

No. _____

In the

Supreme Court of the United States

ARTAVIUS DONTRELL SMITH,
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

J. MATTHEW WRIGHT
* *COUNSEL OF RECORD*
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
500 SOUTH TAYLOR STREET, SUITE 110
AMARILLO, TEXAS 79101
(806) 324-2370
MATTHEW_WRIGHT@FD.ORG

QUESTIONS PRESENTED

1.

Is Texas aggravated robbery—which can be committed by recklessly causing serious bodily injury to another person during the course of a theft—a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e)?

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 ACCA?

3.

To affirm Petitioner’s ACCA sentence, the Fifth Circuit relied upon two significant shifts in its own interpretation of that statute *after* he committed the instant offense. Did 18 U.S.C. § 924(e) provide fair warning to Petitioner?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Artavious Dontrell Smith*, No. 3:16-CR-227 (N.D. Tex.)
2. *United States v. Artavious Dontrell Smith*, No. 17-10616 (5th Cir.)

TABLE OF CONTENTS

QUESTIONS PRESENTED	I
PARTIES TO THE PROCEEDING	II
DIRECTLY RELATED PROCEEDINGS	II
TABLE OF AUTHORITIES	V
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT.....	3
REASONS TO GRANT THE PETITION.....	5
I. The Court should grant the petition and hold that causing injury is not synonymous with the use of physical force.	5
A. Under <i>Leocal</i> , causation of injury is not the same thing as a use of physical force against a victim.	5
B. This Court has already granted certiorari to decide whether reckless causation of injury is a use of physical force against the victim.....	6
C. Texas assaultive crimes reach conduct that involves neither physical contact nor use of violent physical force.....	8
II. The Court should grant the petition to resolve the circuit split over the trespass-plus-crime theory of burglary.	13
III. This Court should grant the petition because the Fifth Circuit's change in interpretation was unpredictable at the time Mr. Smith committed the crimes.....	20
A. In June of 2015 and June of 2016, no one could have predicted the sea-change in Fifth Circuit statutory interpretation.	21
1. The Fifth Circuit continued to apply its longstanding rule that <i>recklessly</i> injuring a victim was not a <i>use</i> of physical force <i>against</i> that victim.....	22

2. The Fifth Circuit also continued to apply its longstanding distinction between <i>injury</i> and <i>force</i> in the months before Petitioner committed his offense.	23
3. The circuit splits addressed by <i>Reyes-Contreras</i> and <i>Voisine</i> did not exist in January 2016.	25
4. At the time of Mr. Smith's offenses, Fifth Circuit precedent also foreclosed the argument that Texas Penal Code § 30.02(a)(3) is a generic burglary.....	27
B. The decision below conflicts with this Court's precedent.....	27
1. The Fifth Circuit's retroactivity decision ignores the important role of existing circuit precedent when evaluating fair-warning claims.	27
2. The Fifth Circuit has failed to address <i>Marks</i>	28
CONCLUSION.....	30
PETITION APPENDIX	
Fifth Circuit Opinion	1a

TABLE OF AUTHORITIES

Cases

<i>Alacan v. State</i> , 03-14-00410-CR, 2016 WL 286215 (Tex. App.—Austin Jan. 21, 2016, no pet.)	19
<i>Ashcroft v. al-Kidd</i> , 563 U.S. 731 (2011)	28
<i>Battles v. State</i> , 13-12-00273-CR, 2013 WL 5520060 (Tex. App.—Corpus Christi Oct. 3, 2013, pet. ref'd)	19
<i>Billingsley v. State</i> , No. 11-13-00052-CR, 2015 WL 1004364 (Tex. App. – Eastland 2015, pet. ref'd)	12
<i>Borden v. United States</i> , No. 19-5410	8, 30
<i>Bouie v. City of Columbia</i> , 378 U.S. 347 (1964)	27
<i>Brooks v. State</i> , 08-15-00208-CR, 2017 WL 6350260 (Tex. App.—El Paso Dec. 13, 2017, pet. ref'd)	19
<i>Burton v. State</i> , 510 S.W.3d 232 (Tex. App.—Fort Worth 2017, no pet.)	8
<i>Chazen v. Marske</i> , 938 F.3d 851 (7th Cir. 2019)	19
<i>Crawford v. State</i> , 05-13-01494-CR, 2015 WL 1243408 (Tex. App.—Dallas Mar. 16, 2015, no pet.)	19
<i>Daniel v. State</i> , 07-17-00216-CR, 2018 WL 6581507 (Tex. App.—Amarillo Dec. 13, 2018, no pet.)	18, 19
<i>Davis v. United States</i> , 900 F.3d 733 (6th Cir. 2018)	7

<i>DeVaughn v. State</i> , 749 S.W.2d 62 (Tex. Crim. App. 1988).....	14
<i>Guzman v. State</i> , 2-05-096-CR, 2006 WL 743431 (Tex. App.—Fort Worth Mar. 23, 2006, no pet.)	19
<i>Johnson v. State</i> , 14-10-00931-CR, 2011 WL 2791251 (Tex. App.—Houston [14th Dist.] July 14, 2011, no pet.)	19
<i>Johnson v. United States</i> , 576 U.S. 591 (2015)	4, 21
<i>Landrian v. State</i> , 268 S.W.3d 532	9
<i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004)	<i>passim</i>
<i>Lexington Ins. Co. v. Precision Drilling Co., L.P.</i> , 830 F.3d 1219 (10th Cir. 2016)	21
<i>Lomax v. State</i> , 233 S.W.3d 302 (Tex. Crim. App. 2007).....	16, 17, 18, 19
<i>Marks v. United States</i> , 430 U.S. 188 (1977)	21, 27, 28, 29
<i>May v. State</i> , 919 S.W.2d 422 (Tex. Crim. App. 1996).....	16
<i>McBoyle v. United States</i> , 283 U.S. 25 (1931)	20, 27
<i>McNair v. State</i> , No. 02-10-00257-CR, 2011 WL 5995302 (Tex. App. Nov. 23, 2011)	11
<i>Memoirs v. Massachusetts</i> , 383 U.S. 413 (1966)	29
<i>Miller v. California</i> , 413 U.S. 15 (1973)	29
<i>Padieu v. State</i> , 05-09-00796-CR, 2010 WL 5395656 (Tex. App.—Dallas Dec. 30, 2010, pet. ref'd)	12

<i>Patterson v. McLean Credit Union,</i> 491 U.S. 164 (1989)	22
<i>Pogue v. State,</i> No. 05-12-00883-CR, 2013 WL 6212156 (Tex. App.—Dallas Nov. 27, 2013).....	11
<i>Quarles v. United States,</i> 139 S. Ct. 1872 (2019)	14
<i>Scroggs v. State,</i> 396 S.W.3d 1 (Tex. App.—Amarillo 2010, pet. ref'd, untimely filed)	19
<i>State v. Duran,</i> 492 S.W.3d 741 (Tex. Crim. App. 2016).....	19
<i>State v. Rivello,</i> Case No. F-1700215-M (Crim. Dist. Ct. No. 5, Dallas Co., Tex.).....	13
<i>State v. Rivello,</i> Case No. F-1900747 (Crim. Dist. Ct. No. 4, Dallas Co., Tex.)	13
<i>State v. Zakikhani,</i> Case No. 1512289 (Crim. Dist. Ct. No. 176, Harris Co., Tex. June 20, 2018).....	12
<i>Torrez v. State,</i> 12-05-00226-CR, 2006 WL 2005525 (Tex. App.—Tyler July 19, 2006, no pet.)	19
<i>Tyra v. State,</i> 897 S.W.2d 796 (Tex. Crim. App. 1995).....	11
<i>United States v. Begay,</i> 934 F.3d 1033 (9th Cir. 2019)	7
<i>United States v. Booker,</i> 644 F.3d 12 (1st Cir. 2011).....	26
<i>United States v. Burris,</i> 920 F.3d 942 (5th Cir. 2019)	7, 29
<i>United States v. Calderon-Pena,</i> 383 F.3d 254 (5th Cir. 2004) (en banc)	24
<i>United States v. Castillo-Rivera,</i> 853 F.3d 218 (5th Cir. 2017) (en banc)	15

<i>United States v. Castleman</i> , 572 U.S. 157 (2014)	<i>passim</i>
<i>United States v. Ceron</i> , 775 F.3d 222 (5th Cir. 2014)	24
<i>United States v. Constante</i> , 544 F.3d 584 (5th Cir. 2008)	4
<i>United States v. Cortez-Rocha</i> , 552 F. App'x 322 (5th Cir. 2014)	24
<i>United States v. Emeary</i> , 794 F.3d 526 (5th Cir. 2015)	27
<i>United States v. Fields</i> , 863 F.3d 1012 (8th Cir. 2017)	7
<i>United States v. Fierro-Reyna</i> , 466 F.3d 324 (5th Cir. 2006)	24
<i>United States v. Garcia-Figueroa</i> , 753 F.3d 179 (5th Cir. 2014)	22
<i>United States v. Garcia-Perez</i> , 779 F.3d 278 (5th Cir. 2015)	23, 24
<i>United States v. Garcia-Santana</i> , 774 F.3d 528 (9th Cir. 2014)	26
<i>United States v. Gomez Gomez</i> , 917 F.3d 332 (5th Cir. 2019)	25, 26
<i>United States v. Gore</i> , 636 F.3d 728 (5th Cir. 2011)	22
<i>United States v. Gracia-Cantu</i> , 302 F.3d 308 (5th Cir. 2002)	24
<i>United States v. Herrera-Alvarez</i> , 753 F.3d 132 (5th Cir. 2014)	24
<i>United States v. Herrold</i> , 941 F.3d 173 (5th Cir. 2019) (en banc)	<i>passim</i>
<i>United States v. Hill</i> , 882 F.3d 135 (2d Cir. 2016)	25

<i>United States v. Hodge,</i> 902 F.3d 420 (4th Cir. 2018)	7
<i>United States v. Houston,</i> 364 F.3d 243 (5th Cir. 2004)	11
<i>United States v. Lanier,</i> 520 U.S. 259 (1997)	20, 21, 28
<i>United States v. Lerma,</i> 877 F.3d 628 (5th Cir. 2017)	8
<i>United States v. Martinez-Rodriguez,</i> 857 F.3d 282 (5th Cir. 2017)	24
<i>United States v. Middleton,</i> 883 F.3d 485 (4th Cir. 2018)	7
<i>United States v. Ocampo-Cruz,</i> 561 F. App'x 361 (5th Cir. 2014)	22
<i>United States v. Pam,</i> 892 F.3d 1271 (D.C. Cir. 2018)	7, 8
<i>United States v. Ramirez,</i> 507 F. App'x 353 (5th Cir. 2013)	27
<i>United States v. Resendiz-Moreno,</i> 705 F.3d 203 (5th Cir. 2013)	24
<i>United States v. Reyes-Contreras,</i> 882 F.3d 113 (5th Cir. 2018)	<i>passim</i>
<i>United States v. Rico-Mejia,</i> 859 F.3d 318 (5th Cir. 2017)	24
<i>United States v. Rodriguez-Rodriguez,</i> 775 F.3d 706 (5th Cir. 2015)	24
<i>United States v. Rodriguez-Rodriguez,</i> 775 F.3d at 711–712	26
<i>United States v. Vargas-Duran,</i> 356 F.3d 598 (5th Cir. 2004) (en banc)	5, 23
<i>United States v. Vargas-Soto,</i> 700 F.3d 180 (5th Cir. 2012)	9

<i>United States v. Villegas-Hernandez</i> , 468 F.3d 874 (5th Cir. 2006),	4, 24
<i>United States v. Vinson</i> , 794 F.3d 418 (4th Cir. 2015)	26
<i>United States v. Voisine</i> , 778 F.3d 176 (1st Cir. 2015).....	26
<i>United States v. Windley</i> , 864 F.3d 36 (1st Cir. 2017).....	7
<i>Van Cannon v. United States</i> , 890 F.3d 656 (7th Cir. 2018)	14, 15, 19
<i>Voisine v. United States</i> , 136 S. Ct. 2272 (2016)	<i>passim</i>
<i>Voisine v. United States</i> , No. 14-10154 (U.S. filed Jan. 19, 2016)	23
<i>Walker v. State</i> , 897 S.W.2d 812 (Tex. Crim. App. 1995).....	11
<i>Walker v. United States</i> , 931 F.3d 467 (6th Cir. 2019)	7
<i>Whyte v. Lynch</i> , 807 F.3d 463 (1st Cir. 2015).....	26
<i>Wingfield v. State</i> , 282 S.W.3d 102 (Tex. App.—Fort Worth 2009, pet. ref'd)	19
<i>Woodard v. State</i> , 294 S.W.3d 605 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd).....	8
Statutes	
8 U.S.C. § 1101(h)	9, 10
18 U.S.C. § 16(a)	10
18 U.S.C. § 921(a)(33)(A)	6
18 U.S.C. § 922(g)(9)	6
18 U.S.C. § 924(e)(1)	<i>passim</i>

28 U.S.C. § 1254(1)	1
Fla. Stat. § 316.193(c)(2).....	10
Tex. Penal Code § 29.03.....	4
Tex. Penal Code § 30.02.....	4
Texas Penal Code § 6.02	17
Texas Penal Code § 6.03(c)	9
Texas Penal Code § 19.02(a) (West 1981)	17
Texas Penal Code § 22.01	13, 15
Texas Penal Code § 22.04	19
Texas Penal Code § 22.04(a).....	16
Texas Penal Code § 22.011(a)(2)	16
Texas Penal Code § 22.041	16
Texas Penal Code § 29.02(a).....	2
Texas Penal Code § 29.03(a).....	3
Texas Penal Code § 30.02(a).....	3, 17
Texas Penal Code § 30.02(a)(1), (a)(2).....	18
Texas Penal Code § 30.02(a)(3)	<i>passim</i>

Other Authorities

Tera Robertson, <i>Man may be knowingly infecting victims with HIV, police say</i> , https://www.click2houston.com/news/investigates/man-may-be-knowningly-infecting-victims-with-hiv-police-say (accessed Oct. 30, 2018)	12
4 William Blackstone, <i>Commentaries on the Laws of England</i> 227 (1769)	13

PETITION FOR A WRIT OF CERTIORARI

Petitioner Artavius Dontrell Smith 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 813 Federal Appendix 981 and is reprinted in the Appendix to this Petition. App., *infra*, 1a–4a.

JURISDICTION

The Fifth Circuit issued its judgment on July 31, 2020. On March 19, this Court extended the deadline to file certiorari to 150 days from the judgment. This petition is timely under the March 19 Order and Supreme Court Rule 30.1. This Court has jurisdiction to review the Fifth Circuit's final decision under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

No person shall . . . be deprived of life, liberty, or property, without due process of law.

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.

The case involves the application of these provisions to the Texas offenses of aggravated robbery and burglary. Texas Penal Code § 29.02(a) defines “robbery” as follows:

(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.

Texas Penal Code § 29.03(a) defines “aggravated robbery” as follows:

- (a) A person commits an offense if he commits robbery as defined in Section 29.02, and he:
 - (1) causes serious bodily injury to another;
 - (2) uses or exhibits a deadly weapon; or
 - (3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:
 - (A) 65 years of age or older; or
 - (B) a disabled person.

Texas Penal Code § 30.02(a) defines “burglary” as follows:

Sec. 30.02. BURGLARY. (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

Petitioner pleaded guilty to three federal offenses: possessing a firearm after felony conviction on June 30, 2015; possessing ammunition after felony conviction on

June 19, 2016; and possessing cocaine with intent to distribute on June 19, 2016.

Petitioner had four adult felony convictions from the time he was a teenager:

Date of Commission	Date of Arrest	Offense	Statute of Conviction
09/30/2008	09/30/2008	Burglary of a Habitation	Tex. Penal Code § 30.02
09/30/2008	09/30/2008	Burglary of a Habitation	Tex. Penal Code § 30.02
02/26/2009	04/11/2009	Burglary of a Habitation	Tex. Penal Code § 30.02
04/09/2009	04/11/2009	Aggravated Robbery	Tex. Penal Code § 29.03

App., *infra*, 2a.

Without the Armed Career Criminal Act enhancement, Mr. Smith would have faced an aggregate sentencing recommendation of 46–57 months in prison. But the district court decided that Mr. Smith’s record gave rise to an ACCA enhancement under 18 U.S.C. § 924(e). The court ordered him to serve 188 months in prison. App., *infra*, 1a–2a.

All of Mr. Smith’s federal crimes were committed after this Court’s struck down the ACCA’s residual clause in *Johnson v. United States*, 576 U.S. 591 (2015). Without that clause, there was reason to believe that he was not an Armed Career Criminal. The Fifth Circuit had long held that some forms of Texas burglary were non-generic, *see United States v. Constante*, 544 F.3d 584, 587 (5th Cir. 2008), *overruled by United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc), and had likewise long held that Texas’s “result-oriented” assaultive offenses did not have the use of physical force as an element. *See, e.g., United States v. Villegas-Hernandez*, 468 F.3d 874, 879

(5th Cir. 2006) (distinguishing between causing injury and using physical force), *overruled by United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc);

Mr. Smith objected to application of the ACCA in district court and renewed his argument on appeal. He first argued that the Government could not prove that his first two burglary convictions—committed September 30, 2008—were committed on separate “occasions,” as required by the ACCA. 18 U.S.C. § 924(e)(1). He then argued that neither burglary nor aggravated robbery were categorically violent felonies, and that the two offenses were indivisible. The district court overruled his objection and imposed the 188-month sentence. The Fifth Circuit affirmed.

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 *Reyes-Contreras*, 910 F.3d at 186 (“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 physical 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. That 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.” *Burris*, 920 F.3d at 952. 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* and *Burris* are decided.¹

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;

¹ As Petitioner noted in his briefing below, a panel of the Fifth Circuit held that Texas aggravated robbery was divisible, and that robbery by threat with a deadly weapon had, as an element, the threatened use of physical force. *See Smith C.A. Ltr. Br. 14–16* (discussing *United States v. Lerma*, 877 F.3d 628, 636 (5th Cir. 2017)). But the Court of Appeals did not rule on the continuing viability of *Lerma* here because the court had ruled that all forms of Texas robbery are violent in *Burris*. In fact, Texas cases confirm that jurors need not be unanimous about which theory of robbery (fear or injury) and which aggravator (serious injury, deadly weapon, or elderly victim) the prosecution has proven. *See Woodard v. State*, 294 S.W.3d 605 (Tex. App.—Houston [1st Dist.] 2009, pet. ref’d) (“[U]nanimity was not required for the aggravating factors” of aggravated robbery. *Burton v. State*, 510 S.W.3d 232, 237 (Tex. App.—Fort Worth 2017, no pet.) (“[C]ausing bodily injury or threatening the victim are different methods of committing the same offense” “of aggravated robbery,” that can be submitted in the disjunctive without violating the requirement of juror unanimity.)

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. Aggravated assault—like most other Texas assaultive crimes—is a “result-oriented offense.” *Landrian v. State*, 268 S.W.3d 532, 533 (Tex. Crim. App. 2008. 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 Fifth Circuit 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-knowningly-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. 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).² In the Fifth Circuit, it is not enough to show that statutory language

² The petition for certiorari in *Herrold* is pending under case number 19-7731.

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.”).

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. The intermediate appellate courts, when listing the elements of “burglary” under § 30.02(a)(3), routinely recognize that felonies with reckless or even negligent *mens rea* are sufficient to convert a trespass into a burglary 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.

3. Petitioner relied on these decisions—not considered by the en banc Court in *Herrold*—to show that the Fifth Circuit’s reading of Texas burglary law was unfounded and implausible. But the Fifth Circuit was not persuaded. App., *infra*, 3a n.5 (quoting *United States v. Walton*, 804 F. App’x 281, 282 (5th Cir. 2020)) (“It is now settled that all ‘challenges to the Texas burglary statute as being nongeneric for purposes of the ACCA enhancement are foreclosed.’”).

III. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE FIFTH CIRCUIT’S CHANGE IN INTERPRETATION WAS UNPREDICTABLE AT THE TIME MR. SMITH COMMITTED THE CRIMES.

As Justice Holmes explained, the Fifth Amendment demands that criminal laws provide “fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.” *McBoyle v. United States*, 283 U.S. 25, 27, 51 (1931). Two “related manifestations” of the fair-warning requirement are relevant here:

[1] the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered;

[and]

[2] due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.

United States v. Lanier, 520 U.S. 259, 266 (1997). Fair-warning “principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences.”

Johnson, 576 U.S. at 596 (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)). “[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant’s conduct was criminal.” *Lanier*, 520 U.S. at 267.

A. In June of 2015 and June of 2016, no one could have predicted the sea-change in Fifth Circuit statutory interpretation.

At the times Mr. Smith possessed the firearms, and even continuing through his direct appeal, no one could have predicted the current state of Fifth Circuit precedent. The intervening decisions in *Reyes-Contreras* and *Herrold* “marked a significant departure from” the prior governing regime, and “expanded criminal liability” under the ACCA. *Marks v. United States*, 430 U.S. 188, 194 (1977). That means they cannot be retrospectively applied against him.

To reject similar fair-warning arguments in the past, the Fifth Circuit relied on *other* decisions rendered after Petitioner committed his crimes. This defies Supreme Court precedent. See *Lanier*, 527 U.S. at 267; see also *Marks*, 430 U.S. at 190–194. The Fifth Circuit’s *post hoc* approach to fair-warning “threatens due process (fair notice) problems by foisting retroactively on litigants textual interpretations they would have had difficulty imagining when arranging their affairs.” *Lexington Ins. Co. v. Precision Drilling Co., L.P.*, 830 F.3d 1219, 1223 (10th Cir. 2016) (Gorsuch, J.).

When Petitioner committed his offense, binding (and as-yet unquestioned) Fifth Circuit precedent foreclosed, in his favor, any argument that burglary under Texas Penal Code § 30.02(a)(3) or robbery committed by recklessly causing injury

could be violent felonies. Going back to at least 2004, the en banc Fifth Circuit had held that reckless conduct was not a *use* of force *against* the victim, and *causing injury* did not necessarily entail a *use of physical force*. Moreover, a well-informed reader of precedent would have confidence in the longevity of those two rules, because “[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation.” *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–173 (1989).

1. The Fifth Circuit continued to apply its longstanding rule that recklessly injuring a victim was not a *use* of physical force *against* that victim.

As noted earlier, long before Petitioner committed his offense, the Fifth Circuit embraced the nearly universal view that a reckless-injury crimes was not a use of physical force against the victim. Result-oriented reckless crimes (like Texas robbery and aggravated robbery) were deemed “violent felonies under the Residual Clause.” *United States v. Gore*, 636 F.3d 728, 744 (5th Cir. 2011) (Higginbotham, J., concurring). But nothing in Fifth Circuit or Supreme Court jurisprudence suggested, prior to June 2016, that recklessly causing injury alone would be a *use of force against* a victim.

The Fifth Circuit continued to recognize and follow that rule after *Castleman* was decided. For example, in April of 2014, the court recognized that North Carolina assault with a deadly weapon involving serious injury did not satisfy the elements clause because it did not require “intentional conduct.” *United States v. Ocampo-Cruz*, 561 F. App’x 361, 365–367 (5th Cir. 2014). The Fifth Circuit also adhered to this rule in June 2014 (*United States v. Garcia-Figueroa*, 753 F.3d 179, 185 (5th Cir. 2014))

and again in February 2015 (*United States v. Garcia-Perez*, 779 F.3d 278, 283–284 (5th Cir. 2015)).

The Fifth Circuit, of course, was not alone. As this Court recognized in March of 2014, “the Courts of Appeals ha[d] almost uniformly held that recklessness is not sufficient” “to constitute a ‘use’ of force” against a victim. *Castleman*, 572 U.S. at 169 n.8 & cases cited. Indeed, a few months *after* Petitioner committed his first § 922(g) offense and a few months *before* he committed his second, the Solicitor General filed its *Voisine* merits brief in this Court arguing that MCDV embraced reckless offenses precisely because MCDV is “broader than the term[] . . . ‘violent felony’ under the Armed Career Criminal Act.” *See* U.S. Br. 31–37, *Voisine v. United States*, No. 14-10154 (U.S. filed Jan. 19, 2016). Respondent should have to explain how ACCA (standing alone or as construed) provided Petitioner with “fair notice” of a construction of ACCA different from Respondent’s own construction of the law at the time he committed the present offense. Petitioner committed his second offense a few days before this Court released its *Voisine* opinion. At the time, no one claimed that reckless injuring was a use of physical force against the victim.

2. The Fifth Circuit also continued to apply its longstanding distinction between *injury* and *force* in the months before Petitioner committed his offense.

In addition to the *mens rea* issue, the Fifth Circuit had long held that a result-of-conduct offense did not have use of physical force as an element. *Vargas-Duran*, 356 F.3d at 606. While the current Fifth Circuit majority has deemed that distinction

“unnatural,” *Reyes-Contreras*, 910 F.3d at 183, it was settled law in the Fifth Circuit for more than a decade.³

If *Castleman* was the harbinger of change for statutes *other than* MCDV, that message was lost on judges and litigants in the Fifth Circuit. The Fifth Circuit continued to rely on and apply the force-injury distinction in May 2014,⁴ December 2014,⁵ January 2015,⁶ and February 2015.⁷ It is even harder to accept the Fifth Circuit’s premise that its new regime was “reasonably clear” in June of 2016 in light of the fact that Fifth Circuit judges rejected the *Castleman*-based argument once the Government started raising it (long after Petitioner had committed his crimes). *See United States v. Rico-Mejia*, 859 F.3d 318, 321 (5th Cir. 2017); *United States v. Reyes-Contreras*, 882 F.3d 113, 123 (5th Cir. 2018), both abrogated by the en banc decision in *Reyes-Contreras*.

³ See, e.g., *United States v. Villegas-Hernandez*, 468 F.3d 874, 882–883 (5th Cir. 2006); *United States v. Cortez-Rocha*, 552 F. App’x 322, 326–327 (5th Cir. 2014); *United States v. Martinez-Rodriguez*, 857 F.3d 282, 286 (5th Cir. 2017); *United States v. Resendiz-Moreno*, 705 F.3d 203, 205 (5th Cir. 2013); *United States v. Fierro-Reyna*, 466 F.3d 324, 326 (5th Cir. 2006); *United States v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004) (en banc); *United States v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002).

⁴ *United States v. Herrera-Alvarez*, 753 F.3d 132, 135 (5th Cir. 2014).

⁵ *United States v. Ceron*, 775 F.3d 222, 229 (5th Cir. 2014).

⁶ *United States v. Rodriguez-Rodriguez*, 775 F.3d 706, 711–712 (5th Cir. 2015).

⁷ *Garcia-Perez*, 779 F.3d at 283–284.

3. The circuit splits addressed by *Reyes-Contreras* and *Voisine* did not exist in January 2016.

The Fifth Circuit first rejected a fair-warning challenge to its new interpretation of the elements clause in *United States v. Gomez Gomez*, 917 F.3d 332 (5th Cir. 2019):

Reyes-Contreras . . . merely reconciled our circuit precedents with the Supreme Court’s decision in *Castleman* . . . We simply backed away from our anomalous position and aligned our circuit with the precedents of other circuits. In short, *Reyes-Contreras* was neither unexpected nor indefensible.

Id. at 334. This might be deemed the “death by 1,000 cuts” defense of the Fifth Circuit’s change in the interpretation of the ACCA.

But none of those cuts had been applied at the time Petitioner committed his crimes in June 2015 and June 2016. It may be true that, by the time of *Reyes-Contreras* (November 2018), “the First through Eleventh Circuits and the District of Columbia Circuit” had all cast doubt on the viability of the force-versus-injury distinction for statutes other than MCDV. *Reyes-Contreras*, 910 F.3d at 180–182 & n.23. But the “precedents of other circuits” listed in footnote 23 of *Reyes-Contreras* did not yet exist when Smith committed his crimes. The earliest decision cited in that footnote is the Second Circuit’s August 2016 opinion *United States v. Hill*, 882 F.3d 135 (2d Cir. 2016), two months after Petitioner was arrested.

The precedent that existed *when Petitioner committed his crimes* tells a different story. Courts consistently *distinguished* between the Lautenberg Amendment’s broad definition of MCDV (interpreted in *Castleman*), and the

narrower definition of “violent force” used in ACCA.⁸ The First Circuit’s December 2015 decision in *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015), illustrates the state of precedent 6 months after the first crime and 6 months before the second and third crimes. Though the First Circuit had already held that MCDV included *reckless* offenses, that reasoning only applied “in the context of the more capacious, common law meaning of ‘physical force’ embodied in the Domestic Violence Gun Offender Ban.” *Id.* at 471–472. Indeed, the seminal First Circuit decision cited in *Castleman* and eventually affirmed in *Voisine* trumpeted this distinction: “There are sound reasons to decline to interpret the two statutes in tandem.” *United States v. Booker*, 644 F.3d 12, 20 (1st Cir. 2011).

Outside of MCDV, courts (including the First Circuit) continued to hold that recklessness does not constitute a *use* of physical force *against* a victim. *Castleman*, 134 S. Ct. at 1414 n.8 & cases cited. In other words, when Petitioner committed his offenses in 2015 and 2016, Fifth Circuit law was not “anomalous.” *Contra Gomez v. Gomez*, 917 F.3d at 334. There was no reason to doubt *Vargas-Duran*’s continued viability, which the Fifth Circuit had “consistently” applied for more than ten years. *United States v. Rodriguez-Rodriguez*, 775 F.3d at 711–712.

⁸ See, e.g., *United States v. Voisine*, 778 F.3d 176, 181 (1st Cir. 2015), *aff’d*, 136 S. Ct. 2272 (2016); *United States v. Vinson*, 794 F.3d 418, 422 (4th Cir. 2015), on *reh’g*, 805 F.3d 120 (4th Cir. 2015); *United States v. Garcia-Santana*, 774 F.3d 528, 540 (9th Cir. 2014).

4. At the time of Mr. Smith’s offenses, Fifth Circuit precedent also foreclosed the argument that Texas Penal Code § 30.02(a)(3) is a generic burglary

In the months and years leading up to Mr. Smith’s federal offenses, the Government regularly admitted that Texas Penal Code § 30.02(a)(3) was non-generic. It argued instead that the crime was a residual-clause violent felony. *See United States v. Ramirez*, 507 F. App’x 353 (5th Cir. 2013) (affirming a decision that (a)(3) was not generic burglary but was a residual-clause violent felony). The Fifth Circuit also regularly agreed. *See, e.g., United States v. Emeary*, 794 F.3d 526, 529–30 (5th Cir. 2015) (Without the ACCA’s residual clause, “it is now clear without any room for doubt that Texas Penal Code § 30.02(a)(3) offenses are not ‘violent felonies’ under the ACCA, period.”).

B. The decision below conflicts with this Court’s precedent.

Even if Respondent prevails regarding the correct interpretation of ACCA’s elements clause, and regarding “burglary,” it would be worth taking a second look at the Fifth Circuit’s retroactivity analysis. By failing to discuss *Marks*, the Fifth Circuit’s approach to retroactivity imputes a level of legal clairvoyance to an “ordinary” citizen that was not even shared by federal judges in 2016.

1. The Fifth Circuit’s retroactivity decision ignores the important role of existing circuit precedent when evaluating fair-warning claims.

When Petitioner committed his offenses, no one could reasonably be expected to anticipate “what the law intend[ed] to do” in response to his possession of the gun.

McBoyle, 283 U.S. at 27; *see also Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964).

Bouie, 378 U.S. at 351. Stare decisis and lenity would both require a ruling in

Petitioner's favor at that time, and no judicial decision "fairly disclosed" that a newly expanded conception of ACCA would bring reckless offenses (whether assault or burglary) "within its scope." *Lanier*, 520 U.S. at 266.

A "judicial gloss on an otherwise uncertain statute" is very important in the fair-warning context. *Id.* Often, these interpretations supply enough "clarity" to save a statute that would otherwise be void-for-vagueness. *Id.* If ordinary citizens are expected to know the "judicial gloss" on statutory language, then they should also be allowed to *rely* on that gloss. This is especially true here, where the judicial gloss was firmly established by more than a decade of published decisions.

Under *Lanier*, the rules governing fair-warning for criminal laws are the same as the rules that govern qualified immunity "[i]n the civil sphere." *Lanier*, 520 U.S. at 270. That doctrine is supposed to provide government officials with "the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *Id.* at 270–271. A government official is not civilly liable unless "existing precedent . . . placed the statutory or constitutional question beyond debate." *Cf. Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Here, "existing precedent" unequivocally resolved the statutory question in Petitioner's favor. That means he should get the benefit of the law that governed when he committed his offense.

2. The Fifth Circuit has failed to address *Marks*.

Even *correct* decisions that expand criminal statutes must not be applied retroactively. *Marks v. United States* illustrates that principle. In *Marks*, the defendants distributed a pornographic movie. That distribution ended in February

1973. At that time, this Court had not yet finalized its definition of “obscenity.” The most recent controlling decision at the time of the crime was the plurality opinion in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), but that had never been accepted by a majority of the Supreme Court.

In June 1973—after the crime but before the trial—this Court overruled *Memoirs* in *Miller v. California*, 413 U.S. 15 (1973). *Miller* announced new standards for defining obscenity. The trial court quite reasonably applied *Miller*, because that was the “correct” law. But *Marks* rejected that approach. The question was not whether *Miller* was a correct statement of the law—it was. For fair warning, the only issue was whether *Miller* “expanded criminal liability” as compared to the law that applied when the crime was committed. *Marks*, 430 U.S. at 194 (emphasis added).

In *Burris*, the Fifth Circuit recognized that intervening decisions “significantly changed” its “ACCA jurisprudence.” *Burris*, 920 F.3d at 952. These changes were outcome-determinative. Under the law that governed at the time of his offense, it was not clear that ACCA applied. The same was true at sentencing. The Fifth Circuit’s decisions in *Reyes-Contreras* and *Herrold* expanded criminal liability. Under *Marks*, the retrospective application of these new decisions violated his right to due process.

CONCLUSION

Petitioner asks that this Court hold the case pending a decision in *Borden*, then grant the petition and set the case for a decision on the merits.

Respectfully submitted,

J. MATTHEW WRIGHT
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
500 SOUTH TAYLOR STREET, SUITE 110
AMARILLO, TEXAS 79101
MATTHEW_WRIGHT@FD.ORG
(806) 324-2370

DECEMBER 23, 2020