NO._____

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA WALLACE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(7), Petitioner Joshua Wallace asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (c), in the United States District Court and on appeal to the United States Court of Appeals for the Fifth Circuit.

Date: August 31, 2020

Respectfully submitted,

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QUESTION PRESENTED

Where a state statute explicitly defines "burglary" in a way that does not require proof of an intent to commit a crime, and thus lacks an element necessary to satisfy the Armed Career Criminal Act's generic definition of "burglary," 18 U.S.C. § 924(e)(2)(B)(ii), is that facial overbreadth enough to demonstrate that the crime is non-generic, or must a federal defendant also prove that the state has convicted someone who did not, in fact, harbor that intent?

PARTIES TO THE PROCEEDINGS

All parties to the petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

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PRAYER

Petitioner Joshua Wallace ("Mr. Wallace") prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Westlaw version of the opinion of the United States Court of Appeals for the Fifth Circuit, *United States v. Wallace*, 964 F.3d 386 (5th Cir. 2020), is attached to this petition as Appendix A. The written order of the United States District Court for the Southern District of Texas denying Mr. Wallace's motion to vacate his sentence pursuant to 28 U.S.C. § 2255 is attached as Appendix B.

JURISDICTION

The Fifth Circuit's judgment and opinion was entered on July 6, 2020. *See* Appendix A. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Wallace*, No. 2:12-cr-595 (S.D. Tex.) (original judgment entered Jan. 18, 2013).

2. *United States v. Wallace*, No. 13-40136 (5th Cir.) (judgment entered Jan. 8, 2014).

3. *United States v. Wallace*, No. 14-40281 (5th Cir.) (judgment entered Nov. 21, 2014).

4. *Wallace v. United States*, No. 14-8159 (U.S.) (order denying certiorari March 2, 2015).

5. *Wallace v. United States*, No. 2:16-cv-0020 (S.D. Tex.) (judgment entered Dec. 15, 2016).

6. *United States v. Wallace*, No. 17-40007 (5th Cir.) (judgment entered July 6, 2020).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Armed Career Criminal Act, 18 U.S.C. § 924(e); Tex. Penal Code § 30.02 (West 1974); and Tex. Penal Code § 30.02 (West 1994). Those provisions are reprinted in Appendices C - E.

INTRODUCTION

The Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), imposes a mandatory minimum sentence of fifteen years in prison for any convicted felon who unlawfully possesses a firearm and who has three prior convictions for any "violent felony" or "serious drug offense." 18 U.S.C. § 924(e)(1). Absent the ACCA's mandatory minimum, the maximum prison sentence for a felon-in-possession conviction is ten years. 18 U.S.C. § 924(a)(2).

The Question Presented in this case concerns the definition of "burglary." The ACCA defines "violent felony" to include a conviction for "burglary" punishable by imprisonment for a term exceeding one year. § 924(e)(2)(B)(ii). In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court held that § 924(e) uses the term "burglary" in its generic sense, to cover any crime "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, *with intent to commit a crime*." *Id*. at 598-599 (emphasis added).

The Question Presented has led to divisions among the circuits in part because Texas, along with a handful of other states, has chosen to define the common crime of burglary in an uncommonly broad way.

The element that has always distinguished burglary from mere trespass is the *intent to commit a crime* inside the building. 4 William Blackstone, *Commentaries on the Laws of England* 227 (1769) ("[I]t is clear, that [the] breaking and entry must be with a felonious intent, otherwise it is only a trespass."). Texas' theory "dispenses with the need to prove intent" when the actor actually commits a predicate crime inside the building after an

unlawful entry. *DeVaughn* v. *State*, 749 S.W.2d 62, 65 (Tex. Crim. App. 1988) (internal quotation omitted). Judge Sykes has helpfully dubbed this new theory "trespass-plus-crime." *Van Cannon v. United States*, 890 F.3d 656, 664 (7th Cir. 2018). For all five states with trespass-plus-crime statutes—Minnesota, Michigan, Montana, Tennessee, and Texas—the list of predicate offenses includes non-intentional crimes. In these states, prosecutors can convict a defendant for burglary by proving that he committed a reckless, negligent, or strict liability crime while trespassing. These burglary offenses are broader than *Taylor*'s generic burglary definition, because they lack the "intent" element *Taylor* plainly requires. So they should be deemed non-generic.

This Court explicitly reserved judgment on this issue in *Quarles v. United States*, 139 S. Ct. 1872, 1880 n.2 (2019). The issue has expressly divided the Fifth and Seventh Circuits. And it is intertwined with a deeper dispute about *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). Under that case, a petitioner claiming a state statute is non-generic cannot rely solely upon "application of legal imagination to a state statute's language," but must demonstrate "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." *Id*. at 193. In at least some circumstances, the defendant must "point to" a case "in which the state courts in fact did apply the statute in the special (nongeneric) manner" before the statute will be regarded as non-generic. *Id.*

Following *Duenas-Alvarez*, the circuits are divided about whether a defendant must advance proof in *every* case that a state statute has been applied to non-generic facts, or whether such evidence is unnecessary when the elements of the state crime are plainly

broader on their face than the generic crime. And the circuits are in "nearly unanimous disagreement" with the Fifth Circuit's position. *Hylton* v. *Sessions*, 897 F.3d 57, 65 (2d Cir. 2018). This entrenched dispute affects not only the ACCA, but every criminal and immigration statute that requires analysis of prior convictions.

Only through plenary review can this Court definitively resolve this continued circuit split, which contributes to the splintered application of the ACCA. The Court currently has pending a petition for certiorari in *Herrold v. United States*, No. 19-7731, which is scheduled for conference on September 29, 2020, and that petition raises these same issues on ACCA and Texas burglary. The line of *Herrold* decisions is the genesis of Mr. Wallace's case – the relief he sought in the Fifth Circuit was predicated on the Fifth Circuit's decision in *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (*en banc*), and the Fifth Circuit's decision in Mr. Wallace's case was based on that court's reconsideration and, ultimately, reversal of its earlier 2018 decision in *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (*en banc*), the decision from which the petitioner in *Herrold* now seeks certiorari. It may be appropriate for the Court to hold this petition for its decision in *Herrold*.

STATEMENT OF THE CASE

A. The original conviction, ACCA sentence, and first appeal.

On September 27, 2012, in the Corpus Christi Division in the Southern District of Texas, Joshua Wallace pleaded guilty to one count of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g) and 924(a)(2). At the rearraignment, Mr. Wallace was admonished that the maximum punishment possible for the offense of conviction was 10 years of imprisonment and 3 years of supervised release.

After the plea, the Presentence Investigation Report (PSR) prepared by the Probation Office proposed that Mr. Wallace was subject to an enhanced 15-year mandatory minimum sentence under the ACCA, 18 U.S.C. § 924(e), alleging that he had five qualifying "violent felony" convictions, all under Texas law:

- a 1994 conviction for burglary of a building in Dallas County;
- a 1994 conviction for burglary of a habitation in Dallas County;
- a 1997 conviction for burglary of a habitation in Navarro County;
- a 1997 conviction for burglary of a habitation in Limestone County; and,
- a 2005 conviction for escape from custody in Nueces County.

The PSR reflected a statutory mandatory minimum sentence of 15 years of imprisonment with a maximum sentence of life and up to 5 years of supervised release.

At sentencing, on January 17, 2013, the district court reviewed the prior convictions, finding that the burglary-of-habitation convictions qualified Wallace for the ACCA enhancement. The defendant did not object, and the district court accepted the government's recommendation of a 160-month prison sentence, finding that his criminal

history "fits within the definition of armed career criminal," but granting the government's motion for a sentence below the statutory mandatory minimum. The district court also imposed a 5-year term of supervised release.

On January 30, 2013, Mr. Wallace filed a *pro se* notice of appeal, and on appeal he challenged the application of the ACCA enhancement rather than the 10-year statutory maximum sentence to which he had pleaded guilty. In a decision issued on January 8, 2014, the Fifth Circuit Court of Appeals vacated the judgment and sentence, finding that the district court plainly erred by admonishing Mr. Wallace to the 10-year statutory maximum and then sentencing him under the enhanced mandatory minimum and statutory maximum sentence of 18 U.S.C. § 924(e). *United States v. Wallace*, 551 Fed. Appx. 193, 195-96 (5th Cir. 2014) (unpublished).

B. The second rearraignment, sentencing, and second appeal.

Following appeal the district court held a second plea proceeding on January 16, 2014, in which the district court corrected the error in admonishment, and Mr. Wallace entered a second plea of guilty to the same charge of being a felon in possession of a firearm. The Probation office prepared a new PSR, which repeated the statutory penalties associated with 18 U.S.C. § 924(e), based on the same five felonies. Both counsel and Mr. Wallace filed objections to the consideration of several of the burglary convictions as predicates for ACCA enhancement, with Wallace ultimately requesting a sentence under the 10-year statutory maximum of 18 U.S.C. § 924(a)(2).

At resentencing on February 27, 2014, counsel for Mr. Wallace argued that the district court could not determine the subsection of the Texas burglary statute under which

each conviction was entered, so that none of the burglary convictions could be used to enhance the sentence. The district court examined the conviction documents and determined that the conviction documents permitted narrowing of the offense of conviction to burglary with intent to commit theft for three burglary convictions, and that such convictions qualified as generic burglary for purposes of the ACCA. The government again made a motion for a downward departure from the statutory mandatory minimum sentence to a sentence of 160 months, and the district court granted that motion, sentencing Wallace again to 160 months of imprisonment and 5 years of supervised release.

Mr. Wallace appealed a second time. This time, the Fifth Circuit affirmed the conviction and sentence with the ACCA statutory enhancement, holding that the two prior Texas burglary convictions challenged on appeal qualified as "generic burglary" by applying the modified categorical approach to the Texas burglary statute as a divisible statute under *United States v. Conde-Castañeda*, 753 F.3d 172, 176 (5th Cir. 2014), and using Mr. Wallace's judicial confessions to establish the subsection under which conviction was entered. *United States v. Wallace*, 584 Fed. Appx. 263, 264-65 (5th Cir. 2014) (unpublished). This Court denied certiorari on March 2, 2015. *Wallace v. United States*, 135 S. Ct. 1512 (2015).

C. 2255 proceedings.

On January 19, 2016, Mr. Wallace filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255(a), arguing that his ACCA-enhanced sentence was invalid after *Johnson v. United States*, 576 U.S. 591 (2015), because his Texas burglary convictions no longer qualified as "violent felonies" under the now-void residual clause.

In its response, the government urged the district court to deny Mr. Wallace's motion because his burglary convictions still qualified as "violent felonies" under the ACCA because they were enumerated offenses under 18 U.S.C. § 924(e)(2)(B)(ii) and, therefore, not subject to challenge by reason of *Johnson*'s invalidation of the residual clause. The government argued that the district court should deny the motion to vacate because the burglary convictions could be narrowed, using the modified categorical approach and reviewing the conviction documents, to an ACCA-qualifying offense. Mr. Wallace, in turn, cited the district court to this Court's recent (June 23, 2016) decision of *Mathis v. United States*, 136 S. Ct. 2243 (2016), and argued that his burglary convictions no longer qualified as predicates for an ACCA enhancement in light of *Mathis*.

On December 15, 2016, the district court issued a memorandum opinion and order denying Mr. Wallace's § 2255 motion, agreeing with the government that the conviction documents for Mr. Wallace's prior burglary convictions established that he was convicted under Tex. Penal Code § 30.02(a) provisions which qualified as the generic enumerated offense of "burglary," and rejecting Mr. Wallace's *Mathis* arguments against divisibility of the statute. Ultimately, the district court ruled that three of Mr. Wallace's Texas burglary convictions constituted generic burglary and therefore qualified Mr. Wallace for the statutory enhanced sentence under 18 U.S.C. § 924(e).

D. *Herrold*, *Quarles*, and this appeal.

The Fifth Circuit granted Mr. Wallace a certificate of appealability on the issue of whether his Texas burglary convictions qualified as generic burglary convictions in light of *Mathis*. During the briefing process, the Fifth Circuit answered that question in the

negative in its decision in *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (*en banc*), in which the Fifth Circuit held that the Texas burglary statute was both indivisible and, by reason of Texas' incorporation of the trespass-plus-crime form of Tex. Penal Code §30.02(a)(3), beyond the generic meaning of burglary. *Id.* at 523-26, 529-37. Before oral argument in Mr. Wallace's appeal, however, this Court issued its opinion in *Quarles v. United States*, 139 S. Ct. 1872 (2019), in which the Court held that a Michigan statute penalizing the formation of an intent to commit a crime while remaining in a structure qualified as generic burglary for ACCA purposes. *Id.* at 1880. The *Quarles* opinion led the Fifth Circuit to re-examine its holding in *Herrold* (2018), and, in 2019, the *en banc* Court reversed itself in *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (*en banc*), holding that Texas' burglary statute, while indivisible, reached only generic burglary under the *Quarles* form. *Herrold*, 941 F.3d at 177. The Fifth Circuit rejected Herrold's arguments that trespass-plus-crime versions of burglary failed to meet the generic definition of burglary because of the lack of intent as a necessary element of the underlying crime, as the Seventh Circuit had decided in *Van Cannon v. United States*, 890 F.3d 656, 663-64 (7th Cir. 2018), in part, because Herrold could point to no specific "cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Herrold*, 941 F.3d at 179 (internal citation omitted).

In light of the 2019 *Herrold* decision, Mr. Wallace filed supplemental briefing in which he countered that *Quarles* did not reach a statute such as Texas' burglary statute, in which intentional conduct need never be proved because incorporated crimes included offenses that could be committed recklessly or negligently.

The Fifth Circuit rejected Mr. Wallace's arguments. The Fifth Circuit relied on its decision in *Herrold* (2019), holding that, as this Court had found with regard to Michigan law in *Quarles*, Texas court decisions required the formation of intent for the trespass-plus-crime form of burglary. *Wallace*, 964 F.3d at 388-90. To meet the challenge where the Fifth Circuit found Herrold had failed, namely, to produce cases where Texas courts had applied Texas' burglary definition to trespass-plus-crime forms of burglary committed without intent, Mr. Wallace presented cases in which recklessness was the state of mind for commission of the underlying crime. The Fifth Circuit nevertheless held that Texas' burglary offense did require intent because intent is inherent in the commission or attempted commission of a crime, and that such a substantive holding had been an alternative holding in its 2019 *Herrold* opinion. *Wallace*, 964 F.3d at 388-89 & 390.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari in this case because of the circuit split on the Question Presented of whether the trespass-plus-crime form of burglary qualifies as generic burglary for purposes of the ACCA. The circuits are divided on the question the Court deliberately left open in *Quarles*, and they do so because of their respective places within a larger, deeper, and well-entrenched debate about the basic rules for conducting the "categorical" inquiry after *Duenas-Alvarez*. That debate now encompasses all circuits but two, and it is one in which the Fifth Circuit sits as an outlier. The Fifth Circuit's stance also is irreconcilable with this Court's precedent.

The Question Presented is of national importance—both to the firearm defendants potentially subject to the ACCA, and to the even broader class of parties whose criminal and immigration cases depend upon the use of the categorical approach.

I. The federal courts of appeals are divided on the question expressly left open by *Quarles*: Does the trespass-plus-crime form of burglary equate to generic burglary if a *mens rea* other than intent can satisfy the elements of the statute?

"Burglary" is a trespass committed while harboring a culpable intent—specifically, a plan or purpose to commit another crime inside the premises. At common law—and in almost every jurisdiction today—that plan or purpose is what distinguishes "burglary" from a mere trespass. 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.13(e), p. 473 (1986). When Congress originally passed the ACCA, it incorporated this specific intent element within its definition of "burglary." Pub. L. 98-473, § 1803(2) (1984). And after that definition was inadvertently deleted, this Court agreed that the *intent* to commit another crime would be an "element" within the "generic" definition of burglary. *Taylor*,

495 U.S. at 598.

But Texas—along with a few other states—has adopted a newer, broader conception of burglary. This newer theory allows conviction *without* any proof about the trespasser's intent. If the trespasser committed another crime once inside the building, he is guilty of burglary. *See* Tex. Penal Code § 30.02(a)(3).

As of 1986, when the current version of "violent felony" was finalized, Professors LaFave and Scott described Texas as the *only* jurisdiction to adopt this unusual definition, "perhaps to obviate the problems of proof concerning whether the defendant's intent was formed before or after the unlawful reentry or remaining." LaFave & Scott, *supra*, at § 813(e), p. 475. As of today, only four other states have followed Texas' lead, with three expanding "burglary" to include a trespass-plus-crime theory,[1] and one other state grafting that theory onto its "home invasion" crime.[2]

The Seventh Circuit in *Van Cannon* held that one such statute, from Minnesota, was non-generic, because Minnesota, like Texas, permits conviction for burglary whenever a trespasser "commits a crime while in the building." *Id.* at 663 (describing Minn. Stat. § 609.582). And Judge Sykes, writing for the court, recognized that there are numerous ways under this statute for an entry to be "unprivileged but not accompanied by burglarious

[1] Minn. Stat. § 609.582 (eff. Aug. 1, 1988); Mont. Code Ann. § 45-6-204(1)(b) & (2)(a)(ii) (eff. Oct. 1, 2009); and Tenn. Code Ann. § 39-14-402(a)(3) (eff. July 1, 1995). Apart from fourth-degree burglary in Maryland, which requires only "breaking and entering," Md. Code Ann. Crim. Law § 6-205(a)(b), these trespass-plus-crime statutes appear to be the only "burglary" offenses in the entire nation that do not require proof of "intent to commit a crime" inside the premises.

[2] Mich. Comp. L. § 750.110a(2), (3), (4)(a) (eff. Oct. 1, 1999).

intent." *Id*. at 664. The *commission of a crime* is not synonymous with forming an intent to commit that crime: in Minnesota, "not all crimes are intentional; some require only recklessness or criminal negligence." *Id.*

The Seventh Circuit therefore held that this "trespass-plus-crime" theory of burglary "covers more conduct than *Taylor*'s definition of generic burglary," *Van Cannon*, 890 F.3d at 665, which requires "intent to commit a crime." *Taylor*, 495 U.S. at 598-599. "[T]he Minnesota statute doesn't require proof of intent to commit a crime *at all*—not at *any* point during the offense conduct." *Van Cannon*, 890 F.3d at 664. The court affirmed that this holding survived *Quarles*. *See Chazen* v. *Marske*, 938 F.3d 851, 860 (7th Cir. 2019).

In this case, however, the Fifth Circuit came to the opposite result, holding that Texas' expanded conception of burglary fits within *Taylor*'s generic definition. The Fifth Circuit drew its conclusion from its most recent *en banc* decision in *Herrold.* And in *Herrold*, the Fifth Circuit did not identify any material difference between Texas' burglary statute and Minnesota's. Indeed, the Fifth Circuit parted ways with the Seventh despite "the similarities of the Minnesota and Texas statutes." *Herrold*, 941 F.3d at 180. In *Herrold*, the reason for the departure was instead the circuits' differing interpretations of this Court's decision in *Duenas-Alvarez*.

The departure is even more extreme, however, in Mr. Wallace's case because he did identify Texas case law in which the state courts had applied Tex. Penal Code § 30.02(a)(3)'s trespass-plus-crime form to offenses committed with a *mens rea* less than

intent.[3] Mr. Wallace pointed to Texas cases where courts have affirmed burglary convictions predicated on the crime of injury to an elderly person under Tex. Penal Code § 22.04(a), which can be committed intentionally, knowingly, recklessly or with criminal negligence. *See Battles v. State*, No. 13-12-00273-CR, 2013 WL 5520060 (Tex. App. – Corpus Christi-Edinburg Oct. 3, 2013, pet. ref'd.) (not reported); *Carlock v. State*, 8 S.W.3d 717, 720-22 (Tex. App. – Waco 1999, pet. ref'd.) (affirming burglary conviction where multiple felonies committed within structure charged, including injury to elderly person, on the basis of proof of any such felony). The cases Mr. Wallace cited to the Fifth Circuit demonstrate that Texas does apply Tex. Penal Code § 30.02(a)(3) when the crime later committed after an intentional, unprivileged entry is committed with recklessness or criminal negligence. In rejecting Mr. Wallace's arguments, the Fifth Circuit failed to adhere to this Court's most recent determination that generic burglary included a requirement that the defendant form an *intent* to commit a crime while remaining within the structure, *see Quarles*, 139 S. Ct. at 1877, as did the Court's original description of the

[3] *See Daniel v. State*, No. 07-17-00216-CR, 2018 WL 6581507 at *1, *3 (Tex. App. – Amarillo Dec. 13, 2018, no pet.) (not reported) (burglary predicated on commission of assault where injury sustained by defendant breaking door where part of door frame hit victim); *Campbell v. State*, No. 13-14-00403-CR, 2015 WL 5136365 (Tex. App. – Corpus Christi-Edinburg Aug. 31, 2015, pet. ref'd.) (not reported) (burglary predicated on assault occurring by pushing victim in or near his bed); *Sneed v. State*, No. 05-12-01061-CR, 2014 WL 5477386 (Tex. App. – Dallas Oct. 30, 2014, pet. ref'd.) (not reported) (affirming sufficiency of evidence for burglary based on an assault where the defendant pushed a door to obtain entry and the door hit the victim in the head to cause injury); *see also Trejo v. State*, No. 13-04-143-CR, 2005 WL 1845604 (Tex. App. – Corpus Christi-Edinburg Aug. 4, 2005, no pet.) (not reported) (holding that instructing the jury on a reckless *mens rea* in a burglary charge predicated on commission of assault was not error because recklessness as an element of assault was "a necessary element of the charged offense"); *cf. Crawford v. State*, No. 05-13-10494-CR, 2015 WL 1243408 at * 3 (Tex. App. – Dallas, Mar. 16, 2015, no pet.) (not reported) (affirming conviction where jury instructions charged recklessness, which was correct for charged crime of burglary with commission of assault).

offense in *Taylor v. United States*, 495 U.S. 575, 599 (1990).[4]

This Court should grant certiorari to correct the Fifth Circuit's failure to adhere to this Court's definition of generic burglary offenses and to resolve the circuit split on this issue, specifically between the Seventh Circuit and the Fifth Circuit.

II. The Fifth and Seventh Circuits diverged because of a broader split about the basic rules for determining whether offenses are generic after *Duenas-Alvarez.*

Fifth Circuit precedent interprets *Duenes-Alvarez* to demand *proof* that a statute is non-generic in *all* cases—even where the statute is broader on its face than the generic definition. In *Herrold*, the Fifth Circuit held that his failure to find "supportive Texas cases" doomed his attempt to show that Texas burglary is non-generic. *Herrold*, 941 F.3d at 178. In Mr. Wallace's case, the Fifth Circuit predicated its rejection of his arguments on its most recent *Herrold* decision. *Wallace*, 964 F.3d at 388-89. Even though the Fifth Circuit went on to hold that it had actually provided an alternative holding in *Herrold* that Texas' burglary statute is generic because the statute inherently requires intent, *id*. at 389-90, the Fifth Circuit still predicated its holding on the 2019 *Herrold* decision, which raises the issue of the manner of proving application of a non-generic offense definition. And in that regard, the Fifth Circuit remains an outlier among the circuits in its interpretation of *Duenas-Alvarez.*

In *Duenas-Alvarez*, a noncitizen attempted to prove that his prior vehicle-theft

[4] "We conclude that a person has been convicted of burglary for purposes of a § 924(e) if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure with *intent* to commit a crime." *Taylor*, 495 U.S. at 599. (emphasis added).

conviction under California Vehicle Code § 1851(a) was broader than the generic definition of a "theft offense," and therefore did not subject him to removal under 8 U.S.C. § 1101(a)(43)(G). *Duenas-Alvarez*, 549 U.S. at 192-193. This provision is governed by the same categorical approach as the ACCA's "violent felony" definition. *Id.* at 187. But that California statute's text closely resembled most other jurisdictions' "theft" offenses. *Id*. at 187, 189. Yet Duenas-Alvarez still claimed the offense was non-generic, contending that California courts had construed the theft offense's "aiding and abetting" liability broader than other jurisdictions had, holding an accessory responsible for what he intended "and for what 'naturally and probably' result[ed] from his intended crime." 549 U.S. at 190 (internal quotation omitted). He argued that this judicial expansion transformed the otherwise generic-looking statute into a non-generic one.

This Court rejected Duenas-Alvarez's argument, holding that California's conception of abettor liability did not extend the theft offense "significantly beyond the concept as set forth in the cases of other States." *Id.* at 193. The Court went on to explain what Duenas-Alvarez would need to show to prove that a generic-*looking* theft crime was non-generic. That 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 circuits are divided over whether *Duenas-Alvarez*'s "realistic probability" test requires proof in *every* case that someone has actually been convicted on non-generic facts. The vast majority of circuits—the First, Second, Third, Seventh, Ninth, Tenth, and Eleventh—confine this test to the circumstances that spawned it: where the defendant or immigrant proposes a novel and non-obvious construction for generic-looking statutory language.

Van Cannon falls into the majority. There the court looked only to the *elements* of Minnesota burglary to determine it was non-generic. The *text* of the "Minnesota statute" alone was enough to show that it "covers a broader swath of conduct than generic burglary," with no need to perform a deep dive into the underlying facts of Minnesota burglary prosecutions to confirm that it reached reckless and negligent offenses. *Van Cannon*, 890 F.3d at 658. Indeed, *Van Cannon* resisted *any* effort to judicially narrow the statute to conform to the generic definition—it explicitly rejected the government's argument that commission of a crime *implied* the formation of intent to do so: "*Taylor*'s elements-based approach does not countenance imposing an enhanced sentence based on implicit features in the crime of conviction." *Id.* The text—and the text alone—should be consulted to determine whether the elements of the crime match the generic definition.

Most circuits agree. Where "a state statute explicitly defines a crime more broadly than the generic definition," then the crime is non-generic, period. *See United States* v. *Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (*en banc*), *abrogated on other grounds by United States v. Stitt*, 139 S. Ct. 399 (2018). The text of a statute alone can establish the "realistic probability" *Duenes-Alvarez* requires—the probability that someone could be prosecuted

for non-generic conduct—without resorting to "legal imagination" or fanciful hypotheticals. *See Lopez-Aguilar* v. *Barr*, 948 F.3d 1143, 1147 (9th Cir. 2020) (citing *Grisel*); *accord Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017) (Where the statutory language "clearly does apply more broadly than the federally defined offense," then the statute is non-generic.); *Hylton*, 897 F.3d at 63 (There is no need to point to actual examples of prosecution "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 v. Att'y Gen.*, 709 F.3d 1066, 1071-1072 (11th Cir. 2013) (same); *see also Singh v. Att'y Gen.*, 839 F.3d 273, 286 n.10 (3d Cir. 2016) (The "realistic probability" test comes into play only when "the relevant elements" of the state crime and the generic definition are "identical."); *United States v. Titties*, 852 F.3d 1257, 1274 (10th Cir. 2017) ("The Government gives no persuasive reason why we should ignore this plain language to pretend the statute is narrower than it is.")

Only two circuits—the Fifth and the Eighth—require more. In those circuits, even where an element of a state statute is plainly broader on its face than the generic equivalent, the statute is still considered generic unless the defendant can *prove* that state authorities have, in fact, prosecuted someone on non-generic facts.

The Fifth Circuit's approach in *Herrold* as then re-applied in Mr. Wallace's case is an example. Even though the Fifth Circuit recognized the similarities between the Minnesota statute at issue in *Van Cannon* and the Texas statute at issue in *Herrold*, the Fifth Circuit nevertheless held that the Seventh Circuit's decision had "little relevance" precisely because Herrold had not come up with examples of actual application of the

statute in that non-generic format. *Herrold*, 941 F.3d at 178-79. This was because, in the Fifth Circuit, it is not enough for a defendant to show that the text of a statute is broader than generic burglary. *Id.* (quoting *United States v. Castillo-Rivera*, 853 F.3d 218, 222, 224 (5th Cir. 2017) (*en banc*)). Even where a state statute is "broader on its face" than the relevant generic federal definition, the defendant must "point to an actual case in which Texas courts applied" the text "to capture those not included under" the generic definition. *Castillo-Rivera*, 853 F.3d at 223. And the Fifth Circuit has acknowledged that its approach in *Castillo-Rivera* departs from other circuits' approaches. *Vazquez v. Sessions*, 885 F.3d 862, 873 (5th Cir. 2018).

The Eighth Circuit joined the Fifth in *Mowlana v. Lynch*, 803 F.3d 923, 925 (8th Cir. 2015). Like *Castillo-Rivera*, *Mowlana* held that the "analysis of realistic probability must *go beyond the text of the statute* of conviction to inquire whether the government actually prosecutes offenses" under the statute for "conduct" that would not satisfy the generic definition. *Id.* Even though the federal crime at issue in *Mowlana*—unlawful use or transfer of supplemental nutrition benefits in violation of 7 U.S.C. § 2024(b)—did not require a specific intent to deceive, the court accepted the Attorney General's assurance that the government only prosecuted defendants under that statute who *in fact* harbored an intent to deceive. *Id.* at 926-928.

These are the only two circuits where defendants must point to actual prosecutions to prove that statutes with non-generic language are prosecuted on non-generic facts.

That approach is contrary to this Court's decisions. This Court's categorical approach cases have consistently focused on the *elements* of a state crime as defined in

statutory text—what the jury was actually required to find "in order to convict the defendant." *Taylor*, 495 U.S. at 602. In conducting this analysis, federal courts focus on "the least of the acts *criminalized*" by the statute, not the least culpable acts ever *prosecuted*. *Moncrieffe v. Holder*, 569 U.S. 184, 190-191 (2013) (emphasis added, internal alterations and quotation omitted).

This is because the categorical approach applied in ACCA and elsewhere "involves, and involves only, comparing elements." *Mathis*, 136 S. Ct. at 2257. It "does not care about" facts. *Id.* And this Court's categorical approach cases bear this out. The Massachusetts burglary statute in *United States v. Shepard*, 544 U.S. 13, 17 (2005), was non-generic because it applied to "boats and cars" on its face. The Iowa burglary statute in *Mathis* 136 S. Ct. at 2250, was also non-generic because, on its face, it included "a broader range of places" than generic burglary, including any "*land, water, or air vehicle*." And the Kansas drug statute in *Mellouli v. Lynch*, 135 S. Ct. 1980, 1984 (2015), did not "relat[e] to" controlled substances, as defined in 21 U.S.C. § 802, because the Kansas crime applied to "at least nine substances not included in the federal lists."

None of these cases involved an examination of "state enforcement practices," and this Court did not treat any of these state offenses as "narrower than it plainly is." *Swaby*, 847 F.3d at 66; *Titties*, 852 F.3d at 1274. This Court has "*never* conducted a 'realistic probability' inquiry" where "the elements of the crime of conviction are not the same as the elements of the generic federal offense." *Singh*, 839 F.3d at 286 n.10. The closest the Court has ever come was in *Moncrieffe*, 569 U.S. at 206—but that was in *dicta* responding to the government's worry about an argument someone else might make in a hypothetical

case about a different kind of crime.

Time has proved the Court's elements-only approach to be the correct one. And the wisdom of that approach is clear. Consider a state crime that draws no distinction between intentional, knowing, reckless, or negligent mental states. There is no reason to require a federal defendant to *prove* that such a statute reaches negligent or reckless conduct. The statute clearly says so. The only time extrinsic evidence of prosecution should be necessary would be in the narrow circumstance *Duenas-Alvarez* describes: if the defendant attempts to show that the state statute extends *beyond* the plain meaning of its text.

The Fifth Circuit's minority approach is not only unnecessary, it is unwise. An approach that involves judicially narrowing state statutes to make them conform to federally imposed "generic" boundaries is unfaithful to statutory text, casual with the proper division of authority between State legislatures and federal courts, and inconsistent with the rule of law.

Finally, the minority approach tilts the scale unfairly against criminal defendants. It presumes unfairly that the prior conviction triggers a severe penalty, forcing the defendant (or non-citizen) to *prove* otherwise by showing that the statute actually means what it says. Even when court documents or appellate opinions are available for other people's convictions, they are unlikely to shed much light on whether a defendant's conduct was *in fact* non-generic. Where a state law like Tex. Penal Code § 30.02(a) expressly prohibits both generic and non-generic conduct, a defendant has neither incentive nor opportunity "to contest what does not matter under the law; to the contrary, he may have good reason not to—or even be precluded from doing so by the court." *Mathis*, 136 S. Ct. at 2253

(internal quotation omitted).

For all these reasons, other circuits have been critical of the Fifth Circuit's approach. *See Hylton*, 897 F.3d at 64 (The approach has "practical challenges" and "finds little purchase in Supreme Court precedent."); *see also Salmoran v. Att'y Gen.*, 909 F.3d 73, 81 (3d Cir. 2018) (*Castillo-Rivera* reflects "confusion."). And the approach was initially controversial even within the Fifth Circuit. *Castillo-Rivera*, 853 F.3d at 239-241 (Dennis, J., dissenting) ("*Duenas-Alvarez* does not, as the majority opinion holds, require a defendant to disprove the inclusion of a statutory element that the statute plainly does not contain using a state case.") & 243-244 (Higginson, J., concurring in part and dissenting in part) ("Although I have applied the 'realistic-probability' test announced in *Duenas-Alvarez*, I agree with Judge Dennis's dissenting opinion that this added showing is unnecessary when a state statute is facially broader than its federal analog.").

In the decision below, a panel of the Fifth Circuit applied this approach, via its 2019 *Herrold* decision, to reject Mr. Wallace's claim that Texas' unusual burglary statute is non-generic. Even though the Fifth Circuit found that its alternative holding in *Herrold* that Texas' burglary statute was, in its entirety, generic burglary would foreclose Mr. Wallace's claims, that holding remains bound up in the Fifth Circuit's discussion of *Duenas-Alvarez* in *Herrold*. Therefore, even in Mr. Wallace's case, plenary review is warranted to correct an expansion of *Duenas-Alvarez* prevailing in the Fifth Circuit that is out of step with the majority of circuits and with this Court's precedent.

III. The question presented warrants plenary review, or at least a hold for *Herrold*.

Certiorari is warranted because the Question Presented in this case is recurring and

of national significance, making plenary review appropriate.

This petition offers an opportunity to resolve circuit conflicts over the ACCA's application, and in the process, clarify the basic doctrinal rules for applying the categorical approach after *Duenas-Alvarez*. The circuit split between the Seventh Circuit and the Fifth Circuit is clear – the Seventh Circuit treats trespass-plus-crime statutes that do not require a *mens rea* of intent as non-generic and not qualifying as a basis for ACCA enhancement, while the Fifth Circuit treats materially indistinguishable Texas offenses in just the opposite manner, calling into question this Court's definition of generic burglary in *Quarles* and *Taylor*. To the extent that the panel in Mr. Wallace's case relied on the 2019 *Herrold* decision, the Fifth Circuit also incorporated its minority interpretation of *Duenas-Alvarez*, demanding extra evidence of actual application of a non-generic offense definition when evaluating whether Texas burglary is generic.

The question on generic burglary for ACCA purposes is of national importance. The decision below intersects several different strands in the federal criminal and immigration law, exacerbating splits among the circuits in each. Burglary as an ACCA enhancement has been frequently litigated in this Court, as is clear from the line of cases of *Shepard*, *Descamps*, *Mathis*, *Stitt*, and *Quarles* That frequent need to resolve these issues reflects the frequent application on the basis of such offenses, which in turn makes this "a matter of exceptional importance to the consistent administration of the federal criminal law." U.S. Pet. 17-18, *United States v. Stitt*, No. 17-765 (U.S. filed Nov. 21, 2017). And while there are only a few states that define burglary like Texas, the federal courts should reach similar conclusions about similar statutes.

The doctrinal division over *Duenas-Alverez* is equally important. The geographic impact is broader—encompassing all circuits but two. And its larger impact in the law is deeper, because the "categorical approach" is not only used for the ACCA, but also in numerous other criminal and immigration contexts, such as the multi-purpose "crime of violence" definition found in 18 U.S.C. § 16 (and its materially identical analogs throughout the criminal code, *e.g.*, §§ 521, 924(c)(3), 3156(a)(4)); the prohibition on firearm possession by those convicted of a "misdemeanor crime of domestic violence," §§ 922(g)(9) & 921(a)(33)(A); the definition of "serious violent felony" in § 3559(c)(2)(F), which was recently incorporated into 21 U.S.C. § 841(b); the definitions of, and classifications for, "sex offenses" under SORNA, 34 U.S.C. § 20911; the U.S. Sentencing Guidelines' definitions of "crime of violence" and "controlled substance offense," U.S.S.G. § 4B1.2; and immigration law's definitions of "aggravated felony," 8 U.S.C. § 1101(a)(43), and "crime of moral turpitude," § 1227(a)(2)(A)(i).

Mr. Wallace's case in the Fifth Circuit rose and fell with the vicissitudes of the *Herrold* case. The Court currently has pending a petition for certiorari in *Herrold v. United States*, No. 19-7731, which is scheduled for conference on September 29, 2020, and that petition raises these same issues on ACCA and Texas burglary. The line of *Herrold* decisions is the genesis of Mr. Wallace's case – the relief he sought in the Fifth Circuit was predicated on the Fifth Circuit's decision in *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (*en banc*), and the Fifth Circuit's decision in Mr. Wallace's case was based on that court's reconsideration and, ultimately, reversal of its earlier 2018 decision in *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (*en banc*), the decision from which the

petitioner in *Herrold* now seeks certiorari. For that reason, Mr. Wallace recognizes that it may be appropriate for the Court to hold this petition for its decision in *Herrold*. If *Herrold* is successful, then Mr. Wallace's petition should be granted, and the judgment of the Fifth Circuit vacated and remanded.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: August 31, 2020

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