NO. 19-7731

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

PETITIONER'S REPLY BRIEF

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

September 24, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

In the Supreme Court of the United States

No 19-7731

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

REPLY

The decision below (and the Government's Brief defending that decision) typify an attitude under which it is presumed that the Armed Career Criminal Act applies and it is up to a defendant to prove otherwise. But this Court's precedent "demand[s] . . . certainty" before applying the enhancement. *Mathis* v. *United States*, 136 S. Ct. 2243, 2257 (2016) (quoting *Shepard* v. *United States*, 544 U.S. 13, 21 (2005)).

Petitioner has shown that Texas burglary is plainly broader on its face than generic burglary because one form of the crime replaces the traditional *mens rea* element (intent to commit a crime inside the premises) with a broader element—*commission* of a crime inside the premises. And he has shown that Texas defines "delivery" of a controlled substance to

include a mere offer to sell simulated or fake substances. That means the Texas crime does not "necessarily entail one of the types of conduct identified in § 924(e)(2)(A)(ii)." *Shular* v. *United States*, 140 S. Ct. 779, 784 (2020) (internal quotation omitted).

The Government's arguments against certiorari are unpersuasive. The Court should grant the petition and set the case for a decision on the merits. Alternatively, the Court should vacate the decision below and remand for further consideration in light of *Shular*.

A. This case directly implicates the broader conflict over the reasonable probability standard and the narrower conflict over the new trespass-plus-crime theory of burglary.

Trespass-plus-crime statutes prohibit conduct that would not ordinarily count as generic burglary because they do not require proof of specific intent to commit an additional crime (other than trespass) inside the premises. Texas Penal Code § 30.02(a)(3) reaches *any* assault and *any* felony committed by a trespasser, and there are "several felonies that fit in this enumerated list but do not require 'the intent to commit a crime.'" Pet. App. 9a. In the Seventh Circuit, that is enough to make the crime non-generic: the categorical approach is "elements-based," and the *text* of a statute determines its elements. *Van Cannon* v. *United States*, 890 F.3d 656, 664 (7th Cir. 2018) (The ACCA's "elements-based approach does not countenance imposing an enhanced sentenced based on implicit features in the crime of conviction.").

That wasn't enough to make the crime non-generic in the Fifth Circuit. Petitioner's "argument fail[ed] for lack of supportive Texas cases." Pet. App. 10a (discussing *United States* v. *Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc). As that court recently re-emphasized, there is "*no exception*"—every defendant must point to an "actual" case prosecuted on non-generic facts, even where, as here, "a court concludes a state statute is broader on its face." *Alexis* v. *Barr*, 940 F.3d 722, 727 (5th Cir. 2020); *see id.* at 731 (Graves, J., concurring) (protesting that "the realistic probability test and 'actual case' requirement are simply illogical and unfair"); *id.* at 735 (Dennis, J., dissenting) ("[W]e should interpret *Castillo-Rivera* more narrowly and realistically to avoid creating such an unreasonable and insurmountable hurdle.")

The Government contends that this case "does not implicate" the entrenched division over the realistic probability test, U.S. Br. 16, but this rings hollow. The Fifth Circuit explicitly *said* that Petitioner's "argument fails for lack of supportive Texas cases." Pet. App. 10a; *see also id.* 11a (faulting Petitioner because "he does not point to any convictions matching this description, nor does he cite a single Texas case").

The Fifth Circuit also acknowledged that the text of § 30.02(a)(3) is broader than generic burglary: The "enumerated" predicates include crimes that could be committed with only recklessness or "criminal negligence." Pet. App. 9a. Said another way, the Fifth Circuit recognized that § 30.02(a)(3) was broader than generic burglary *on its face*. But under Fifth Circuit precedent, a defendant must show *more* than facial over-

breadth of his statute of conviction. It is hard to imagine how a case could *more directly* implicate the broader circuit conflict over the categorical approach.

Despite this very clear language identifying the basis for the Fifth Circuit's decision, the Government suggests that the court was instead following an "authoritative interpretation of the Texas burglary statute" by the Texas Court of Criminal Appeals. U.S. Br. 16 (citing *DeVaughn* v. *State*, 749 S.W.2d 62, 65 (Tex. Crim. App. 1988)). But *DeVaughn* proves exactly the opposite: In Subsection (a)(3), the commission of a predicate offense "*supplants* the specific intent" which would otherwise be required under Texas Penal Code § 30.02(a)(1) and (a)(2). *DeVaughn*, 749 S.W.2d at 65 (emphasis added).

It is true that Subsection (a)(3) *allows* conviction where a trespasser enters and then "subsequently forms that intent and commits or attempts a felony or theft." *DeVaughn*, 749 S.W.2d at 65 (quoting Seth S. Searcy, III and James R. Patterson, *Practice Commentary* 144, Vernon's Texas Codes Annotated (West 1974)). But that does not mean the statute *requires* formation of specific intent to convict.

That much is clear from *Lomax* v. *State*, 233 S.W.3d 302, 305 (Tex. Crim. App. 2007). In Texas, the crimes of murder and burglary share a similar structure: (1) there are three ways for prosecutors to prove the crime; (2) the first two ways explicitly require proof of *mens rea*; and (3) the third way supplants or replaces the *mens rea* element if prosecutors prove commission of a separate predicate offense:

Murder (Penal Code § 19.02(b)):	**Burglary (Penal Code § 30.02(a)):**
A person commits an offense if he:	A person commits an offense if, without the effective consent of the owner, the person:
(1) **intentionally or knowingly** causes the death of an individual;	(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) **intends to cause serious bodily injury** and commits an act clearly dangerous to human life that causes the death of an individual; or	(2) remains concealed, **with intent to commit a felony, theft, or an assault**, in a building or habitation; or
(3) **commits or attempts to commit a felon**y, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt . . . he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.	(3) enters a building or habitation and **commits or attempts to commit a felony, theft, or an assault**.

Lomax held that this structure unambiguously *eliminated* the requirement to prove additional *means rea* beyond that required for commission of the predicate offense: "It is significant and largely dispositive that Section 19.02(b)(3) omits a culpable mental state while the other two subsections in Section 19.02(b) expressly require a culpable mental state." 233 S.W.3d at 304 (quoting *Aguirre* v. *State*, 22 S.W.3d 463, 472–473 (Tex. Crim. App. 1999)); *id.* at 307 n.14 ("It is difficult to imagine how Section 19.02(b)(3), with its silence as to a culpable mental state, could be construed to require a culpable mental state for an underlying felony for which the Legislature has plainly dispensed with a culpable mental state.")

After *Lomax*, it is impossible to accept the Government's premise that § 30.02(a)(3) somehow requires proof of specific intent to commit the predicate offense. Subsection (a)(1) and (a)(2) require proof of specific intent; Subsection (a)(3) "supplants" the *mens rea* element where prosecutors prove commission of a predicate crime while trespassing. *DeVaughn*, 749 S.W.2d at 65.

Texas courts discussing § 30.02(a)(3) have repeatedly and consistently stated that proof that a trespasser committed a reckless or negligent felony would satisfy the Government's burden. See, *e.g.*, *State* v. *Duran*, 492 S.W.3d 741, 743 (Tex. Crim. App. 2016) (recognizing reckless assault as a predicate for § 30.02(a)(3) liability); *Scroggs* v. *State*, 396 S.W.3d 1, 10 & n.3 (Tex. App. 2010) (same); *Wingfield* v. *State*, 282 S.W.3d 102, 105 (Tex. App. 2009) (same); *Battles* v. *State*, 13-12-00273-CR, 2013 WL 5520060, at *1 & n.1 (Tex. App. 2013) (recognizing that the predicate

felony could be committed by recklessly or negligently injuring an elderly person).

It is true that Petitioner cannot *prove* that the brute facts of these cases involved only recklessness or negligence. That is a "nearly impossible" task, as the Fifth Circuit recognizes. *Alexis*, 960 F.3d at 729. But if facial overbreadth is enough—as most circuits hold—then § 30.02(a)(3) is overbroad and non-generic. And the en banc Court "reinstate[d]" its previous holding that § 30.02(a) was a single, indivisible offense. Pet. App. 7a.

B. Petitioner properly preserved his argument that his prior offense should not count as a "serious drug offense" under the ACCA.

Twelve years ago, the Fifth Circuit adopted an "exceedingly broad" definition of the term "involving," as used in the ACCA's definition of "serious drug offense." *United States* v. *Vickers*, 540 F.3d 356, 365 (5th Cir. 2008). In Texas, a defendant commits "delivery" of a controlled substance if he merely offers to sell what he claims to be a controlled substance. "The intentional offer to sell a controlled substance is the crime; the accused need not have any drugs to sell or even intend ever to obtain the drugs he is purporting to sell." *United States* v. *Vickers*, 540 F.3d 356, 365 (5th Cir. 2008) (discussing *Stewart* v. *State*, 718 S.W.2d 286, 288 (Tex. Crim. App. 1986) and *Francis* v. *State*, 890 S.W.2d 510, 513 (Tex. App. 1994)). The Government does not dispute any of that.

Shular unambiguously overruled this "exceedingly broad" interpretation of the definition. To count as a

serious drug offense, a state crime must "necessarily entail one of the types of conduct" identified in § 924(e)(2)(A)(ii)"—that is, it must "necessarily require" proof of "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))." 18 U.S.C. § 924(e)(2)(A)(ii). The Government does not dispute that, either. U.S. Br. 18. It affirmatively advocated that position in *Shular*.

A crime involving "substances not on the federal lists" does not "necessarily involve" conduct covered by the serious drug offense definition. *See Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1982 (2015). Thus, where a state crime can be committed by possessing *simulated* drugs, it is not a crime covered by the federal drug statutes. *United States* v. *Brown*, 598 F.3d 1013, 1018 (8th Cir. 2010); *accord United States* v. *Thompson*, 961 F.3d 545, 552–553 (2d Cir. 2020).

According to the Government, Petitioner did not properly preserve his challenge to the Fifth Circuit's interpretation of "serious drug offense" because his *original* appellate brief (filed in April 2015) focused not on *delivery* of a controlled substance (including delivery by fraudulent offer), but on *possession* of a controlled substance *with intent to deliver*. U.S. Br. 19–20. There were two reasons for that narrow focus. First, *Vickers* foreclosed any argument that a fraudulent offer fell outside the "exceedingly broad" reach of the "serious drug offense" definition. 540 F.3d at 365. Second, the Fifth Circuit had held that *delivery* of a controlled substance was divisible from *possession*

with intent to deliver. *See United States* v. *Ford*, 509 F.3d 714 (5th Cir. 2007).

Since that time, this Court decided *Mathis*, then vacated the original Fifth Circuit panel decision. 137 S. Ct. 310. The Fifth Circuit now recognizes that "delivery" and possession-with-intent-to-deliver are *indivisible*, with a mere offer being the least culpable form of the crime. *United States* v. *Tanksley*, 848 F.3d 347, 349 (5th Cir. 2017), supplemented, 854 F.3d 284 (5th Cir. 2017). But the Fifth Circuit *reiterated* its view that "involving" broad enough to include such offers in *United States* v. *Cain*, 877 F.3d 562 (5th Cir. 2017). In his most recent briefing to the Fifth Circuit, Petitioner acknowledged that the argument remained foreclosed by *Vickers* and *Cain*, but alerted the court that this "could change" with the forthcoming decision in *Shular*. Herrold Aug. 2019 Supp. Br. 7 (filed Aug. 9, 2019). He "preserve[d] the issue for further review." *Ibid.* Without waiting for *Shular*, the Fifth Circuit passed on the issue by holding, again, that his crime was a "serious drug offense." Pet. App. 2a n.2. Petitioner certainly "did not concede in the current case the correctness of" *Vickers*. *United States* v. *Vonn*, 535 U.S. 55, 59 (2002).

More importantly, the Fifth Circuit allowed the Government to retreat from an outright concession made at the same early stage of this litigation and carried forward much longer. At the original sentencing hearing, the Government conceded "that a conviction under Texas Penal Code § 30.02(a)(3), does not qualify as generic burglary." 5th Cir. Sealed R. 356. The Government did not back away from that concession in its October 2015 Supplemental Brief, its January 2016

Oral Argument, its September 2016 response to Petitioner's original petition for certiorari, its March 2017 Supplemental Brief after the first remand, or its May 2017 opposition to Petitioner's request for rehearing en banc. The argument that § 30.02(a)(3) *was*, in fact, generic burglary first appeared on pages 50–57 of the Government's September 2017 En Banc Brief. The Government ultimately prevailed on this argument because the Fifth Circuit allowed it to modify its argument to reflect changes in governing law. Pet. App. 8a n.28.

This Court unequivocally overruled the gloss that controlled the decision below. Before *Shular*, the Fifth Circuit had held that a mere offer to sell drugs—even where the offender had no "drugs to sell" and did not "even intend ever to obtain the drugs he is purporting to sell"—was a serious drug offense. *Vickers*, 540 F.3d at 365. The court included conduct so far from real distribution because it believed "involving" carried "expansive connotations" to include acts "beyond the precise offenses of distributing, manufacturing, or possessing" drugs. *Vickers*, 540 F.3d at 365 (quoting *United States* v. *Winbush*, 407 F.3d 703, 707 (5th Cir. 2005). That cannot be reconciled with *Shular*.

This Court should grant the petition to decide whether a mere offer to sell what one claims to be a controlled substance—something that is not a federal crime—is nonetheless a "serious drug offense." Alternatively, the Court should vacate the decision below and remand for reconsideration in light of *Shular*.

CONCLUSION

This Court should grant the petition and reverse the judgment of the court of appeals below.

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

September 24, 2020