No. _____

In the

Supreme Court of the United States

LOUIS GENE WILLIAMS,
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 FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

A state crime is a "violent felony" (and therefore a predicate prior conviction under the Armed Career Criminal Act) if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). Texas defines its assaultive offenses (including aggravated assault and robbery) in terms of result—causing harm or injury—without referring to "force." Is causing injury synonymous with the use of physical force?

2.

Texas—like a small handful of other states—has expanded its definition of burglary to include the commission of any felony while trespassing, without requiring proof that the trespasser formed specific intent to commit that other crime. Is this a generic "burglary" offense for purposes of the Armed Career Criminal Act?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Louis Gene Williams*, No. 1:06-CR-29 (N.D. Tex.)

2. *Louis Gene Williams v. United States*, No. 1:16-CV-110 (N.D. Tex.)

3. *United States v. Louis Gene Williams*, No. 18-10666 (5th Cir.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Louis Gene Williams asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion in this case was not selected for publication. It can be found at 800 F. App'x 252 and is reprinted in the Appendix to this Petition.

JURISDICTION

The Fifth Circuit issued its judgment on April 6, 2020. On March 19, this Court extended the deadline to file certiorari to 150 days from the judgment. This Court has jurisdiction to review the Fifth Circuit's final decision under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Armed Career Criminal Act, 18 U.S.C. § 924(e):

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

STATEMENT

After responding to a complaint about a domestic disturbance, a sheriff's deputy found Petitioner in possession of a short-barreled shotgun. Federal authorities charged him with violating 18 U.S.C. § 922(g)(1), and he pleaded guilty in 2006. App., *infra*, 1a. Although that crime ordinarily carries a maximum penalty of ten years in prison, *see* 18 U.S.C. § 924(a)(2), the Armed Career Criminal Act imposes a fifteen-year minimum when the defendant has three or more prior convictions for "violent felonies" committed on separate occasions. 18 U.S.C. § 924(e)(1).

At the time he pleaded guilty, Petitioner acknowledged four prior Texas convictions that were considered "violent felonies" under Fifth Circuit precedent—

aggravated assault, aggravated robbery, burglary, and attempted murder. App., *infra*, 2a–3a. The district court sentenced him under the ACCA to 235 months in prison, nearly double the non-ACCA maximum of 120 months. App., *infra*, 6a. Petitioner did not appeal.

Less than a year after this Court struck down the ACCA's residual clause in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Petitioner moved to vacate his ACCA-enhanced sentence under 28 U.S.C. § 2255. App., *infra*, 9a–18a. He argued that "at least two" of the four predicates were violent felonies under the unconstitutionally vague residual clause. App., *infra*, 15a. The district court deemed the motion untimely and dismissed it. App., *infra*, 1a. The court alternatively denied the motion on the merits. App., *infra*, 1a. The Fifth Circuit granted a certificate of appealability, but affirmed merits decision without reaching timeliness. App., *infra*, 3a–4a.

REASONS TO GRANT THE PETITION

I. THE COURT SHOULD GRANT THE PETITION AND HOLD THAT CAUSING INJURY IS NOT SYNONYMOUS WITH THE USE OF PHYSICAL FORCE.

A. Under *Leocal*, causation of injury is not the same thing as a use of physical force against a victim.

In 2004, this Court held that a Florida offense defined as "causing serious bodily injury" to another while "driving under the influence of alcohol" did not "have 'as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004) (quoting Fla. Stat. § 316.193(c)(2) & 18 U.S.C. § 16(a)). For many years, the Fifth Circuit likewise acknowledged the "difference between a defendant's causation of an injury and the

defendant's use of force." *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (en banc). But the Fifth Circuit recently reversed course in *United States v. Reyes-Contreras*, 910 F.3d 169, 186 (5th Cir. 2018) (en banc) ("It is high time for this court to take a mulligan on [crimes of violence]."). The court relied on its newly minted violent-crime jurisprudence to affirm here. App., *infra*, 3a–4a.

B. This Court has already granted certiorari to decide whether reckless causation of injury is a use of physical force against the victim.

"*Leocal* reserved the question whether a reckless application of force could constitute a 'use' of force." *United States v. Castleman*, 572 U.S. 157, 169 n.8 (2014) (citing *Leocal*, 543 U.S. at 9). But all of the lower courts to consider the question—including the Fifth Circuit—"held that recklessness is not sufficient." *Id.* (citing *United States v. Palomino Garcia*, 606 F.3d 1317, 1335–1336 (11th Cir. 2010); *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008); *United States v. Torres-Villalobos*, 487 F.3d 607, 615–616 (8th Cir. 2007); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1127–1132 (9th Cir. 2006) (en banc); *Garcia v. Gonzales*, 455 F.3d 465, 468–469 (4th Cir. 2006); *Oyebanji v. Gonzales*, 418 F.3d 260, 263–265 (3d Cir. 2005); *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003); and *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir. 2001)).

That unanimity disappeared after this Court decided *Voisine v. United States*, 136 S. Ct. 2272 (2016). In *Voisine*, this Court interpreted a similar elements clause

found in the definition of "misdemeanor crime of domestic violence," 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9). "That provision, unlike the one here, requires only a 'use . . . of physical force' period, rather than a use of force 'against the person of another.'" *Walker v. United States*, 931 F.3d 467, 468 (6th Cir. 2019) (Kethledge, J., dissenting from denial of reh'g). This Court held—for purposes of MCDV—that a "person who assaults another recklessly 'use[s]' force, no less than one who carries out that same action knowingly or intentionally." *Voisine*, 136 S. Ct. at 2280. Excluding recklessness would "render[ ] § 922(g)(9) broadly inoperative in the 35 jurisdictions with assault laws extending to recklessness." *Id.* (assuming that the relevant crimes are indivisible).

After *Voisine*, the lower courts are sharply divided over whether reckless injury crimes count as a *use* of force *against* a victim. In the First, Fourth, Eighth, and Ninth Circuits, reckless-injury crimes do not count because they do not have *use* of physical force *against* the victim as an element. *See United States v. Windley*, 864 F.3d 36, 38 (1st Cir. 2017); *United States v. Fields*, 863 F.3d 1012, 1015–1016 (8th Cir. 2017); *United States v. Hodge*, 902 F.3d 420, 427 (4th Cir. 2018) (discussing *United States v. Middleton*, 883 F.3d 485, 500 (4th Cir. 2018) (Floyd, J., concurring in the judgment and joined by Harris, J.)); *United States v. Begay*, 934 F.3d 1033, 1038–1041 (9th Cir. 2019).

The Fifth Circuit disagreed. The court has held that *Reyes-Contreras* and *Voisine* "confirm that reckless conduct constitutes the 'use' of physical force under the ACCA, and that the distinction between causing an injury and the use of force is no

longer valid." *United States v. Burris*, 920 F.3d 942, 952 (5th Cir. 2019). The Sixth, Tenth, and District of Columbia Circuits have also held that recklessness is enough. *See Davis v. United States*, 900 F.3d 733, 736 (6th Cir. 2018); *United States v. Pam*, 892 F.3d 1271, 1280–1281 (D.C. Cir. 2018); *United States v. Haight*, 892 F.3d 1271, 1280–1281 (D.C. Cir. 2018) (Kavanaugh, J.).

This Court will likely resolve that question in *Borden v. United States*, No. 19-5410. The Court has held the certiorari petition in *Burris* to await the outcome of *Borden*. At a minimum, then, it seems appropriate to hold this petition until *Borden* is decided.

C. Texas assaultive crimes reach conduct that involves neither physical contact nor use of violent physical force.

Even though "*Leocal* reserved" the question of whether recklessly causing injury was a use of force against the injured person, the decision provided a roadmap for resolving the issue.

1. *Leocal* rejected the argument that a drunk-driver who causes a collision has *used* physical force *against* the victim or the victim's property. This conclusion was based upon an analysis of the plain meaning of the statutory terms "use" and "against": a person would "'use physical force against' another when pushing him; however, we would not ordinarily say a person 'uses physical force against' another by stumbling and falling into him." 543 U.S. at 9 (alterations omitted).

2. There is little or no daylight between an intoxicated driver and a reckless driver. Bodily Injury Robbery—like most other Texas assaultive crimes—is a "result-oriented offense." *Landrian v. State*, 268 S.W.3d 532, 533 (Tex. Crim. App.

2008); *see Cooper v. State*, 430 S.W.3d 426, 443 (Tex. Crim. App. 2014) (Price, J., dissenting) ("Indeed, apart from the added acquisitive conduct/intent element, the robbery statute is practically indistinguishable from the simple assault statute."); *McCrary v. State*, 327 S.W.3d 165, 175 (Tex. App. 2010) ("Both [aggravated assault and aggravated robbery] are result-oriented crimes with injury being the result."). Because Texas defines robbery by its *result*, "[t]he precise act or nature of conduct in this result-oriented offense is inconsequential." *Landrian*, 268 S.W.3d at 537.

Texas defines recklessness in a way that surely includes most, if not all, drunk-driving accidents:

> (c) A person acts recklessly, or is reckless, with respect to . . . the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that . . . the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Texas Penal Code § 6.03(c). In *United States v. Vargas-Soto*, 700 F.3d 180 (5th Cir. 2012), the court analyzed a Texas prosecution where a single drunk-driving accident resulted in a conviction for intoxicated assault and manslaughter. *Id.* at 184.

3. In *Leocal*, this Court relied on Congress's decision to include both drunk-driving accidents and "crimes of violence" under the broader heading of "serious criminal offense" within the Immigration and Nationality Act. *Leocal*, 543 U.S. at 12 (discussing 8 U.S.C. § 1101(h)). The statute in question also lists *reckless driving* offenses that cause injury:

> For purposes of section 1182(a)(2)(E) of this title, the term "serious criminal offense" means--

> (1) any felony;
>
> (2) any crime of violence, as defined in section 16 of Title 18; or
>
> (3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.

8 U.S.C. § 1101(h). If—as the Fifth Circuit held and Respondent now argues—recklessly caused injuries were, by definition, a use of physical force against the victim, then those crimes would be violent under 18 U.S.C. § 16(a). "[T]he distinct provision for" reckless-driving-injury offenses under [§ 1101(h)] should "bolster[ ]" Petitioner's argument that the use-of-force clause "does not itself encompass" reckless-injury offenses. *Leocal*, 543 U.S. at 12 & n.9.

4. There is a non-trivial linguistic difference between "using physical force" and causing physical injury. *Leocal* acknowledged the difference. 543 U.S. at 10–11 & n.7. Section 16(b), this Court reasoned "plainly does not encompass all offenses which create a 'substantial risk *that injury will result from a person's conduct*.'" *Id.* at 10 n.11 (emphasis added). Congress used both *injury* and *force* within § 924 itself, which suggests it intended a different meaning. *Compare* § 924(c)(3)(A), (c)(3)(B), (e)(2)(B)(i), *with* § 924(e)(2)(B)(ii). Within ACCA's elements clause, Congress specified that *use of force* must be an element of the offense. Surely Congress did not believe that language would extend to all statutes defined by causing injury.

5. "Even if" the ACCA "lacked clarity on this point," this Court "would be constrained to interpret any ambiguity in the statute in petitioner's favor." *Leocal*, 543 U.S. at 12 n.8. ACCA, like § 16, "is a criminal statute," and "the rule of lenity

applies." *Id.* ACCA's elements clause is not merely *susceptible* to an interpretation that excludes recklessly caused injuries; that was the universally accepted meaning prior to *Voisine*.

6. Texas courts have affirmed convictions for that offense where an offender's reckless driving caused bodily injury. Texas defines "deadly weapon" under "the broadest possible understanding in context of which it was reasonably susceptible in ordinary English." *Tyra v. State*, 897 S.W.2d 796, 797 (Tex. Crim. App. 1995). A recklessly driven automobile is a deadly weapon, even if the defendant did not intend to use the car as a weapon. *Walker v. State*, 897 S.W.2d 812, 814 (Tex. Crim. App. 1995).

In *Pogue v. State*, No. 05-12-00883-CR, 2013 WL 6212156 (Tex. App.—Dallas Nov. 27, 2013), the court held that the defendant committed aggravated assault because (a) he recklessly drove a motor vehicle, (b) his reckless driving caused injury to the victim, and (c) the manner he drove the car made it a "deadly weapon," because it was "capable" of causing death or serious bodily injury to the victim. Similarly, the court in *McNair v. State*, No. 02-10-00257-CR, 2011 WL 5995302, at *9 (Tex. App. Nov. 23, 2011), held that a 76-year old defendant would be guilty of aggravated assault if he "failed to properly control his vehicle" as he attempted to drive past a line of striking picketers into work.

7. Texas courts have also convicted defendants of aggravated assault for transmitting a virus during consensual sexual intercourse. Use of physical force "is not an element" of crimes "prohibiting consensual sexual contact with" a victim.

United States v. Houston, 364 F.3d 243, 246 (5th Cir. 2004). But Texas has prosecuted and convicted defendants for aggravated assault where such consensual conduct passed a virus to the unwitting victim. Sometimes, prosecutors and courts relied on the "serious bodily injury" aggravator. *See*, *e.g.*, *Billingsley v. State*, No. 11-13-00052-CR, 2015 WL 1004364, at *2 (Tex. App. – Eastland 2015, pet. ref'd) (affirming aggravated assault conviction because the defendant "caused serious bodily injury to [the victim] by causing [the victim] to contract human immunodeficiency virus (HIV)"). Other times, prosecutors charge the "deadly weapon" alternative. *See, e.g., Padieu v. State*, 05-09-00796-CR, 2010 WL 5395656, at *1 (Tex. App.—Dallas Dec. 30, 2010, pet. ref'd) ("Philippe Padieu was indicted on six charges of aggravated assault with a deadly weapon for intentionally, knowingly, and recklessly causing six women serious bodily injury by exposing them to the HIV virus through unprotected sexual contact. A jury convicted appellant on all charges and assessed punishment, enhanced by a prior felony conviction, at forty-five years in prison in five cases and twenty-five years in prison in the sixth case.").

In *State v. Zakikhani*, Case No. 1512289 (Crim. Dist. Ct. No. 176, Harris Co., Tex. June 20, 2018), Texas again convicted a defendant of aggravated assault for transmitting HIV through consensual intercourse. One complainant made clear that the *actus reus* was *not* physically forceful: during the time she and the defendant were intimate, he was "friendly, charming, outgoing," and he cared for her and her child. Tera Robertson, *Man may be knowingly infecting victims with HIV, police say*, Click2Houston.com, June 9, 2016, available at:

https://www.click2houston.com/news/investigates/man-may-be-knowingly-infecting-victims-with-hiv-police-say (accessed Oct. 30, 2018).

8. Texas prosecutors have charged another defendant with aggravated assault based solely on social media activity. *See* Indictment, *State v. Rivello*, Case No. F-1700215-M (Crim. Dist. Ct. No. 5, Dallas Co., Tex.); *see also* Indictment, *State v. Rivello*, Case No. F-1900747 (Crim. Dist. Ct. No. 4, Dallas Co., Tex.). According to the allegations in that case, the Maryland-based defendant sent the Texas-based victim an animated or flashing strobe image through Twitter, and the victim later suffered a seizure when he saw that image. These allegations do not suggest any "use" of "physical force," at least under the commonly accepted meaning of those terms.

9. While these non-forceful ways to commit the crime arise under both prongs of the aggravated assault statute, it is also worth noting that the crime is not divisible. The two statutes—Texas Penal Code §§ 22.01 & 22.02—set out alternative *means*, not alternative elements. Texas and federal law are clear on this point. *See Landrian v. State*, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008); *Gomez-Perez v. Lynch*, 829 F.3d 323 (5th Cir. 2016); *United States v. Barcenas-Yanez*, 826 F.3d 752, 754 (4th Cir. 2016) ("In a holding imbued with . . . unmistakable clarity, the Texas Court of Criminal Appeals has determined that jury unanimity as to mens rea is not required for an aggravated assault conviction under § 22.02(a)(1), (2).").

10. In Texas, robbery and assault (in both simple and aggravated forms) are defined in terms of *causation of injury*, rather than use of physical force. *See* Texas

Penal Code §§ 22.01; 22.02; 29.02; 29.03. Thus, if the phrases are not synonymous for purposes of the ACCA, Petitioner is not an Armed Career Criminal.

II. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE CIRCUIT SPLIT OVER THE TRESPASS-PLUS-CRIME THEORY OF BURGLARY.

Given identical inputs—a state crime labeled "burglary" committed whenever a trespasser commits some other crime inside a building, even one with a mental state short of strict criminal intent—the Fifth and Seventh Circuits reached opposite outputs. Texas introduced this novel theory of "burglary" liability. 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's pioneering 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).

Five states now define burglary to include trespass-plus-crime—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 generic burglary because they lack the element of "intent" to commit another crime inside the building.

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 how to "do" the categorical approach. The Seventh Circuit has held that trespass-plus-crime burglaries are non-generic: The *commission of a crime* is not synonymous with forming an intent to commit that crime. "[N]ot all crimes are intentional; some require only recklessness or criminal negligence." *Van Cannon*, 890 F.3d at 664.

But the Fifth Circuit, reviewing a materially identical version of burglary, held that the crime *was* generic. *See United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc).[1] In the Fifth Circuit, it is not enough to show that statutory language plainly embraces non-generic conduct; a defendant must also *prove* that the state would prosecute someone under the non-generic theory. *See United States* v. *Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc).

There is no relevant statutory difference between the Minnesota crime in *Van Cannon* and the Texas crime in *Herrold*. Any argument that Texas courts somehow *require* proof of specific intent is rebutted by examining Texas law. The two circuits are in direct conflict, and this Court should resolve that conflict.

Texas Penal Code § 30.02(a)(3) does not require proof of specific intent to commit another crime inside the premises. A trespasser commits "burglary" in Texas if, after an unlawful entry, he "commits . . . a felony, theft, or an assault." Texas Penal Code § 30.02(a)(3). Often, those predicate crimes are committed *intentionally*. "But

[1] The petition for certiorari in *Herrold* is pending under case number 19-7731.

not all crimes are intentional; some require only recklessness or criminal negligence." *Van Cannon*, 890 F.3d at 664. For example, in Texas, a person commits assault when he "*recklessly* causes bodily injury" or when he knowingly "causes physical contact" with the victim when he "*should reasonably believe* that the other will regard the contact as offensive or provocative." Texas Penal Code § 22.01(a)(1), (3) (emphasis added). Neither of those "assault" crimes requires formation of intent. But § 30.02(a)(3) counts *any* assault committed after unlawful entry as "burglary."

Subsection (a)(3) also includes all *felonies* committed after unlawful entry. The Texas Penal Code defines several felonies that are committed without ever forming specific intent, including:

- Injury to a child / elderly person / disabled person: "A person commits" this felony if he "recklessly, or with criminal negligence" causes the victim to suffer "bodily injury," Texas Penal Code § 22.04(a);

- Endangering a child: "A person commits" the state-jail felony offense of "endangering a child" if he "recklessly, or with criminal negligence, by act or omission, engages in conduct that places a child younger than 15 years in imminent danger of . . . bodily injury, or physical or mental impairment," Texas Penal Code § 22.041; and

- Sexual assault / statutory rape: A person commits felony sexual assault if he has sexual contact or intercourse with someone who is younger than 17 years old, "regardless of whether the person knows the age of the child at the time of the offense," Texas Penal Code § 22.011(a)(2); *see also May v. State*, 919 S.W.2d 422, 424 (Tex. Crim. App. 1996) (Under Texas law, statutory rape is a "strict liability offense.").

Herrold refused to consider this aspect of Texas burglary because the defendant did not "cite a single Texas case" for the proposition that the state would

allow conviction under Texas Penal Code § 30.02(a)(3) for a crime "with lesser *mens rea*" than specific intent. 941 F.3d at 179.

Two lines of cases establish the "realistic probability," *Herrold*, 941 F.3d at 179, that Texas would apply § 30.02(a)(3) where a defendant committed a non-intentional crime after unlawful entry.

1. The Texas Court of Criminal Appeals has rejected the argument that specific intent should be an implied element for felony murder in *Lomax v. State*, 233 S.W.3d 302 (Tex. Crim. App. 2007). Structurally, felony murder (§ 19.02(a)(3) in 1974 Penal Code; § 19.02(b)(3) in the 1994 Penal Code) is very nearly identical to trespass-plus-crime burglary under Penal Code § 30.02(a)(3):

Murder: **Texas Penal Code § 19.02(a) (West 1981)**	**Burglary:** **Texas 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 felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from 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.

In *Lomax*, the defendant argued that Texas law would *imply* a mental state of at least recklessness for the predicate felony. *See Lomax*, 233 S.W.3d at 306 (discussing Texas Penal Code § 6.02). *Lomax* held exactly the opposite: "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." 233 S.W.3d at 307 n.14. The Texas legislature plainly intended to *dispense with* a specific intent requirement (present in the other two forms of murder) and to *replace it* with whatever mental state (if any) was necessary for the predicate felony:

> 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. A person commits murder under Section 19.02(b)(1), Tex. Pen. Code, when he "knowingly and intentionally" causes a person's death. A person commits murder under Section 19.02(b)(2), Tex. Pen. Code, when he "intends to cause serious bodily injury" and commits an act clearly dangerous to human life that causes a person's death. The omission of a culpable mental state in Section 19.02(b)(3) is "a clear implication of the legislature's intent to dispense with a mental element in that [sub]section."

Lomax, 233 S.W.3d at 304 (quoting *Aguirre v. State*, 22 S.W.3d 463, 472–473 (Tex. Crim. App. 1999)).

Thus, a strict liability offense (DWI) could be the predicate felony for felony murder. Applying the same logic here, the Texas Court of Criminal Appeals would hold that Texas Penal Code § 30.02(a)(3) plainly *dispenses with* the formation of specific intent, given that Subsections (a)(1) and (a)(2) "expressly require" formation of specific intent to commit another crime. *Lomax*, 233 S.W.3d at 304*; see* Texas Penal Code § 30.02(a)(1), (a)(2).

2. When listing the elements of "burglary" under § 30.02(a)(3), Texas appellate decisions routinely recognize that felonies with reckless or even negligent *mens rea* are sufficient to give rise to liability under § 30.02(a)(3):

- *Daniel v. State*, 07-17-00216-CR, 2018 WL 6581507, at *3 (Tex. App.—Amarillo Dec. 13, 2018, no pet.): "All the State was required to prove was that he entered the residence without consent or permission and while inside, assaulted or attempted to assault Phillips and Schwab." *Id.* And "a person commits assault when he intentionally, knowingly, *or recklessly* causes bodily injury to another." *Id.*, 2018 WL 6581507, at *2 (emphasis added).

- *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.—Amarillo 2010, pet. ref'd, untimely filed) (same);

- *Wingfield v. State*, 282 S.W.3d 102, 105 (Tex. App.—Fort Worth 2009, pet. ref'd) (same);

- *Alacan v. State*, 03-14-00410-CR, 2016 WL 286215, at *3 (Tex. App.—Austin Jan. 21, 2016, no pet.) (same);

- *Crawford v. State*, 05-13-01494-CR, 2015 WL 1243408, at *2 (Tex. App.—Dallas Mar. 16, 2015, no pet.) (same);

- *Johnson v. State*, 14-10-00931-CR, 2011 WL 2791251, at *2 (Tex. App.—Houston [14th Dist.] July 14, 2011, no pet.) (same);

- *Torrez v. State*, 12-05-00226-CR, 2006 WL 2005525, at *2 (Tex. App.—Tyler July 19, 2006, no pet.) (same);

- *Guzman v. State*, 2-05-096-CR, 2006 WL 743431, at *2 (Tex. App.—Fort Worth Mar. 23, 2006, no pet.) (same)

- *Brooks v. State*, 08-15-00208-CR, 2017 WL 6350260, at *7 (Tex. App.—El Paso Dec. 13, 2017, pet. ref'd) (listing robbery by reckless causation of injury as a way to prove § 30.02(a)(3)).

- *Battles v. State*, 13-12-00273-CR, 2013 WL 5520060, at *1 & n.1 (Tex. App.—Corpus Christi Oct. 3, 2013, pet. ref'd) (recognizing that the predicate felony—injury to an elderly individual under Texas Penal Code § 22.04—could be committed with recklessness or with "criminal negligence."

Particularly in light of the reasoning of *Lomax*, these cases eliminate the inference that Texas requires proof of "formation of specific intent" to convict under § 30.02(a)(3). Under the reasoning of *Van Cannon*, 890 F.3d at 664, and *Chazen v. Marske*, 938 F.3d 851, 860 (7th Cir. 2019), that makes § 30.02(a)(3) non-generic. But the Fifth Circuit has held that it *is* generic. This Court should grant the petition to resolve that conflict.

CONCLUSION

Petitioner asks that this Court grant the petition and set the case for a decision on the merits.

Respectfully submitted,

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