No. _____

In the

Supreme Court of the United States

EDDIE LAMONT LIPSCOMB,
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 simple robbery under Texas Penal Code § 29.02 remains a "violent felony" without the Armed Career Criminal Act's unconstitutional residual clause, 18 U.S.C. § 924(e)(2)(B)(ii).

2.

Whether burglary under Texas Penal Code § 30.02 remains a violent felony without the Armed Career Criminal Act's unconstitutional residual clause.

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

RELATED PROCEEDINGS

United States v. Lipscomb, No. 3:07-CR-357 (N.D. Tex.)

United States v. Lipscomb, No. 09-10240 (5th Cir.)

Lipscomb v. United States, No. 10-9991 (U.S.)

Lipscomb v. United States, No. 3:16-CV-1500 (N.D. Tex.)

United States v. Lipscomb, No. 18-11168 (5th Cir.)

United States v. Lipscomb, No. 18-11419 (5th Cir.)

United States v. Lipscomb, No. 19-10948 (5th Cir.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Eddie Lamont Lipscomb 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 below is published at 982 F.3d 927. It is reprinted at pages 1a–6a of the Petition Appendix. The Fifth Circuit's prior opinion on direct appeal case was published at 619 F.3d 474. That opinion is reprinted on pages 29a–61a of the Appendix. The Magistrate and District Judges' opinions concerning Mr. Lipscomb's motion under 28 U.S.C. § 2255 were not selected for publication but they appear at pages 7a–20a and 21a of the Appendix.

JURISDICTION

The Fifth Circuit entered judgment on December 8, 2020. 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).

STATUTORY PROVISIONS INVOLVED

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

> (e)
>
> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence

of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

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

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

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

This case involves Texas Penal Code § 29.02(a), which 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.

This case also involves Texas Penal Code § 30.02(a), which defines "burglary" as follows:

> (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

After this Court struck down the Armed Career Criminal Act's unconstitutionally vague residual clause in *Johnson v. United States*, 576 U.S. 591 (2015), Petitioner Eddie Lamont Lipscomb successfully moved to vacate his ACCA-enhanced sentence. Pet. App. 21a. In July 2018, the district court reduced his original 240-month sentence to 120 months, the non-ACCA statutory maximum, which resulted in his immediate release from custody. Pet. App. 22a–23a.

Years later, the Fifth Circuit reversed the decision granting collateral relief and ordered the district court to re-instate the original 240 month sentence. Pet. App. 1a–6a. Mr. Lipscomb has returned to federal prison, but seeks through this petition to restore the favorable decision on his motion for collateral relief.

1. Mr. Lipscomb pleaded guilty to possessing a firearm after felony conviction in 2007. Pet. App. 1a. The district court applied the Armed Career

Criminal Act, 18 U.S.C. § 924(e), and sentenced him to twenty years in prison. Pet. App. 1a. Without the ACCA, the maximum lawful sentence would have been ten years in prison. 18 U.S.C. § 924(a)(2). A divided Fifth Circuit panel affirmed his conviction and sentence on direct appeal, and this Court denied certiorari. *United States v. Lipscomb*, 619 F.3d 474 (5th Cir. 2010), *pet. for cert. denied*, 563 U.S. 1000 (2011).

2. After *Johnson*, Mr. Lipscomb filed a motion under 28 U.S.C. § 2255 seeking to vacate his ACCA-enhanced sentence. The ACCA applies if a defendant convicted under § 922(g) has "three previous convictions . . . for a violent felony . . . committed on occasions different from one another." 18 U.S.C. § 924(e)(1). Mr. Lipscomb had Texas convictions for robbery (committed on two occasions) and burglary (committed on two occasions). Pet. App. 2a–3a. He argued that none of those Texas convictions satisfied the statutory definition of "violent felony" without the ACCA's residual clause.

3. The district court granted Mr. Lipscomb's motion after concluding that Texas simple robbery was not categorically violent without the residual clause. Pet. App. 7a–20a; 21a. The court then re-sentenced Mr. Lipscomb to 120 months in prison. Pet. App. 22a–23a. The Government appealed.

4. While the Government's appeal was pending, the district court twice revoked Mr. Lipscomb's supervised release. Pet. App. 4a. Meanwhile, the Fifth Circuit overruled many of the statutory interpretation decisions on which the district court had relied when it granted his motion to vacate. In December of 2020, the Fifth Circuit reversed the decision granting collateral relief and ordered the district court

to re-instate the original 240-month sentence. Pet. App. 1a–6a. The court refused Mr. Lipscomb's request to await this Court's decisions in *Burris* and *Borden*. Pet. App. 4a–5a. Mr. Lipscomb is now back in federal custody because of the Fifth Circuit's decision. This timely petition follows.

REASONS TO GRANT THE PETITION

I. THE COURT SHOULD GRANT THE PETITION AND HOLD THAT TEXAS SIMPLE ROBBERY IS NOT A VIOLENT FELONY WITHOUT THE ACCA'S RESIDUAL CLAUSE.

This Court will decide whether recklessly causing serious injury is a "use of physical force against" the victim, for purposes of the ACCA, in *Borden v. United States*, 140 S. Ct. 1262 (2020). Based on that decision, the Court will then resolve the pending petition in *Burris v. United States*, No. 19-6186. If the petitioners in those cases prevail, the Court should vacate the Fifth Circuit's decision here. That decision was explicitly predicated on *Burris*. Pet. App. 3a. Mr. Lipscomb expressly preserved his argument that *Burris* was wrongly decided. Pet. App. 3a n.3.

A. Texas defines robbery in terms of injury, not application of force. The crime can be committed recklessly and without a physical confrontation.

Texas defines "robbery" in an unusual way. "The majority of states require property to be taken from a person or a person's presence by means of force or putting in fear." *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380 (5th Cir. 2006). The same is true of most federal robbery statutes.

But Texas is different: the state defines the *actus reus* in terms of a *result* (injury) rather than in terms of a *mechanism* (physical force). In Texas, a thief becomes a robber if, during the course of theft, attempted theft, or flight, he

"knowingly, intentionally, or recklessly *causes bodily injury*" to someone else or if he "intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." Texas Penal Code § 29.02(a) (emphasis added).

Texas court decisions confirm that prosecutors utilize the statute too its full, unusual extent. For example, Texas's highest criminal court upheld a conviction for aggravated robbery where the defendant and the victim never even interacted. In *Howard v. State*, 333 S.W.3d 137, 138 (Tex. Crim. App. 2011), a store clerk observed an armed defendant on a video screen from a locked room, and felt fear. That was aggravated robbery. *Id.* In *Martin v. State*, 03-16-00198-CR, 2017 WL 5985059, at *6 (Tex. App.—Austin Dec. 1, 2017, no pet.), a shoplifter told two Hobby Lobby employees that "she had AIDS," which made the one of the "victims" feel "'worried' and 'scared' of 'contracting AIDS [and] dying.'" *Id.*, 2017 WL 5985059, at *1 (Tex. App.—Austin Dec. 1, 2017, no pet.). That was also robbery. *Id.* It was not a threatened use of physical force.

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

In 2004, this Court held that a Florida offense defined as "causing serious bodily injury" to another while "driving under the influence of alcohol" did not "have 'as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004) (quoting Fla. Stat. § 316.193(c)(2) & 18 U.S.C. § 16(a)). For many years, the Fifth Circuit likewise acknowledged the "difference between a defendant's causation of an injury and the defendant's use of force." *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir.

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

C. 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 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 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. The most recent *Burris* decision from the Fifth Circuit held that all forms of Texas robbery satisfy the ACCA's elements clause, notwithstanding the unusually broad scope of the law and prior Fifth Circuit decisions saying otherwise. *See Burris*, 920 F.3d at 953–958. The court also held it could apply its new interpretation of the elements clause retrospectively, even though the en banc court had previously definitively held that Texas's result-oriented assaultive offenses did not have, as an element, the use, attempted use, or threatened use of physical force against the person of another as an element. *Burris*, 920 F.3d at 952.

The petition for certiorari in *Burris* (Case 19-6186) has been pending since October 2019. Because the Fifth Circuit relied explicitly on *Burris* to hold that Mr. Lipscomb was not entitled to collateral relief, the Court should hold this petition until *Burris* is decided. Pet. App. 3a.

D. The Court should hold that "the use of physical force against" a victim requires physical contact.

In Texas, both forms of robbery 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. Texas prosecutors have charged one defendant with causing injury based solely on his 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.

Because a defendant can cause a victim to suffer injury (or to fear injury) without ever interacting with the victim or without deplying any physical object, these Texas crimes do not have, as an element, the use, attempted use, or threatened use of physical force as an element.

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

The district court chose not to resolve Mr. Lipscomb's arguments regarding burglary because it ruled in his favor regarding robbery. Pet. App. 13a–14a n.12. Mr. Lipscomb argued below, as an alternative ground for affirming the decision granting relief, that Texas's burglary statute was non-generic. Like his argument about robbery, that argument relied on Fifth Circuit precedent overruled while the Government's appeal was pending. He also preserved his challenge regarding burglary for further review. Pet. App. 3a n.3.

If the petitioners in *Borden* and *Burris* lose, this Court should grant this petition to resolve the circuit split over trespass-plus-crime forms 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. In those states, the list of predicate offenses that convert a trespass into a burglary includes non-intentional crimes. Prosecutors can convict a defendant for burglary without ever proving that he formed the intent to commit another crime inside the presmises, so long as they prove 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 whether this theory of burglary is generic 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). In the Fifth Circuit, it is not enough to show that statutory language plainly embraces non-generic conduct; a defendant must also *prove* that the state would prosecute someone under the non-generic theory. *See United States* v. *Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc).

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

Texas Penal Code § 30.02(a)(3) does not require proof of specific intent to commit another crime inside the premises. A trespasser commits "burglary" in Texas

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

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

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

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

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

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 there is an implied specific-intent element in felony murder. *Lomax v. State*, 233 S.W.3d 302 (Tex. Crim. App. 2007). That is important because the structure of the felony murder statute is virtually identical to the burglary statute:

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

clearly dangerous to human life that causes the death of an individual.	

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. The Government has thus far succeeded in avoiding Supreme Court review of this question by arguing that it is a matter of state law, which is better left to the regional courts of appeals. E.g., U.S. Br. 13, *Herrold v. United States*, No. 19-7731 (discussing *Bowen v. Massachusetts*, 487 U.S. 879, 908 (1988), and *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004)). That argument ignores the *federal* requirement of "certainty" when analyzing whether state-court convictions satisfy the ACCA's definition of "violent felony." The categorical approach demands certainty before applying the ACCA's draconian mandatory minimum sentence. The categorical approach demands "certainty" before applying the ACCA's draconian mandatory minimum sentence. *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016); *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. Here, no one is *certain* that Texas would require proof of specific intent to commit a predicate felony inside the trespassed premises. In fact, the best available evidence shows that Texas would not require that proof. Thus, this is not a question of state law; it is a question of how the federal courts of appeals should analyze identical burglary offenses under the ACCA.

CONCLUSION

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

Respectfully submitted,

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