No. _____

In the

Supreme Court of the United States

MICHAEL DEWAYNE VICKERS,
PETIONER,
V.

UNITED STATES OF AMERICA,
RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court analyzing a prior state-court conviction to determine whether the offense qualifies as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e), is bound by a state supreme court's authoritative interpretation of the statute of conviction even if the interpretation was announced after the defendant's conviction.

2. Whether Texas felony murder—committing "an act clearly dangerous to human life that causes the death of an individual" during the course of a felony—"has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. § 924(e)(2)(B)(i).

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

RELATED PROCEEDINGS

United States v. Vickers, No. 3:16-CR-229 (N.D. Tex.)

United States v. Vickers, No. 07-10767 (5th Cir.)

United States v. Vickers, No. 08-7249 (U.S.)

Vickers v. United States, No. 3:09-CV-1777 (N.D. Tex.)

Vickers v. Maye, No. A–11–CV–958 (W.D. Tex.)

Vickers v. Maye, No. 12-50837 (5th Cir.)

Vickers v. Pearce, No. 13-556 (U.S.)

In re Vickers, No. 16-10509 (5th Cir.)

Vickers v. United States, No. 3:15-CV-3912 (N.D. Tex.)

United States v. Vickers, No. 18-10940 (5th Cir.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Dewayne Vickers 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 vacating the district court order granting collateral relief is published at 967 F.3d 480 and is reprinted on pages 1a–11a of the Appendix. The court of appeals's previous opinion on direct appeal was published at 540 F.3d 356 and is reprinted on pages 43a–56a of the Appendix.

There are two additional unpublished opinions from the Court of Appeals related to Mr. Vickers's conviction and sentence: an order affirming the district court's denial of a habeas corpus petition, 546 F. App'x 395, and an order granting prefiling authorization for the § 2255 motion that initiated this action, which is reprinted at pages 15a–16a of the Appendix.

JURISDICTION

The Fifth Circuit entered judgment on July 23, 2020. App., *infra*, 12a. The court denied Mr. Vickers's timely petition for rehearing en banc on September 22, 2020. App., *infra*, 13a. On March 19, 2020, this Court extended the deadline to file petitions for certiorari in all cases to 150 days from the date of the order denying rehearing.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Armed Career Criminal Act, 18 U.S.C. § 924(e), and Texas Penal Code § 19.02 (West 1974). The Armed Career Criminal Act provides:

> (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, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

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

Texas Penal Code § 19.02 defines the offense of "murder." From January 1, 1974 through August 31, 1994, that statute provided:

§ 19.02. Murder

(a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; 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.

(b) An offense under this section is a felony of the first degree.

Tex. Penal Code § 19.02 (West 1974). A 1993 amendment added additional subsections relevant to punishment, but preserved the language defining the offense under revised Subsection (b):

(a) In this section:

(1) "Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

> (2) "Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.
>
> (b) A person commits an offense if he:
>
> (1) intentionally or knowingly causes the death of an individual;
>
> (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
>
> (3) commits or attempts to commit a felony, other than 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.
>
> (c) Except as provided by Subsection (d), an offense under this section is a felony of the first degree.
>
> (d) At the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree.

Tex. Penal Code § 19.02 (current version), as amended by 1993 Tex. Gen. Laws 900 § 1.01 (eff. Sept. 1, 1994).

INTRODUCTION

Several years into an ACCA-enhanced sentence of imprisonment, the district granted collateral relief, vacated that sentence, and re-sentenced Mr. Vickers to less time than he had already served. The Government successfully appealed that decision to the Fifth Circuit, and Mr. Vickers now asks this Court to vacate *that* decision and reinstate the grant of post-conviction relief.

The ultimate question is whether Mr. Vickers's 1982 Texas conviction for murder has, as an element, the use, attempted use, or threatened use of physical force against another person. *See* 18 U.S.C. § 924(e)(2)(B)(i). To answer that question, the Court must determine whether the least culpable conduct that would constitute Texas murder would also satisfy the ACCA's elements clause. The answer to that question should be a straightforward "no." The logic is syllogistic:

> **Major Premise:** An offense that can be committed by the "negligent operation of a vehicle"—such as when a drunk driver collides with another car and hurts someone—does not have, as an element, "the *use* of physical force . . . *against* the victim." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). This statutory language "most naturally suggests a higher degree of intent than negligent or merely accidental conduct."
>
> **Minor Premise:** In Texas, a strict liability drunk-driver who collides with another car and kills one of the passengers is guilty of murder. *Lomax v. State*, 233 S.W.3d 302, 303 (Tex. Crim. App. 2007).
>
> **Conclusion:** Texas murder does not require proof of the use of physical force against the victim.

The federal courts are "bound by" the Texas Court of Criminal Appeals's "interpretation of state law, including its determination of the elements of" murder. (*Curtis) Johnson v. United States*, 559 U.S. 133, 138 (2010). Yet the Fifth Circuit decided to *ignore* the holding and reasoning of *Lomax* because that case was decided "years after Vickers's conviction. We consider only the state law as it existed at the time of Vickers's 1982 murder conviction." App., *infra*, 8a. In the Fifth Circuit's view, a federal court analyzing a prior conviction should ignore developments in state-court *decisional law* in the same way the court ignores subsequent *statutory amendments*—

they do not speak to state law "as it existed" at the time of the conviction. App., *infra*, 8a–9a (discussing *McNeill v. United States*, 563 U.S. 816, 820 (2011)).

The Fifth Circuit's decision brought it into direct conflict with the Eleventh Circuit. That court recognizes that statutory amendments and court decisions are not the same. When a state court interprets statutory language, the court "tells us what that statute always meant." *United States v. Fritts*, 841 F.3d 937, 943 (11th Cir. 2016) (discussing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–313 (1994)). This Court agrees with the Eleventh Circuit. In *Curtis Johnson* itself, this Court recognized that it was "bound by" the Florida Supreme Court's 2007 statutory interpretation decision in *State v. Hearns*, 961 So.2d 211, 218 (Fla. 2007), when evaluating the defendant's "2003 battery conviction." *Curtis Johnson*, 559 U.S. at 136–137.

There is no way to reconcile the Eleventh Circuit's decision in *Fritts* and the Fifth Circuit's decision here. Both are published authoritative decisions on an important federal question. This Court should grant this petition to settle the split. Alternatively, this Court should grant the petition and hold that Texas felony murder does not satisfy the ACCA's element clause.

STATEMENT

1. In August of 2005, Dallas Police investigating a burglary in Mr. Vickers's neighborhood mistook him for the suspect. App., *infra*, 43a–44a. They ahd "the wrong guy," *ibid.*, but he was carrying a .38 special revolver to protect himself and his family from criminal activity. He was not allowed to have the gun because he was a felon.

2. In May 2006, he pleaded guilty in Texas state court to charges of felon-in-possession and evading arrest. 5th Cir. R. 687–688. The state court imposed concurrent sentences of 2 years (for the gun crime) and 150 days (for evading). Federal prosecutors, apparently unhappy with that sentence, secured an indictment in July 2006 charging him with the federal version of felon-in-possession, 18 U.S.C. § 922(g)(1). Once in federal court, the Government alleged that his record warranted enhancement under the Armed Career Criminal Act, which would raise the minimum punishment to fifteen years in prison. 18 U.S.C. § 924(e)(1).

3. The district court based its ACCA determination on three prior Texas convictions: murder, burglary, and delivery of drugs. App., *infra*, 2a. The only conviction that matters for this petition is his 1982 Texas conviction for murder. Whatever actually happened that gave rise to the conviction, state authorities did not react as though he had committed a serious violent felony. The state court sentenced him to "shock probation"—180 days confinement, followed by community supervision. The state court later revoked his probation after and ordered him to serve five years in prison after he was convicted of burglary. 5th Cir. Sealed R. 685 ¶ 24.

4. At the time of sentencing, Fifth Circuit decisional law foreclosed any argument that Texas murder would satisfy the ACCA's elements clause—even if it was intentional murder. The en banc Fifth Circuit had held that causation of injury was not equivalent to use of physical force against the victim. *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (en banc); *accord United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006) (If a crime can be committed by

administering poison or tricking the victim into driving into traffic, it does not have use of force as an element). The district court thus necessarily relied on the ACCA's residual clause when it applied the enhancement at sentencing.

5. On direct appeal, the Fifth Circuit affirmed Mr. Vickers's federal conviction and ACCA-enhanced sentence. *United States v. Vickers*, 540 F.3d 356 (5th Cir. 2008). App., *infra*, 43a–51a. This Court denied certiorari. 555 U.S. 1088 (2008). Previous attempts at collateral attack failed.[1]

6. After this Court struck down the ACCA's residual clause in *(Samuel) Johnson v. United States*, 576 U.S. 591 (2015), the Fifth Circuit granted authorization for Mr. Vickers to file a successive motion to vacate under 28 U.S.C. § 2255(h)(2). App., *infra*, 15a–16a. The authorizing panel did not believe *Samuel Johnson* would affect the analysis of Mr. Vickers's burglary conviction, but the court allowed him to file a motion arguing that Texas murder would no longer count as a violent felony without the ACCA's residual clause. *Ibid.* If the murder conviction is not a violent felony, Mr. Vickers would not be an Armed Career Criminal.

7. Texas law provides three alternative ways the prosecution can prove the offense of murder:

> A person commits an offense if he:
>
> > (1) intentionally or knowingly causes the death of an individual;

[1] *See Vickers v. United States*, 2011 WL 103026 (N.D. Tex. Jan. 12, 2011) (first motion to vacate under 28 U.S.C. § 2255); *Vickers v. Maye*, 2012 WL 2462009 (W.D. Tex. June 26, 2012), *aff'd*, 546 F. App'x 395 (5th Cir. 2013) (petition for habeas corpus).

> (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
>
> (3) commits or attempts to commit a felony, other than 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.

Texas Penal Code § 19.02(a) (West 1974). It is undisputed that these three theories represent alternative means of proving a single, indivisible offense.[2]

8. Relying on *Vargas-Duran* and *Villegas-Hernandez*, the district court held that none of these alternatives satisfied the ACCA's elements clause. App., *infra*, 25a–26a.

9. On June 27, 2018, the district court re-sentenced Mr. Vickers by an amended judgment in the criminal case to 98 months in prison. App., *infra*, 36a–37a. He had already served longer than that in prison; the Bureau of Prisons immediately released him. The Government appealed the district court's amended criminal judgment. App., *infra*, 3a.

10. While the appeal was pending,

[2] *See Aguirre v. State*, 732 S.W.2d 320, 325–326 (Tex. Crim. App. 1982). The Magistrate Judge's Report recognized that a Texas jury can return a unanimous guilty verdict while disagreeing about which alternative was proven, and that makes the offense indivisible. App., *infra*, 919–921. The Government did not object to this conclusion, and affirmatively "accept[ed]" the indivisibility holding "for purposes of this appeal." U.S. C.A. Br. 8.

11. On July 17, 2018, the Government filed just one notice of appeal, in the criminal action, directed at "the final judgment and sentence imposed after granting Section 2255 relief, entered in this case on June 27, 2018." (ROA.271).

12. While the Government's appeal was pending, intervening Fifth Circuit decisions "significantly changed [that] court's ACCA jurisprudence." *United States v. Burris*, 920 F.3d 942, 952 (5th Cir. 2019). The en banc Court declared a "mulligan" on its use-of-force jurisprudence in *United States v. Reyes-Contreras*, 910 F.3d 169, 186 (5th Cir. 2018) (en banc), overruling more than 14 years' worth of statutory interpretation decisions. Under *Reyes-Contreras*, intentional, knowing, or reckless causation of injury is now deemed synonymous with the use of physical force against a victim. The Fifth Circuit has held that is free to apply this new interpretive framework retrospectively against defendants like Mr. Vickers who committed their crimes under the old interpretive regime. *Burris*, 920 F.3d at 952–953.

13. Mr. Vickers urged the Fifth Circuit to affirm the decision to grant collateral relief. He first preserved, for further review, the argument that *Reyes-Contreras* and *Burris* were wrong. Vickers C.A. Br. 11. This Court will presumably resolve that contention in *Borden v. United States*, No. 19-5410. Relying on *Lomax* and on this Court's decision in *Leocal*, he also argued that Texas felony murder was even broader than the elements clause *as expanded* by *Reyes-Contreras* and *Burris*. Unlike other assaultive crimes, Texas felony murder does not even require recklessness.

14. The Fifth Circuit decided that it was not "bound by" *Lomax*, and went so far as to hold that it *could not consider* the Texas Court of Criminal Appeals's authoritative construction of Texas's murder statute. This is because *Lomax* "was decided in 2007, more than 20 years after Vickers's conviction." App, *infra*, 8a. The court went on to hold, contrary to *Lomax*, that (at the time of Mr. Vickers's conviction) Texas's crime of felony murder required proof of at least a reckless state of mind, and that killing someone while committing a reckless crime was necessarily a use of physical force against the victim. App., *infra*, 8a–9a.

15. Mr. Vickers filed a petition for rehearing en banc arguing that the decision below directly conflicted with the Eleventh Circuit's authoritative decisions in *Fritts* and in *Welch v. United States*, 958 F.3d 1093, 1098 (11th Cir. 2020). He also argued that the decision below was inconsistent with this Court's decision in *Curtis Johnson*. The Fifth Circuit denied rehearing.

REASONS TO GRANT THE PETITION

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE CIRCUIT SPLIT OVER THE TIMING OF STATE COURT STATUTORY INTERPRETATION DECISIONS.

A. The Fifth and Eleventh Circuits have reached opposite answers to the first question presented.

In the published decision below, the Fifth Circuit decided that it was required to ignore an authoritative state court decision interpreting Texas's murder statute because the decision came after Mr. Vickers's conviction. App, *infra*, 8a. This holding directly conflicts with two authoritative decisions of the Eleventh Circuit. *See Fritts*, 841 F.3d at 943 ("When the Florida Supreme Court in [*Robinson v. State*, 692 So.2d

883 (Fla. 1997)] interprets the robbery statute, it tells us what that statute always meant."); *accord Welch*, 958 F.3d at 1098 (*Fritts* "thus concluded that Florida robbery has always required force sufficient to satisfy the ACCA's elements clause."). Even when Mr. Vickers pointed out the conflict, the En Banc Fifth Circuit refused to reconsider the panel's dubious decision. App., *infra*, 13a. Plenary review is the only way to avoid splintered and inconsistent application of the ACCA based only on the accident of geography. *See* S. Ct. R. 10(a).

1. "The highest state court is the final authority on state law." *Fid. Union Tr. Co. v. Field*, 311 U.S. 169, 177 (1940); *accord Polk's Lessee v. Wendal*, 13 U.S. (9 Cranch) 87, 94 (1815) ("In cases depending on the statutes of a state, the settled construction of those statutes, by the state Courts, is to be respected."). The Court of Criminal Appeals is Texas's highest court for criminal matters. *Seaton v. Procunier*, 750 F.2d 366, 368 (5th Cir. 1985); *Arnold v. Cockrell*, 306 F.3d 277, 279 (5th Cir. 2002).

2. Even in the context of ACCA, this Court has held that a federal court analyzing a state conviction is "bound by" a state supreme court's "interpretation of state law, including its determination of the elements" of the prior conviction. *Curtis Johnson*, 559 U.S. at 138. In the past, the Court has drawn guidance from state court statutory interpretation decisions without regard for whether those decisions came before or after the prior conviction being analyzed. *See*, e.g., *Mathis v. United States*, 136 S. Ct. 2243, 2250 (2016) (using Iowa decisions from 1981 and 2015 to analyze

1981 and 1991 burglary convictions)[3] *Descamps v. United States*, 570 U.S. 254, 259 n.5 (2013) (considering California decisions from 1892, 1980, 1994, 2000, and 2011, as well as jury instructions published in 2012, to analyze a 1978 burglary conviction); *James v. United States*, 550 U.S. 192, 202–203, 213 (2007) (using Florida decisions from 1992, 1995, 1999, and 2006 to analyze a 1997 attempted burglary conviction).

3. Even so, the Fifth Circuit decided that it could and should disregard the Texas Court of Criminal Appeals's authoritative interpretation of the Texas murder statute in *Lomax* because *Lomax* was decided after Mr. Vickers's murder conviction. App, *infra*, 8a. According to the Fifth Circuit, the ACCA requires federal courts to review state court *decisions* the same way they review state *statutory amendments*: courts must "consult the law that applied at the time of that conviction" and ignore any subsequent developments. App., *infra*, 8a (quoting *McNeill v. United States*, 563 U.S. at 820). The court believed it should "consider only the state law as it existed at the time of" Mr. Vickers's murder conviction, and *Lomax* did not yet "exist[ ]."

4. In an identical context—analyzing whether a prior state-court conviction satisfies the ACCA's elements clause—the Eleventh Circuit has held that it *is* bound by state court decisions interpreting the relevant statutory language, even when those decisions came after the date of the crime or conviction. *See Fritts*, 841 F.3d at 943; *accord Welch*, 958 F.3d at 1098. Prior to the Florida Supreme Court's decision in *Robinson v. State*, 692 So.2d 883 (Fla. 1997), the state's intermediate

[3] The dates of Mathis's convictions appear in his brief before this Court. *See* Petitioner's Br. 3, *Mathis v. United States*, No. 15-6092, 2016 WL 737453, *7 (U.S. filed Feb. 22, 2016).

appellate courts reached divergent conclusions about whether a "sudden snatching" of property—without resistance by the victim—involved a sufficient amount of force to qualify as "robbery." *Compare Robinson v. State,* 680 So. 2d 481, 484 (Fla. 1st Dist. Ct. App. 1996) ("[T]he degree of force used in snatching someone's purse or other property from their person, even where that person does not resist and is not injured, is sufficient to satisfy the force or violence element of robbery in Florida."), *and Andre v. State*, 431 So. 2d 1042, 1043 (Fla. 5th Dist. Ct. App. 1983) ("[T]he act of 'snatching' the money from another's hands is force and that force will support a robbery conviction."), *with R.P. v. State*, 478 So. 2d 1106, 1107 (Fla. 3d Dist. Ct. App. 1985) ("[T]he law is well settled that picking a pocket or snatching a purse is not robbery if no more force or violence is used than is necessary to remove the property from a person who does not resist."); *Goldsmith v. State*, 573 So. 2d 445 (Fla. 2d Dist. Ct. App. 1991) ("[T]he slight force used by Goldsmith to remove the bill from Ward's hand is insufficient to constitute the crime of robbery."). The Florida Supreme Court resolved that conflict in *Robinson*: "The snatching or grabbing of property without such resistance by the victim amounts to theft rather than robbery." *Robinson v. State*, 692 So. 2d 883, 887 (Fla. 1997).

5. When considering a pre-*Robinson* conviction for Florida robbery, the decision here would insist that a federal court "consider only the state [decisional] law as it existed at the time of [the defendant's robbery] conviction." App., *infra*, 8a. But the Eleventh Circuit rejected that view: "When the Florida Supreme Court in *Robinson* interprets the robbery statute, it tells us what that statute always meant."

Fritts, 841 F.3d at 943 (citing *Rivers*, 511 U.S. at 312–313). A few months ago, the Eleventh Circuit reaffirmed its *Fritts* decision in *Welch v. United States*, 958 F.3d 1093, 1098 (11th Cir. 2020) (*Fritts* "thus concluded that Florida robbery has always required force sufficient to satisfy the ACCA's elements clause.").

6. The conflict between the Fifth Circuit and the Eleventh Circuit is a conflict of *federal* sentencing law. As this Court explained in *McNeill*, the ACCA focuses on the nature of a defendant's prior conviction. This Court's ACCA decisions always focus on the statutory language that existed at the time of the offense. E.g., *Taylor v. United States*, 495 U.S. 575, 602 (1990); *James*, 550 U.S. at 197. Non-retroactive statutory amendments after the defendant committed the offense are truly irrelevant to that "backward-looking" analysis. *McNeill*, 563 U.S. at 820. The Fifth Circuit decided to extend that principle to changes in *decisional* law. App., *infra*, 8a.

7. There is no way to reconcile the decision below with *Fritts* and *Welch*. In the Eleventh Circuit, and in this Court, state courts have the right to "tell[ ] us what the statute always meant." *Fritts*, 841 F.3d at 943. In the Fifth Circuit, a binding interpretation does not "exist" before it is issued, so the statute very well might change its meaning without any legislative action.

B. The Fifth Circuit's decision is wrong and the Eleventh Circuit's decisions were right.

In support of its novel position, the Fifth Circuit cited this Court's decision in *McNeill*. To count as a "serious drug offense" under the ACCA, a state crime must be punishable by at least ten years in prison. 18 U.S.C. § 924(e)(2)(A)(ii). At the time

McNeill committed his six prior drug crimes, they were punishable by a 10-year maximum sentence. 563 U.S. at 818. But the North Carolina legislature later "reduced the maximum sentence" to less than four years in prison. *Ibid.* That change was *not* made retroactive. *Id.* at 825 n.1 (reserving judgment on the effect of subsequent retroactive statutory amendments).

McNeill held that the "serious drug offense" definition looked only to the statutory penalty at the time of conviction:

> The plain text of ACCA requires a federal sentencing court to consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction for that offense. The statute requires the court to determine whether a "previous convictio[n]" was for a serious drug offense. The only way to answer this backward-looking question is to consult the law that applied at the time of that conviction.

McNeill, 563 U.S. at 820.

The Fifth Circuit cited this part of *McNeill* in support of its view that it "must apply the state court interpretation at the time of Vickers's conviction." App., *infra*, 9a. In doing so, it elided the distinction between *statutory* amendments—which truly change the definition (or punishment) for a crime—and judicial changes to *interpretation*, which do not actually *change* the elements of a crime.

"The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." *Rivers*, 511 U.S. 298, 311–312 (1994) (quoting *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982)). "Judicial decisions have had retrospective operation for near a thousand years." *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting); *see also Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 95 (1993) (noting that the

presumptive retroactivity of judicial decisions arises from "the nature of judicial review"). When a court interprets a statute, the court it tells us what the language *always* meant.

The Fifth Circuit had no trouble applying its own novel interpretation of the ACCA's elements clause against Mr. Vickers, even though he committed his federal offense many years before *Reyes-Contreras* was decided. App., *infra*, 2a–3a. Yet the Fifth Circuit refused to honor the Texas Court of Criminal Appeals's prerogative to interpret what the Texas felony murder statute always meant.

The Fifth Circuit's decision is inconsistent with *Curtis Johnson*, in which this Court acknowledged that it was "bound by" a Florida decision rendered after . It is inconsistent with "thousands" of years of judicial dogma. The rule would be a nightmare to administer (as though the categorical approach were not already difficult enough).

Perhaps most troubling is the implicit assumption that the lower courts in *Lomax* violated Texas law when they convicted the appellant and then affirmed his conviction. Lomax challenged his conviction for felony murder based upon strict-liability felony DWI, arguing that this theory was foreclosed by the Texas Court of Criminal Appeals's earlier decision in *Rodriquez v. State*, 548 S.W.2d 26 (Tex. Crim. App. 1977). Rodriquez argued that Texas's felony murder statute was unconstitutionally vague because it did not spell out the culpable mental state necessary for the act that caused the victim to die. The court rejected the constitutional claim, but its discussion of felony-murder is far from a model of clarity.

Some of its language suggested that State would have to prove a reckless mental state for the underlying felony, and that the felony-murder rule would "transfer" that mental state to "the act of murder." *Rodriquez*, 548 S.W.2d at 28–29.

But other language in the *Rodriquez* opinion suggested that *any* culpable mental state sufficient to convict for the predicate felony would be sufficient for felony murder. In fact, just two years before Mr. Vickers was convicted of murder, the Fifth Circuit noted that the language of *Rodriquez* was entirely consistent with a felony murder conviction premised on the negligent felony of injury-to-a-child:

> As to the claim relating to the requisite level of culpability, counsel correctly relied on the language of *Rodriquez v. State*, 548 S.W.2d 26 (Tex. Crim. App. 1977), which states that "the culpable mental state for the act of murder (under Section 19.02(a)(3)) is supplied by the underlying committed or attempted felony." This language indicates that the culpability requirement for the felony of "injury to a child," includes "intentionally, knowingly, recklessly, Or with criminal negligence" causing injury to a child. While the actual meaning of the language in *Rodriquez* is something that the Texas courts must address, counsel's failure to object to a charge allowing Easter to be convicted of murder based on a culpability requirement including criminal negligence does not warrant finding that Easter was denied effective assistance of counsel . . . .

Easter v. Estelle, 609 F.2d 756, 760–761 (5th Cir. 1980).

Fortunately, we do not have to speculate or guess which of these interpretations of Texas law is right. *Lomax* held, definitively, that the Texas legislature plainly intended to dispense with any mental state for felony murder *other than* the mental state necessary for conviction of the underlying felony. clear legislative intent to plainly dispense with a culpable mental state. See Aguirre, 22 S.W.3d at 472–476. "And, deciding that Section 19.02(b)(3) dispenses with a culpable

mental state is consistent with the historical purpose of the felony-murder rule, the very essence of which is to make a person guilty of an 'unintentional' murder when he causes another person's death during the commission of some type of a felony." *Lomax*, 233 S.W.3d at 305.

If the Fifth Circuit were correct—if *Rodriquez* forbade conviction for felony murder absent proof of at least a reckless mental state—then Lomax would never have been convicted. But Lomax *was* convicted of felony DWI; and the intermediate Texas Court of Appeals *rejected* his *Rodriquez*-based argument in light of the clear textual evidence; and the Texas Court of Criminal Appeals *affirmed* that decision. While the Court of Criminal Appeals needed to "overrule" some of the confusing language from *Rodriquez*'s holding, it is apparent from both *Easter v. Estelle* and from *Lomax* itself that Texas law never really changed.

This Court is bound by *Lomax*'s "interpretation of state law, including its determination of the elements of" Texas felony murder. *Curtis Johnson*, 559 U.S. at 138. So was the Fifth Circuit. This Court should grant this petition and hold that a federal court is bound by a state supreme court's interpretation of state law, even if that decision is issued after the events leading to conviction.

C. The question warrants plenary review in this Court.

The Fifth Circuit has found a way to make the ACCA's categorical approach even more complex. The rule invites arbitrary and unpredictable outcomes, and it turns this Court's precedent on its ear. The categorical approach demands *certainty* before applying the ACCA's draconian mandatory minimum sentence. *Mathis*, 136 S. Ct. at 2257; *Shepard v. United States*, 544 U.S. 13, 21–22 (2005). The absence of

certainty is supposed to yield a result in the defendant's favor. *Mathis*, 136 S. Ct. at 2257.

Mr. Vickers proved, to a certainty, that Texas has convicted someone of murder for conduct that does not constitute the "*use* of physical force *against* the victim." The Fifth Circuit explicitly chose to ignore a binding and authoritative statutory interpretation by the Texas Court of Criminal Appeals because it did not exist at the time of the conviction.

If that decision remains in place, it will be catastrophic for Mr. Vickers. He has been at (supervised) liberty for years, and has not caused anyone any problems. He fully served both his state sentence and the lawful federal sentence for his decision to arm himself against neighborhood invaders. But the Fifth Circuit's rule also disregards federalism, demotes the court of a co-equal sovereign, and diminishes any hope of a uniform *national* sentencing scheme under the ACCA. This Court should reverse that decision.

II. THE COURT SHOULD GRANT THE PETITION AND HOLD THAT CAUSING A DEATH THROUGH AN ACTION "CLEARLY DANGEROUS TO HUMAN LIFE" IS NOT EQUIVALENT TO A USE OF PHYSICAL FORCE AGAINST THE DECEASED.

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

In *Leocal*, 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*, 543 U.S. at 8 (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." *Vargas-Duran*, 356 F.3d at 606. 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. Reckless felony murder should fall outside of the ACCA's elements clause.

"*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*. The Court may want to hold this petition until *Borden* and *Burris* are decided. Even under the Fifth Circuit's unusual view of historically contingent statutory interpretation, Texas felony murder requires no more than a reckless state of mind. App., *infra*, 9a ("Thus, until 2007, when *Lomax* changed the prevailing standard, felony murder in Texas required a mental state of recklessness or higher.")

C. As a matter of plain meaning, causing death through a dangerous action is not the same as using force against the deceased.

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 the ACCA's elements clause, Congress specified that *use of force* must be an element of the offense; the residual clause was

defined by result (injury). Surely Congress did not believe that the elements clause would extend to all statutes defined as causing injury.

"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. The 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*.

Even if we accept the Fifth Circuit's dubious view that the underlying felony had to be at least *reckless* to give rise to felony-murder liability prior to *Lomax*, that does not mean that the killing itself was reckless.

D. To the extent that the forthcoming decision in *Borden* will shed light on the ACCA's elements clause beyond the question of culpable mental states, this case should be sent back to the Fifth Circuit.

Without knowing the outcome of *Borden*, much less its reasoning, it is hard to say how it might affect the Fifth Circuit's analysis. But if the Court decides not to grant certiorari on the first question presented, it should nonetheless hold this case and allow the parties to brief the effect of *Borden* before deciding what to do about the Fifth Circuit's decision.

CONCLUSION

Petitioner asks that this Court grant the petition and set the case for a decision on the merits. Alternatively, he asks that the Court hold the case pending a decision in *Borden* and vacate the Fifth Circuit's decision in light of the guidance provided by *Borden*.

Respectfully submitted,

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