Conde-Castenada*, in which we held that burglary of a building under Texas Penal Code § 30.02(a)(1) qualifies as generic burglary.[5] "It is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court, a panel cannot overrule a prior panel's decision."[6] Herrold has cited no intervening authority under which to reconsider *Conde-Castenada.* His conviction for burglary of a building qualifies as a predicate offense for ACCA sentence enhancement.

II.

Herrold next argues that his conviction for burglary of a habitation cannot qualify as a predicate offense under ACCA because Texas law defines "habitation" to

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§ 30.02(a)(1). R. 263. The statute reads: "(a) A person commits an offense if, without the effective consent of the owner, the person: (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault[…]"

[4] *See* 18 U.S.C. 924 § (e)(2)(B)(ii).

[5] *United States v. Conde-Castaneda*, 753 F.3d 172, 174 (5th Cir. 2014); *see also United States v. Fearance*, 582 F. App'x 416, 416-17 (5th Cir. 2014) (applying this holding to an ACCA case), *cert. denied* 135 S.Ct. 311 (2015).

[6] *See United States v. Lipscomb*, 299 F.3d 303, 313 n.34 (5th Cir. 2002) (quoting *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999)).

include "vehicles adapted for overnight use."[7] This definition, Herrold claims, covers offenses outside the scope of generic burglary, defined by the Supreme Court in *Taylor v. United States* as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime."[8] Herrold further contends that this Court's decision in *United States v. Silva*[9] does not foreclose his argument. We disagree.

In *Silva*, this Court affirmed the defendant's enhanced sentence under ACCA based on three prior convictions under Texas Penal Code § 30.02, two for burglary of a habitation and one for burglary of a building.[10] We concluded that burglary as defined by § 30.02 is generic burglary, explaining that

> [t]he Supreme Court in *Taylor* stated that "if the defendant was convicted of burglary in a State

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[7] Tex. Penal Code § 30.01(1). In determining that Herrold's burglary of a habitation conviction qualified for enhancement, the district court declined to specify whether it fell within the ACCA as a generic burglary or as covered by the residual clause. After *Johnson v. United States*, 135 S. Ct. 2551 (2015), in which the Supreme Court held that the residual clause is unconstitutionally vague, we can only affirm if Texas burglary of habitation is generic burglary. Of course, we may affirm on any basis supported by the record. *United States v. McGee*, 460 F.3d 667, 669 n.3 (5th Cir. 2006).

[8] 495 U.S. 575, 598 (1990).

[9] 957 F.2d 157 (1992).

[10] *Id.* at 161.

> where the generic definition has been adopted, with minor variations in terminology, then the trial court need find only that the state statute corresponds to the generic meaning of burglary." . . . Section 30.02 of the Texas Penal Code is a generic burglary statute, punishing *nonconsensual entry into a building with intent to commit a crime.* Under the reasoning of *Taylor,* Silva's burglary convictions clearly indicate that he was found guilty of all the essential elements comprising generic burglary. Accordingly, Silva's three Texas burglary convictions were sufficient predicate convictions for enhancement of his sentence pursuant to 18 U.S.C. § 924(e).[11]

Our reasoning admittedly never explicitly stated which provision of 30.02 we were classifying as generic burglary.[12] Section 30.02(a) describes three different courses of conduct:

> (a) A person commits an offense if, without the effective consent of the owner, the person:
>
> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
>
> (2) remains concealed, with intent to commit

---

[11] *Id*. at 162 (emphasis added).

[12] Although *Silva* does not specify any subsection of § 30.02, the italicized language in the excerpt above most closely tracks (a)(1), providing further support for the argument that we addressed that provision.

> a felony, theft, or an assault, in a building or habitation; or
>
> (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

Under *Taylor*, generic burglary requires both entry and specific intent, which are not present in subsections 2 and 3, respectively.[13] Subsection 1 is the only provision that includes both. As we later clarified, *Silva* "could have only been referring to § 30.02(a)(1)" in holding that Texas burglary qualifies as generic burglary.[14] This Court has consistently affirmed this interpretation of *Silva* in a series of unpublished opinions.[15]

Herrold maintains that the court in *Silva* never considered the argument that Texas's definition of

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[13] *Taylor*, 495 U.S. at 598; *see also Constante*, 544 F.3d at 586 ("Since § 30.02(a)(3) does not include the element of specific intent, *Silva* cannot support the district court's conclusion that a conviction under § 30.02(a)(3) is a violent felony for purposes of 18 U.S.C. § 924(e).").

[14] *Constante*, 544 F.3d at 586.

[15] *See, e.g.*, *United States v. Wallace*, 584 F. App'x 263, 264-65 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1512 (2015) ("We have previously held that a conviction under § 30.02(a)(1) qualifies as a generic burglary for purposes of the ACCA."); *United States v. Hageon*, 418 F. App'x 295, 298 (5th Cir. 2011) ("The Texas crime of burglary as defined in § 30.02(a)(1) therefore qualifies as a violent felony under the ACCA."); *United States v. Cantu*, 340 F. App'x 186, 190-91 (5th Cir. 2009) ("[T]he Government has shown that Cantu's burglary . . . violated Texas Penal Code § 30.02(a)(1) and was therefore a violent felony.").

habitation – by including vehicles adapted for the overnight accommodation of persons – broadens the statute beyond generic burglary. He reasons that we are not "bound to follow our dicta in a prior case in which the point now at issue was not fully debated."[16] But the holding in *Silva*, however imprecisely phrased, is not dictum. Our affirmance of Silva's sentence necessarily required the determination that Texas burglary of a habitation qualified as generic burglary for purposes of ACCA. Without those two convictions, he would have had only a single qualifying previous offense. That the court in *Silva* did not consider the argument that Herrold now advances does not make the holding any less binding.[17] *Silva* therefore forecloses Herrold's argument that his conviction for burglary of a habitation does not qualify as a predicate offense under ACCA.

III.

Finally, Herrold argues that his conviction for possession of LSD with intent to deliver is not "a serious drug offense" under ACCA. We disagree.

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[16] *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821) (Marshall, C.J.)).

[17] *See Sykes v. Tex. Air Corp.*, 834 F.2d 488, 492 (5th Cir. 1987) ("The fact that in [the prior decision] no litigant made and no judge considered the fancy argument advanced in this case does not authorize us to disregard our Court's strong rule that we cannot overrule the prior decision."); *see also Crowe v. Smith*, 151 F.3d 217, 233 (5th Cir. 1998) ("Whatever we might think of this reasoning as a de novo matter, we are of course bound by our prior circuit precedent[…]").

The ACCA definition of a "serious drug offense" includes "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law."[18] In 1992, Herrold pled guilty to "unlawful possession with intent to deliver a controlled substance" under Texas Health & Safety Code § 481.112(a). Herrold suggests that the least culpable conduct covered by the statute is the possession of drugs with intent to offer them for sale without actually offering them for sale;[19] he argues that such possession does not "involve" the distribution of drugs, meaning that his conviction under § 481.112(a) is not a "serious drug offense."

Herrold's argument is unpersuasive. "The word 'involving' has expansive connotations,"[20] and by using it, "Congress intended the category of convictions considered a 'serious drug offense' to be expansive."[21]

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[18] 18 U.S.C. § 924(e)(2)(A)(ii).

[19] Because ACCA requires a "categorical approach" that evaluates the breadth of the defendant's statute of conviction rather than his conduct, *see United States v. Allen*, 282 F.3d 339, 342 (5th Cir. 2002), we look to the statute's "least culpable means" of commission to see if that conduct constitutes a "serious drug offense." *United States v. Houston*, 364 F.3d 243, 246 (5th Cir. 2004).

[20] *United States v. Winbush*, 407 F.3d 703, 707 (5th Cir. 2005) (quoting *United States v. King,* 325 F.3d 110, 113-14 (2d Cir. 2003)).

[21] *United States v. Vickers*, 540 F.3d 356, 365 (5th Cir. 2008).

For example, in *United States v. Vickers*, we held that a conviction for "delivery of a controlled substance" was a serious drug offense,[22] despite the fact that someone could have been guilty by "solely. . . offering to sell a controlled substance" without possessing any drugs.[23] We reasoned that "[b]eing in the drug marketplace as a seller—even if, hypothetically, the individual did not possess any drugs at that time" was the kind of criminal history that "Congress was reaching by the ACCA."[24]

Like Vickers, Herrold was in the drug market as a seller. The next step in his conduct, one he intended to take, was the completion of a drug transaction. The least culpable conduct covered by Herrold's statute of conviction is arguably closer to the distribution chain than Vickers's because Herrold necessarily possessed the drugs he intended to distribute. Even if he never offered the drugs for sale, Herrold's conduct "involve[d]. . . possessing with intent to. . . distribute."[25] His conviction is therefore a serious drug offense under ACCA.

AFFIRMED.

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[22] *Id*. at 363.

[23] *Id*. at 364.

[24] Id. at 365-66.

[25] 18 U.S.C. § 924(e)(2)(A).

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-11317

[Filed March 23, 2016]

UNITED STATES OF AMERICA,	)
	)
Plaintiff - Appellee	)
	)
v.	)
	)
MICHAEL HERROLD,	)
	)
Defendant - Appellant	)
	)

Appeal from the United States District Court
for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

(Opinion: February 12, 2016, 5 Cir., ___, ___, F.3d __)

Before HIGGINBOTHAM, SOUTHWICK, and HIGGINSON, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for

Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-11317

[Filed July 7, 2017]

UNITED STATES OF AMERICA,	)
	)
Plaintiff – Appellee	)
	)
versus	)
	)
MICHAEL HERROLD,	)
	)
Defendant – Appellant	)
	)

Appeal from the United States District Court
for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

(Opinion February 12, 2016, 5 Cir., 2016, 813 F.3d 595)
(Opinion on Remand from U.S. Sup. Ct. April 11, 2017, 5 Cir., 2017, ___ Fed. Appx. ___)

Before STEWART, Chief Judge, JOLLY, JONES, SMITH, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON and COSTA, Circuit Judges.

BY THE COURT:

A member of the court having requested a poll on the petition for rehearing en banc, and a majority of the circuit judges in regular active service and not disqualified having voted in favor,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-11317

[Filed November 4, 2019]

UNITED STATES OF AMERICA,	)
	)
Plaintiff - Appellee	)
	)
v.	)
	)
MICHAEL HERROLD,	)
	)
Defendant - Appellant	)
	)

Appeal from the United States District Court
for the Northern District of Texas

Before OWEN, Chief Judge, and JOLLY, HIGGINBOTHAM, JONES, SMITH, STEWART, DENNIS, CLEMENT, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, HO, DUNCAN, ENGELHARDT, and OLDHAM, Circuit Judges.

IT IS ORDERED that appellant's opposed motion to recall the mandate is DENIED.

APPENDIX H

Statutory Provisions Involved

1. 18 U.S.C. § 922 provides, in pertinent part:

   (g) It shall be unlawful for any person—

   (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * *

   to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

2. 18 U.S.C. § 924 provides, in pertinent part:

   (a)

   * * *

   (2) Whoever knowingly violates subsection (a) (6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

   * * *

(e)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

3. In December 1991 and May 1992, the Texas Penal Code provided as follows:

§ 30.02. Burglary

(a) A person commits an offense if, without the effective consent of the owner, he:

(1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony or theft; or

(2) remains concealed, with intent to commit a felony or theft, in a building or habitation; or

(3) enters a building or habitation and commits or attempts to commit a felony or theft.

(b) For purposes of this section, "enter" means to intrude:

(1) any part of the body; or

(2) any physical object connected with the body.

(c) Except as provided in Subsection (d) of this section, an offense under this section is a felony of the second degree.

(d) An offense under this section is a felony of the first degree if:

(1) the premises are a habitation; or

(2) any party to the offense is armed with explosives or a deadly weapon; or

(3) any party to the offense injures or attempts to injure anyone in effecting entry or while in the building or in immediate flight from the building.

4. On October 3, 1992, the Texas Health & Safety Code provided, in pertinent part:

§ 481.002. Definitions

In this chapter:

* * *

(8) "Deliver" means to transfer, actually or constructively, to another a controlled substance, counterfeit substance, or drug paraphernalia, regardless of whether there is an agency

relationship. The term includes offering to sell a controlled substance, counterfeit substance, or drug paraphernalia.

§ 481.102. Penalty Group 1

Penalty Group 1 consists of:

* * *

(5) Lysergic acid diethylamide, including its salts, isomers, and salts of isomers

§ 481.112. Offense: Manufacture or Delivery of Substance in Penalty Group 1

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally manufactures, delivers, or possesses with intent to manufacture or deliver a controlled substance listed in Penalty Group 1.

(b) An offense under Subsection (a) is a felony of the first degree if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, less than 28 grams.