No. _____

In the

Supreme Court of the United States

_____

David Lee Garrett,

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

I. Whether the Texas offense of simple robbery constitutes a "violent felony" under 18 U.S.C. §924(e)?

II. Whether the Texas offense of burglary constitutes a "violent felony" under 18 U.S.C. §924(e)?

III. Whether the case is ripe for review?

PARTIES TO THE PROCEEDING

Petitioner is David Lee Garrett, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Lee Garrett seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Garrett*, 810 Fed. Appx. 353 (5th Cir. June 25, 2020) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B. The district court's order staying proceedings pending the outcome in *United States v. Burris* is attached as Appendix C.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on June 25, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This Petition involves 18 U.S.C. § 924(e), which states in relevant part:

> (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—
>
> ***
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or

destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

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

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

The Petition also involves Texas Penal Code 29.02(a), which states:

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

The Petition also involves Texas Penal Code 30.02(a), which states:

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

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

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

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

STATEMENT OF THE CASE

A. District Court Proceedings

Petitioner David Lee Garrett pleaded guilty to one count of possessing a firearm following a felony conviction. *See* (ROA.245). A Presentence Report (PSR) determined that he was properly subject to the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e), on the basis of three ostensible "violent felonies," a Texas simple robbery conviction, and two Texas burglaries. *See* (ROA.256).

The defense objected that neither robbery nor burglary as Texas defined those crimes satisfied ACCA's definition of a "violent felony." *See* (ROA.292-312, 380-388). The government defended the ACCA designation, and submitted judicial records of all three convictions. *See* (ROA.315-374, 392-406). Records substantiating the robbery conviction showed an allegation and admission that Mr. Garrett threatened injury in the course of theft. *See* (ROA.342-343). Similar records for the burglary convictions alleged and admitted in each case that the defendant entered a habitation with intent to commit theft, and, in each case, that he committed and attempted to commit theft inside a habitation. *See* (ROA.360, 362, 366, 371).

The district court sided with the defense. *See* (ROA.138). More particularly, it held that the burglary offenses did constitute "violent felonies," but that the robbery did not. *See* (ROA.138). It thus imposed a sentence of 84 months, within the ten year maximum for ordinary violations of 18 U.S.C. §922(g), but below the 15 year minimum for violations of the statute under ACCA. *See* (ROA.138).

B. The Appeal

Both sides appealed. After a lengthy series of stays and extensions while the law changed, *see* United States' Unopposed Motion to Stay Appeal in *United States v. Garrett*, 17-10516 (5th Cir. Filed May 30, 2017); United States' Unopposed Motion to Continue Stay of Appeal in *United States v. Garrett*, 17-10516 (5th Cir. Filed September 7, 2017); United States' Unopposed Motion to Stay Appeal or, Alternatively, for an Extension of Time in *United States v. Garrett*, 17-10516 (5th Cir. Filed May 11, 2018); United States' Unopposed Motion to Stay Appeal in *United States v. Garrett*, 17-10516 (5th Cir. Filed January 16, 2018); United States' Unopposed Motion to Stay Appeal or, Alternatively, for an Extension of Time in *United States v. Garrett*, 17-10516 (5th Cir. Filed October 10, 2019), the government sought reversal on the ground that Texas robberies constitute violent felonies, *see* Appellant's Brief in *United States v. Garrett*, 17-10516 (5th Cir. Filed November 21, 2019). By that time, Fifth Circuit precedent treated all Texas robberies and burglaries as "violent felonies." *See United States v. Burris*, 920 F.3d 942 (5th Cir. 2019)(certiorari pending); *United States v. Herrold*, 941 F.3d 173, 177 (5th Cir. Oct. 18, 2019)(en banc).

Mr. Garrett responded, contesting the application of ACCA to both burglaries and simple robberies in Texas. *See* Corrected Appellee-Cross-Appellant's Principal and Response Brief in *United States v. Garrett*, 17-10516, 2019 WL 7372328 (5th Cir. Filed December 30, 2019)("Garrett's Brief"). As to the robbery conviction, he contended:

- that Texas simple robbery was indivisible and lacked force against the person of another as an element because its injury prong could be satisfied by reckless conduct, *see* Garrett's Brief, at 21 (conceding that the issue was foreclosed by *United States v. Reyes-Contreras*, 910 F.3d 169, 183 (5th Cir. 2018)(en banc));
- that both prongs of Texas simple robbery lacked force against the person of another as an element because they could be committed by actual or threatened indirect applications of force, *see id.* (conceding that the issue was foreclosed by *Reyes-Contreras*, 910 F.3d at 182-183);
- that both prongs of Texas simple robbery lacked force against the person of another as an element because they could be committed without a direct confrontation between victim and robber, *see id.* (*comparing Howard v. State*, 333 S.W.3d 137, 138-140 (Tex. Crim. App. 2011), *with Stokeling v. United States*, ___U.S. ___, 139 S.Ct. 544 (2019), *but conceding foreclosure by Burris* 920 F.3d at 956);
- that both prongs of Texas simple robbery fell outside ACCA's force clause because they may be committed without a causal connection between the defendant's use or threatened use of force and the acquisition of property, while ACCA's force clause is intended to capture common law robberies in which property is obtained "by force or violence," *id.* at 23 (*comparing Smith v. State*, 2013 Tex. App. LEXIS 1146, at *6-8 (Tex. App. – Houston [14th Dist.] Feb. 7 2013)(unpublished), *with Stokeling*, 139 S.Ct. at 550);

- that Petitioner was entitled by due process to the understanding of ACCA's force clause that prevailed at the time of his offense, *see id*. at 23 (citing *Bouie v. City of Columbia*, 378 U.S. 347 (1964), *but conceding foreclosure by Burris* 920 F.3d at 956).

As to the burglary contention, Petitioner argued that Texas burglary may be committed without any intent to commit a crime other than trespassing, and that it has been prosecuted as such. *See id*. at 24-33. In particular, he contended that under Tex. Penal Code §30.02(a)(3), Texas burglary may be committed by entering a home or business with no intent to commit any crime other than trespassing, and then committing a reckless or negligent crime therein. *See id.* at 24-32 (citing *Daniel v. State*, 07-17-00216-CR, 2018 WL 6581507, at *3 (Tex. App.-Amarillo Dec. 13, 2018, no pet.); *State v. Duran*, 492 S.W.3d 741, 743 (Tex. Crim. App. 2016); *Scroggs v. State*, 396 S.W.3d 1, 10 & n.3 (Tex. App.-Amarillo 2010, pet. ref'd, untimely filed); *Wingfield v. State*, 282 S.W.3d 102, 105 (Tex. App.-Fort Worth 2009, pet. ref'd); *Alacan v. State*, 03-14-00410-CR, 2016 WL 286215, at *3 (Tex. App.-Austin Jan. 21, 2016, no pet.); *Crawford v. State*, 05-13-01494-CR, 2015 WL 1243408, at *2 (Tex. App.-Dallas Mar. 16, 2015, no pet.); *Johnson v. State*, 14-10-00931-CR, 2011 WL 2791251, at *2 (Tex. App.-Houston [14th Dist.] July 14, 2011, no pet.); *Torrez v. State*, 12-05-00226-CR, 2006 WL 2005525, at *2 (Tex. App.-Tyler July 19, 2006, no pet.); *Guzman v. State*, 2-05-096-CR, 2006 WL 743431, at *2 (Tex. App.-Fort Worth Mar. 23, 2006, no pet.); *Battles v. State*, 13-12-00273-CR, 2013 WL 5520060, at *1 & n.1 (Tex. App.-Corpus Christi Oct. 3, 2013, pet. ref'd); *cf. Brooks v. State*, 08-15-00208-CR, 2017 WL 6350260, at *7 (Tex. App.-El Paso Dec. 13, 2017, pet. ref'd)). This, he contended, is not generic burglary

under ACCA. *See id.* at 24-32 (citing *United States v. Van Cannon*, 890 F.3d 656, 664 (7th Cir. 2018), *Chazen v. Marske*, 938 F.3d 851, 860 (7th Cir. 2019), and *Taylor v. United States*, 495 U.S. 575, 598 (1990)).

To the extent that the government would argue otherwise, he contended that the argument was waived in district court, when the government implicitly conceded that Texas Penal Code §30.02(a)(3) penalized a non-generic form of burglary. *See id.* at 14-15 (citing ROA.392). And he requested, in the alternative, that the court certify the state law question – whether burglary may ever be committed without an intent to commit a crime beyond trespass – to the Texas Court of Criminal Appeals. *See id.* at 14-15 (citing *Clay v. Lynaugh*, 846 F.2d 8, 9 (5th Cir. 1988)).

Finally, he preserved two additional arguments against the use of his burglary conviction:

- that Texas Penal Code §30.02(a)(3) is not equivalent to generic burglary when applied to habitations because it criminalizes crimes committed after a consensual entry, and lacks an element requiring that burgled structure be closed to the public, *see id.* at 32-33 (citing *Gordon v. State, 633 S.W.2d 872 (Tex. Crim. App. 1982); Walker v. State*, 648 S.W.2d 308, 310 (Tex. Crim. App. 1983)(en banc)), and
- that the retroactive application of changes in decisional law violate the constitutional principle of fair warning, *see id.* at 33 (citing *Bouie v. City of Columbia*, 378 U.S. 347 (1964)).

He also asserted a foreclosed challenge to his conviction, arguing that the conviction rested on an overbroad interpretation of the commerce clause to Article I of the United States Constitution. *See id.* at 8-13.

The government moved for summary affirmance of the conviction, and summary vacatur of the sentence. *See* United States' Motion for Summary Disposition or, Alternatively, for an Extension of Time in *United States v. Garrett*, 17-10516 (5th Cir. Filed January 29, 2020)("Motion for Summary Disposition"). In its motion for summary disposition, the government contended that it need not have preserved any contention about the generic status of Tex. Penal Code §30.02(a)(3). *See* Motion for Summary Disposition, at 3-4, n.3. Any need to preserve that contention, argued the government, was obviated by the district court's decision to treat Petitioner's burglaries as violent felonies. *See id.*

The court granted the government's motion without discussing waiver or the requested certification. *See* [Appendix B]; *United States v. Garrett*, 810 Fed. Appx. 353 (5th Cir. June 25, 2020)(unpublished). On resentencing, the district court stayed further proceedings pending the resolution of *Burris v. United States*, 19-6186, which is currently pending before this Court. *See* [Appendix C]; Order in *United States v. Garrett*, 3:16-CR-107-L (N.D. Tex. October 2, 2020)(ECF Entry 69).

REASONS FOR GRANTING THIS PETITION

I. There is a reasonable probability that forthcoming decisions – *Borden v. United States*, 19-5410, and/or *Burris v. United States*, 19-6186 – will undermine the basis for the judgment below, and that a different result will obtain when the case is reconsidered.

The Armed Career Criminal Act (ACCA) provides for a 15-year mandatory minimum and a life maximum term of imprisonment if a person possesses a firearm following three or more "violent felonies." *See* 18 U.S.C. §924(e)(2). Among other provisions not at issue here, or potentially at issue, but no longer constitutionally available, *see Johnson v. United States*, 576 U.S. 591 (2015), ACCA defines "violent felony" to include those offenses that have as an element the use, attempted use, or threatened use of physical force. *See* 18 U.S.C. §924(e)(2)(B).

In deciding whether an offense has such an element, sentencing courts may not look to the defendant's conduct, but rather at the requirements of the offense set forth in the statute of conviction. *See Taylor v. United States*, 495 U.S. 575, 600-601 (1990). Thus, if an offense may be committed in a way that lacks force against the person (including attempted or threatened force), it does not satisfy ACCA's force requirement. Further, a statute may set forth multiple alternative means or ways of committing a single offense, rather than multiple distinct offenses. *See Mathis v. United States*, __U.S.__, 136 S.Ct. 2243, 2249 (2016). In such a case, the statute is said to be "indivisible," and any non-qualifying means or way of committing the

offense housed in the statute may save the defendant from the draconian ACCA sentence. *See Mathis*, 136 S.Ct. at 2251.

The court below held that Texas simple robbery qualifies as a "violent felony" under ACCA's "force clause." *See* [Appendix A]; *Garrett*, 810 Fed. Appx. at 354. But the case it cited for that proposition, *United States v. Burris*, 920 F.3d 942, 946-947 (5th Cir. 2019), *see* [Appendix A]; *Garrett*, 810 Fed. Appx. at 354, is before this Court on writ of certiorari, *see* Petition for Certiorari in *Burris v. United States*, No. 19-6186 (filed October 7, 2019). In the event that the cited precedent is vacated by this Court (likely in light of *Borden v. United States*, 19-5410, __U.S.__, 140 S.Ct. 1262 (March 2, 2020)(granting certiorari)), the court below should be given an opportunity to reconsider this basis for its decision. Simply put, a vacated judgment is not precedent, at least in the court below. *See Cent. Pines Land Co. v. United States*, 274 F.3d 881, 894 (5th Cir. 2001)(citing *Ridley v. McCall*, 496 F.2d 213, 214 (5th Cir. 1974), for the proposition that vacated opinions have no precedential value), and *Durning v. Citibank*, N.A., 950 F.2d 1419, 1424 n.2 (9th Cir. 1991), for the proposition that "[a] decision may be reversed on other grounds, but a decision that has been vacated has no precedential authority whatsoever.").

The decision should also be reconsidered in the event that the Petitioner prevails in *Borden*. In *Borden*, this Court has granted certiorari to decide whether reckless offenses possess as an element the use of force against the person of another. *See Borden*, 140 S.Ct. 1262; Petition for Certiorari in *Borden v. United States*, No. 19-5410, 2019 WL 9543574, at ii (Filed July 24, 2019). Notably, it replaces *Walker v.*

United States, which stood to address the same question with respect to a Texas simple robbery conviction, before it was dismissed in the wake of Mr. Walker's tragic and untimely death. *See Walker v. United States*, No. 19-373, __U.S.__, 140 S.Ct. 519, (November 15, 2019)(granting certiorari); Petition for Certiorari in *Walker v. United States*, 19-373, at p. i (Filed September 19, 2019); *Walker v. United States*, No. 19-373, __U.S.__, 140 S.Ct. 953 (January 27, 2020)(dismissing certiorari in light of death).

It is true that Texas simple robbery does not permit conviction upon a reckless threat, but instead requires a knowing or intentional threat of injury. *See* Tex. Penal Code §29.02(a)(2). That distinction, however, will not likely save the sentence in the event that Mr. Borden prevails.

The Fifth Circuit has not addressed whether Texas simple robbery may be subdivided under *Mathis* into robbery by injury and robbery by threat. *See Burris*, 920 F.3d at 946-947 ("This court has never addressed whether § 29.02(a) is divisible or indivisible —that is, whether robbery-by-injury and robbery-by-threat are (a) different crimes or (b) a single crime that can be committed by two different means). But the Texas state courts have issued conflicting decisions on this question. *Compare Cooper v. State*, 430 S.W.3d 426 (Tex. Crim. App. 2014)(robbery by injury and robbery by threat are but different means of committing same offense); *Burton v. State*, 510 S.W.3d 232, 237 (Tex. App. – Fort Worth 2017)(same) *with Woodard v. State*, 294 S.W.3d 605, 608-609 (Tex. App. – Houston [1st Dist.] 2009])(different offenses). In a case of such uncertainty, *Mathis* holds treats the statute as though it sets forth but

one offense. *See Mathis*, 136 S.Ct. at 2256-2257. It also requires that the statute be treated as indivisible where, as here, the higher state court finds but one offense. *See id.*; *Cooper*, *supra*. Thus, if Texas simple robbery by injury is not a violent felony, all of Texas simple robbery will fall outside the enhancement.

Borden may also affect the treatment of Texas simple robbery in another way. Until *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018)(en banc), the Fifth Circuit held that the mere infliction of injury was not always equivalent to the use of physical force against the person of another. *See United States v. Vargas-Duran*, 356 F.3d 598, 605 (5th Cir. 2004) (en banc). It thus held that an offense requiring only injury, or threatened injury, did not have the use or threatened use of force against the person as an element. *See Vargas-Duran*, 356 F.3d at 605 (injury is not always force); *United States v. De La Ros*a, 264 Fed. Appx. 446, 449 (5th Cir. 2008)(unpublished)(offense requiring only threatened injury lacked threatened force as an element because injury is not force). *Reyes-Contreras*, however, overruled that precedent, relying on *United States v. Castleman*, 572 U.S. 157 (2014). *See Reyes-Contreras*, 910 F.3d at 180. *Castleman* was a case arising under 18 U.S.C. §921(a)(33), and held that the "[i]t is impossible to cause bodily injury without applying force in the common-law sense." *Castleman*, 572 U.S. at 170.

A full exposition of ACCA's "force clause" in *Borden*, however, may show *Reyes-Contreras's* reliance on *Castleman* to be misplaced. The government in *Borden* has contended that recklessness injury is "the use of physical force against the person of another," citing *Voisine v. United States*, __U.S.__, 136 S. Ct. 2272 (2016), another

case arising under 18 U.S.C. §921(a)(33). *See* Brief for the United States in *Borden v. United States*, No. 19-5410, 2020 WL 4455245, at 11 (Filed June 8, 2020). So a victory for the Petitioner in *Borden* would show that precedents arising from §921(a)(33) are not easily transferred to the ACCA context.

There are at least two good reasons to cabin the §921(a)(33) precedents. One of them, discussed at oral argument in *Borden*, *see* Transcript of Oral Argument in *Borden v. United States*, 19-5410, at 54 (November 3, 2020), *available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-5410_o759.pdf, last visited November 19, 2020*,[1] is that the title and context of ACCA suggests a narrower class of more serious offenses, while §921(a)(33) targets a broader collection of assaultive offenses that are forceful in the "common law sense," named "Misdemeanor Crimes of Domestic Violence." *See Castleman*, 572 U.S. at 167 ("Whereas we have hesitated (as in *Johnson*) to apply the Armed Career Criminal Act to crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals,' we see no anomaly in grouping domestic abusers convicted of generic assault or battery offenses together with the others

[1] Justice Kagan explained during questioning:
JUSTICE KAGAN: Mr. Feigin, as -- as you know, *Voisine* expressly reserves this question, just as Leocal expressly reserved the recklessness question. And -- and in that footnote where it does reserve it, it says the context and purposes of the statutes may be sufficiently different to require a different reading. And -- and this, I suppose, goes back to Justice Breyer's questions, because I think the argument might go, or at least part of the argument might go, that in ACCA, one is defining what it means to be a violent felon for purposes of imposing an extremely significant punishment, whereas, in this statute, one is talking about misdemeanors and applying only a prophylactic rule about gun possession.

whom § 922(g) disqualifies from gun ownership.")(internal citations and quotation marks omitted); *see also Whyte v. Lynch*, 807 F.3d 463, 470-72 (1st Cir. 2015)(confining *Castleman* to §921(a)(33)).

Further, *Reyes-Contreras* may have overlooked an important textual difference between §921(a)(33) and force clauses phrased like ACCA. While §921(a)(33) captures all offenses that have as an element "the use of force," ACCA (and the enhancement at issue in *Reyes-Contreras*) require the "use of force *against the person of another*." *Compare* 18 U.S.C. 921(a)(33) *with* 18 U.S.C. 924(e)(2)(B(ii). There is very good reason to think that this additional restrictive clause – "against the person of another" – requires direct physical contact with the victim's body, and not mere infliction of injury by indirect means.

For all these reasons, *Burris* and *Borden* each potentially represent:

> intervening development(s) … reveal(ing) a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation…

Lawrence on Behalf of Lawrence v. Chater, 516 U.S. 163, 167 (1996). The proper course is thus to hold the instant Petition pending *Borden* and *Burris*, and to grant certiorari, vacate the judgment below, and remand for reconsideration in the event that either or both prove relevant. *See Lawrence*, 516 U.S. at 167.

Notably, Petitioner's district court proceedings are currently stayed pending *Burris*. *See* [Appendix C]. This strongly supports a finding that a vacatur in *Burris*

will likely affect the outcome of the instant case – certainly, the district court thinks so.

Three equitable considerations weigh heavily in favor of a hold for GVR in this case. First, this Court has held *Burris* at length; equal treatment of similarly situated litigants supports the same treatment here. *Cf. Griffith v. Kentucky*, 479 U.S. 314, 327 (1987). Second, the government below delayed resolution of the case for *years* while the governing law changed in its favor. To rush the case to final judgment while a relevant legal issue unfolds now would reflect an unequal standard of justice for the prosecution and defense. Finally, GVR orders are especially favored in criminal cases because "our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated." *Stutson v. United States*, 516 U.S. 193, 196 (1996). Here, the defendant merely seeks to serve an already lengthy seven-year sentence rather than a 15-year minimum for firearm possession.

II. The courts of appeals are divided as to whether "burglary" as ACCA uses the term encompasses the entry into a structure without intent to commit a crime followed by the commission of a reckless, negligent, or strict liability crime.

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*, __U.S.__, 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.

Significantly, the Seventh Circuit reaffirmed *Van Cannon* after *Quarles* in *Chazen v. Marske*, 938 F.3d 51 (7th Cir. 2019).

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). 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 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.").

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."

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*, and *Chazen* 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.

III. The case is ripe for review, notwithstanding a pending resentencing.

This Court has sometimes expressed reluctance to grant certiorari when the court of appeals has remanded the case to district court. *See Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam)("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *see also Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction").

There is a pending resentencing in this case, but this Court should not wait to grant certiorari until Petitioner appeals from that decision. The issue before this

Court – whether robbery and burglary qualify as "violent felonies" -- is "'fundamental to the further conduct of the case.'" *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 (1949)(quoting *Land v. Dollar*, 330 U.S. 731, 734 (1949)). If either the burglary or the robbery are disqualified from ACCA, the case is simply over – the district court's original sentence is lawful and litigation can cease.

Further, if *Borden* prevails or *Burris* is vacated, there is little sense in staging a resentencing hearing. Remand to the Fifth Circuit in light of *Borden* and/or *Burris* will permit it to decide this pure question of law without convening a costly and dangerous resentencing hearing at the peak of a pandemic, from whose result at least one party will likely appeal. Importantly, the ranges of lawful punishment with and without the ACCA enhancement do not overlap. Without the enhancement, Petitioner is subject to a maximum of ten years, *see* 18 U.S.C. §922(g); with it, he must serve at least 15 years, *see* 18 U.S.C. §924(e). Accordingly, the district court cannot obviate the basis for appeal by imposing the same sentence irrespective of its resolution of the ACCA issue. The issue must be resolved by the highest available court before it can be finally resolved. Waiting on the district court will only delay the final resolution, as the district court itself recognized by staying the case pending *Burris*. *See* [Appx. C].

Further, waiting to resolve the case until an appeal from the resentencing creates a serious risk that Petitioner will serve more than his lawful sentence. Petitioner David Lee Garrett is currently slated for release in 14 months and 7 days. *See* Bureau of Prisons, Inmate Locator, *available at*

https://www.bop.gov/inmateloc/ last visited November 20, 2020. If he is resentenced to 15 years, there is a very good chance that his appeal from that sentence will not conclude before his current release date. After all, his first government appeal took more than three years from the notice of appeal (May, 2017) until the judgment of the court of appeals (June, 2020). Excess incarceration can never be returned to him, but if the appellate process determines that he is ultimately due 15 years, he can always be returned to custody.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 23rd day of November, 2020.

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