

No. _____

In the
Supreme Court of the United States

MAURICE LAMONT DAVIS,
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. Under plenary appellate review, is a defendant’s trial stipulation that he was a felon at the time he possessed a firearm sufficient evidence that he *knew* of his status at the time he possessed a firearm?

2. To decide whether a prior burglary conviction qualifies as a predicate violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e), “courts compare the elements of the crime of conviction with the elements of the ‘generic’ version of the listed offense—*i.e.*, the offense as commonly understood.” *Mathis v. United States*, 136 S. Ct. 2243, 2247 (2016). “[T]he prior crime qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense.” *Id.* This categorical approach “demand[s] . . . certainty when identifying a generic offense.” *Shepard v. United States*, 544 U.S. 13, 21 (2005).

When applying the categorical approach, federal courts are “bound by” a state supreme court’s “interpretation of state law, including its determination of the elements” of the prior crime. *Johnson v. United States*, 559 U.S. 133, 138 (2010); accord *James v. United States*, 550 U.S. 192, 205–206 (2007). Does this “demand for certainty” apply to federal courts’ application and interpretation of state-court decisional law?

3. Where a state statute explicitly defines “burglary” in a way that does not require proof of an intent to commit a crime, and thus lacks an element necessary to satisfy *Taylor*’s generic definition of “burglary,” 18 U.S.C. 924(e)(2)(B)(ii), is that facial overbreadth enough to demonstrate that the crime is non-generic, or must a federal defendant also prove that the state has convicted someone who did not harbor specific intent?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Davis*, No. 3:15-CR-94 (N.D. Tex.)
2. *United States v. Davis*, 16-10330 (5th Cir.)
3. *Davis v. United States*, 16-8997 vide 16-8777 (U.S.)
4. *United States v. Davis*, 18-431 (U.S. 2019)
3. *United States v. Davis*, No. 20-10228 (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
STATUTORY PROVISIONS INVOLVED	1
STATEMENT.....	3
REASONS TO GRANT THE PETITION.....	8
I. The Court should grant the petition and resolve the question left open by <i>Greer</i> —whether a stipulation of felon status is sufficient evidence of knowledge of that status when a defendant preserved objection to the sufficiency of the evidence.....	8
A. Unlike <i>Greer</i> , this case involves a preserved challenge to the sufficiency of the evidence.....	9
B. <i>Greer</i> left this question unresolved and the lower courts remain divided over it.....	10
II. The Court should grant the petition because the circuit courts have reached irreconcilable results regarding identical burglary statutes.....	12
A. The Fifth Circuit and the Seventh Circuit are in conflict.....	12
B. The divergent outcomes arise from broader disagreements about how to apply the categorical approach.....	15
C. As an alternative rationale for holding that Texas burglary is categorically generic, the Fifth Circuit has embraced a strained construction of Texas law that does not satisfy the ACCA’s “demand for certainty.”	23
CONCLUSION.....	29

PETITION APPENDIX

<i>United States v. Glover</i> , 850 F. App'x 890 (5th Cir. 2021).....	1a
<i>United States v. Davis</i> , 677 F. App'x 933 (5th Cir. 2017).....	7a
<i>United States v. Davis</i> , 903 F.3d 483 (5th Cir. 2018).....	14a
<i>United States v. Davis</i> , 784 F. App'x 277 (5th Cir. 2019).....	22a

TABLE OF AUTHORITIES

Cases

<i>Alacan v. State</i> , 03-14-00410-CR, 2016 WL 286215 (Tex. App.—Austin Jan. 21, 2016, no pet.)	26
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (1995)	9
<i>Battles v. State</i> , 13-12-00273-CR, 2013 WL 5520060 (Tex. App. Oct. 3, 2013).....	26, 27
<i>Betansos v. Barr</i> , 928 F.3d 1133 (9th Cir. 2019)	22
<i>Brooks v. State</i> , 08-15-00208-CR, 2017 WL 6350260 (Tex. App.—El Paso Dec. 13, 2017, pet. ref’d)	27
<i>Chavez v. State</i> , 08-04-00319-CR, 2006 WL 2516464 (Tex. App.—El Paso Aug. 31, 2006, no pet.)	28
<i>Chazen v. Marske</i> , 938 F.3d 851 (7th Cir. 2019)	12, 14, 27
<i>Crawford v. State</i> , 05-13-01494-CR, 2015 WL 1243408 (Tex. App.—Dallas Mar. 16, 2015, no pet.)	27
<i>Daniel v. State</i> , 07-17-00216-CR, 2018 WL 6581507 (Tex. App.—Amarillo Dec. 13, 2018, no pet.)	26
<i>Davis v. United States</i> , 138 S. Ct. 1979 (2018)	5
<i>DeVaughn v. State</i> , 749 S.W.2d 62 (Tex. Crim. App. 1988).....	13, 24
<i>Duran v. State</i> , 492 S.W.3d 741 (Tex. Crim. App. 2016).....	26
<i>Elk Grove Unified Sch. Dist. v. Newdow</i> , 542 U.S. 1 (2004)	28

<i>Gomez-Perez v. Lynch</i> , 829 F.3d 323 (5th Cir. 2016)	23
<i>Gonzales v. Duenas-Alvarez</i> , 549 U.S. 183 (2007)	16, 17, 18, 21
<i>Guzman v. State</i> , 2-05-096-CR, 2006 WL 743431 (Tex. App.—Fort Worth Mar. 23, 2006, no pet.)	27
<i>Herrold v. United States</i> , No. 19-7731	28
<i>Hylton v. Sessions</i> , 897 F.3d 57 (2d Cir. 2018).....	19, 21, 23
<i>Johnson v. State</i> , 14-10-00931-CR, 2011 WL 2791251 (Tex. App.—Houston [14th Dist.] July 14, 2011, no pet.)	27
<i>Leaks v. State</i> , 13-03-613-CR, 2005 WL 704409 (Tex. App.—Corpus Christi Mar. 24, 2005, pet. ref'd)	28
<i>Lomax v. State</i> , 233 S.W.3d 302 (Tex. Crim. App. 2007).....	25, 27
<i>Lopez-Aguilar v. Barr</i> , 948 F.3d 1143 (9th Cir. 2020)	19
<i>Matini v. State</i> , 05-03-00686-CR, 2004 WL 1089197 (Tex. App.—Dallas May 17, 2004, no pet.)	27
<i>Mowlana v. Lynch</i> , 803 F.3d 923 (8th Cir. 2015)	18
<i>Musacchio v. United States</i> , 577 U.S. 237 (2016)	9
<i>Old Chief v. United States</i> , 519 U.S. 172 (1997)	5, 11
<i>Quarles v. United States</i> , 139 S. Ct. 1872 (2019)	14

<i>Ramos v. Att’y Gen.</i> , 709 F.3d 1066 (11th Cir. 2013)	19
<i>Rehaif v. United States</i> , 139 S. Ct. 2191 (2019)	6, 8, 9, 10
<i>Salmoran v. Att’y Gen.</i> , 909 F.3d 73 (3d Cir. 2018).....	21
<i>Scroggs v. State</i> , 396 S.W.3d 1 (Tex. App.—Amarillo 2010, pet. ref’d, untimely filed)	26
<i>Sessions v. Dimaya</i> , 138 S. Ct. 1204 (2018)	5
<i>Singh v. Att’y Gen.</i> , 839 F.3d 273 (3d Cir. 2016).....	19, 21
<i>Swaby v. Yates</i> , 847 F.3d 62 (1st Cir. 2017).....	19, 21
<i>Torrez v. State</i> , 12-05-00226-CR, 2006 WL 2005525 (Tex. App.—Tyler July 19, 2006, no pet.)	27
<i>United States v. Brown</i> , 727 F.3d 329 (5th Cir. 2013)	10
<i>United States v. Burden</i> , 964 F.3d 339 (5th Cir. 2020)	10
<i>United States v. Castillo-Rivera</i> , 853 F.3d 218 (5th Cir. 2017) (en banc)	15, 21
<i>United States v. Dancy</i> , 861 F.2d 77 (5th Cir. 1988)	8
<i>United States v. Daniels</i> , 930 F.3d 393 (5th Cir. 2019)	9
<i>United States v. Davis</i> , 139 S. Ct. 2319 (2019)	3, 6
<i>United States v. Davis</i> , 677 F. App’x 933 (5th Cir. 2017).....	1, 5

<i>United States v. Davis</i> , 784 F. App'x 277 (5th Cir. 2019)	1, 6
<i>United States v. Davis</i> , 903 F.3d 483 (5th Cir. 2018)	1, 6
<i>United States v. Gaudin</i> , 515 U.S. 506 (1995)	8
<i>United States v. Greer</i> , 141 S. Ct. 2090 (2021)	9, 10, 12
<i>United States v. Grisel</i> , 488 F.3d 844 (9th Cir. 2007) (en banc), abrogated on other grounds by <i>United States v. Stitt</i> , 139 S. Ct. 399 (2018)	19
<i>United States v. Herrold</i> , 941 F.3d 173 (5th Cir. 2019) (en banc)	13, 15, 17
<i>United States v. Maez</i> , 960 F.3d 949 (7th Cir. 2020)	11
<i>United States v. McCall</i> , 553 F.3d 821 (5th Cir. 2008)	9
<i>United States v. Medley</i> , 972 F.3d 399 (4th Cir. 2020)	12
<i>United States v. Owens</i> , 966 F.3d 700 (8th Cir. 2020)	11
<i>United States v. Staggers</i> , 961 F.3d 745 (5th Cir. 2020)	8, 10
<i>United States v. Titties</i> , 852 F.3d 1257 (10th Cir. 2017)	20, 21
<i>United States v. Wallace</i> , 964 F.3d 386 (5th Cir. 2020)	13, 15
<i>United States v. Ward</i> , 957 F.3d 691 (6th Cir. 2020)	11
<i>Van Cannon v. United States</i> , 890 F.3d 656 (7th Cir. 2018)	<i>passim</i>

<i>Wingfield v. State</i> , 282 S.W.3d 102 (Tex. App.—Fort Worth 2009, pet. ref'd)	26
---	----

Statutes

8 U.S.C. § 1101(a)(43)	23
8 U.S.C. § 1101(a)(43)(G)	16
18 U.S.C. § 922(g)	6
18 U.S.C. § 922(g)(1)	8, 9
18 U.S.C. §§ 922(g)(1) & 924(e)	7
18 U.S.C. § 924(c)	6, 7
18 U.S.C. § 924(e)	<i>passim</i>
18 U.S.C. § 1951(a)	7
21 U.S.C. § 802	20
28 U.S.C. § 1254(1)	1
34 U.S.C. § 20911	23
California Vehicle Code § 1851(a)	16
Minn. Stat. Ann. § 609.582 (eff. Aug. 1, 1988)	14
Mont. Code § 45-6-204(1)(b) & (2)(a)(ii) (eff. Oct. 1, 2009)	14
N.C. Gen. Stat. § 14-53	13
Pub. L. 98-473, § 1803(2) (1984)	13
Tenn. Code Ann. § 39-14-402(a)(3) (eff. July 1, 1995)	14
Texas Penal Code § 19.02(b)	25
Texas Penal Code § 22.01(a)(1)	22
Texas Penal Code § 22.04	27
Texas Penal Code § 30.02(a)	2, 25
Texas Penal Code § 30.02(a)(1)	24

Texas Penal Code § 30.02 (a)(2)	24
Texas Penal Code § 30.02(a)(3)	<i>passim</i>

Other Authorities

William Blackstone, <i>Commentaries on the Laws of England</i> (1769).....	13
--	----

PETITION FOR A WRIT OF CERTIORARI

Petitioner Maurice Lamont Davis 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 (App. 1a–6a) is not published in the Federal Reporter but is reprinted at 850 F. App'x 890. The Fifth Circuit issued three prior opinions in the case, but only one is published in the Federal Reporter: 677 F. App'x 933 (App. 7a–13a); 903 F.3d 483 (App. 14a–21a); and 784 F. App'x 277 (App. 22a–24a).

JURISDICTION

The Fifth Circuit issued its judgment on March 26, 2021. On March 19, 2020, this Court extended the deadline to file petitions for certiorari in all cases to 150 days from the judgment. Under the July 19, 2021 order, that extension remains in effect for any cases where the Court of Appeals issued its judgment on or before July 19, 2021. This Court has jurisdiction to review the Fifth Circuit's final decision under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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

(e)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and

imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term “serious drug offense” means—

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

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

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

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

(ii) is burglary, arson, or extortion, involves use of explosives, 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.

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

Petitioner Maurice Lamont Davis was convicted by a jury for his role in two armed robberies of Murphy U.S.A. kiosk-style convenient stores in the Dallas-Fort Worth Metroplex. Mr. Davis has appeared before this Court twice before in connection with this prosecution, first as petitioner (139 S. Ct. 1979) and then as respondent (139 S. Ct. 2319).

Mr. Davis participated in two robberies, both on June 22, 2014. Around 7:00 a.m., two men robbed the Mansfield, Texas Murphy U.S.A. store. The man in the “blue shirt”—identified in testimony as Andre Glover—pointed a short-barrel shotgun at the clerk, and the robbers demanded that she go to the “back room,” which serves as storage facility and restroom. (5th Cir. R. 473–474). The robbers took several boxes of cigarettes and threw them into a gray tub. (5th Cir. R. 476). When the clerk told the robbers she could not access the money in a time-lock safe, they left and she called the police. (5th Cir. R. 479). Surveillance video shows that Mr. Glover (in the blue shirt) was the only one who held the shotgun.

Around half an hour later, they robbed the Murphy USA store in Midlothian, Texas. The Assistant Manager had the store’s safe open because she was about to deposit the previous day’s earnings. (5th Cir. R. 500). Mr. Glover burst into the store

and pointed the shotgun at her. (5th Cir. R. 504). Mr. Davis hopped over the counter and took the cash she was about to deposit, as well as additional cigarettes that were on display. (5th Cir. R. 505; 5th Cir. R. 509). They left, and the manager called the police. (5th Cir. R. 513–514). Once again, Mr. Glover was the only one who touched the shotgun, and he got into the driver’s seat while Mr. Davis got into the back seat. The victim recognized the getaway car as a gold Honda SUV without a license plate. (5th Cir. R. 502; see 5th Cir. R. 536).

Dispatch relayed the vehicle’s description to officers in the area. (5th Cir. R. 536–537). Two police officers in Alvarado, Texas, began watching the highway because they believed the robbers might have driven from Midlothian in their direction. (5th Cir. R. 537–538). They spotted the Gold Honda and followed it into a McDonald’s drive-through lane. (5th Cir. R. 540). When one of the officers confronted Glover, the SUV sped away. (5th Cir. R. 542). Police chased the car for a couple of miles at speeds approaching 90 miles per hour, until it crashed and the suspects fled on foot. (5th Cir. R. 544–547). Mr. Glover and Mr. Davis tried to hide, but officers found them and arrested them. (5th Cir. R. 551–554). Officers recovered the sawed-off shotgun from the floorboard of the crashed-out Honda, behind the driver’s seat and buried under other items from the robberies that had apparently fallen over. (5th Cir. R. 649; 5th Cir. R. 999–1001). Mr. Davis confessed his involvement in the robberies later that day. (5th Cir. R. 667–671). Mr. Davis’s statement to police confirmed that Glover—not Mr. Davis—possessed the sawed-off shotgun. (5th Cir. R. 669–670).

The federal government charged Maurice Davis and Andre Glover in an eight-count indictment: one count of Hobbs Act conspiracy, Hobbs Act robbery (three counts for Mr. Davis, four for Glover), two counts of possession of a firearm in furtherance of a crime of violence, and, for Mr. Davis, possession of a firearm after felony conviction. (5th Cir. R. 16–28).

Mr. Davis signed a stipulation at trial (November 18, 2015) that he was convicted of a felony offense, but did not stipulate anything about his awareness or knowledge of his status:

The Defendant hereby stipulates that, prior to the date of arrest, June 22nd, 2014, the Defendant had sustained a felony conviction punishable by imprisonment for a period for a term exceeding one year. Accordingly, the Defense agrees that the Government has carried its burden of proof as to this element of Count 8 of the indictment.

(5th Cir. R. 466); see generally *Old Chief v. United States*, 519 U.S. 172 (1997). The parties later amended that stipulation to admit a felony conviction prior to June 16, 2014. (5th Cir. R. 604; see 5th Cir. R. 1220). And Mr. Davis’s friend Marlon Moss likewise confirmed at trial that Mr. Davis was a felon. (5th Cir. R. 821).

The jury convicted Mr. Davis of six counts but acquitted him of the substantive robbery offense committed June 16, 2014. (5th Cir. R. 227–229). The district court originally sentenced him to more than 50 years in prison (5th Cir. R. 1503).

In the first appellate decision, January 2017, the Fifth Circuit affirmed all counts of conviction and the entire sentence. See *United States v. Davis*, 677 F. App’x 933 (5th Cir. 2017). This Court vacated that decision and remanded for reconsideration in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). See *Davis v.*

United States, 138 S. Ct. 1979 (2018). On the first remand, the Fifth Circuit vacated the defendants' convictions and sentences on Count Two (for possession of a firearm in furtherance of conspiracy) and affirmed the convictions and sentences on all other counts. *United States v. Davis*, 903 F.3d 483, 486 (5th Cir. 2018). The Government petitioned for certiorari, and the defendants moved for rehearing.

This Court granted certiorari, ultimately affirming the Fifth Circuit's decision that the 18 U.S.C. § 924(c) residual clause was unconstitutionally vague. *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019). The Court remanded the case to the Fifth Circuit a second time for a ruling on the still-pending rehearing petitions. *Id.* On the second remand, the Fifth Circuit granted the defendants' petitions for rehearing and vacated the sentences on all counts. *United States v. Davis*, 784 F. App'x 277 (5th Cir. 2019). The Court re-affirmed all the convictions other than the conspiracy-predicated § 924(c) conviction. *Id.*

After returning to the district court, Mr. Davis renewed his objections to application of the Armed Career Criminal Act, 18 U.S.C. § 924(e), and to the remaining § 924(c) conviction and sentence. (5th Cir. R. 1725–1728). He also objected to any conviction or sentence on the felon-in-possession count, in light of this Court's then-recent decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). *Rehaif* held that knowledge of felon status was an element of the crime defined in 18 U.S.C. § 922(g). Mr. Davis noted that the Government presented no evidence at trial that he knew of his felon status at the time of the offense. (5th Cir. R. 1559). The district court overruled these objections. (5th Cir. R. 1567–1568).

In light of those rulings, Mr. Davis faced a mandatory minimum sentence of 300 months in prison and a guideline range of 308–355 months. The district court varied down to 300 months in light of the mitigating evidence Mr. Davis presented at the re-sentencing hearing. (5th Cir. R. 1570–1573; 5th Cir. R. 1576). But the court could go no lower without disturbing the ACCA enhancement for Count Eight or the § 924(c) conviction in Count Seven.

The district court recorded the new sentence in an amended judgment entered on March 3, 2020. That judgment reflects the following convictions and sentences:

Count	Date and Location of Offense	Offense	Statute	Sentence
1	June 16–22, 2014	Conspiracy to Interfere with Commerce by Robbery	18 U.S.C. § 1951(a)	180 months, concurrent with 5, 6, 8
5	June 22, 2014 (Mansfield, Texas)	Interference with Commerce by Robbery	18 U.S.C. § 1951(a)	180 months, concurrent with 1, 6, 8
6	June 22, 2014 (Midlothian, Texas)	Interference with Commerce by Robbery	18 U.S.C. § 1951(a)	180 months, concurrent with 1, 5, 8
7	June 22, 2014	Brandishing a Short-Barrel Shotgun in Furtherance of a Crime of Violence	18 U.S.C. § 924(c)	120 months, consecutive to all other counts
8	June 22, 2014	Felon in Possession of a Firearm	18 U.S.C. §§ 922(g)(1) & 924(e)	180 months, concurrent with 1, 5, 6

Mr. Davis appealed this judgment to the Fifth Circuit. As relevant here, he preserved his arguments that the Government presented insufficient evidence that he knew of his status and that his prior Texas burglary convictions were not for

“violent felonies” as defined by the Armed Career Criminal Act. Pet. App. 3–6 & n.3. The Fifth Circuit rejected both arguments. *Id.* This timely petition follows.

REASONS TO GRANT THE PETITION

I. THE COURT SHOULD GRANT THE PETITION AND RESOLVE THE QUESTION LEFT OPEN BY *GREER*—WHETHER A STIPULATION OF FELON STATUS IS SUFFICIENT EVIDENCE OF KNOWLEDGE OF THAT STATUS WHEN A DEFENDANT PRESERVED OBJECTION TO THE SUFFICIENCY OF THE EVIDENCE.

Mr. Davis’s conviction on Count Eight cannot stand in light this Court’s decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). *Rehaif* held “that knowledge of felon status is an element of a § 922(g)(1) offense.” *United States v. Staggers*, 961 F.3d 745, 754 (5th Cir. 2020). This decision overruled many years of Fifth Circuit precedent. *See Staggers*, 961 F.3d at 754 (“Before *Rehaif*, we—along with every other circuit court to have considered the issue—required the United States to prove that a defendant knowingly possessed a firearm but not that the defendant knew he or she was a felon.”); *see, e.g., United States v. Dancy*, 861 F.2d 77, 81–82 (5th Cir. 1988).

At Mr. Davis’s trial, the Government presented no evidence that he knew he was a felon. “The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without ‘due process of law’; and the Sixth, that ‘in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.’” *United States v. Gaudin*, 515 U.S. 506, 509–510 (1995) (quoting U.S. Const., amends. V & VI) (cleaned up). “[T]hese provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *Id.*

They are “constitutional protections of surpassing importance.” *Apprendi v. New Jersey*, 530 U.S. 466, 476 (1995).

A federal appellate court reviewing the sufficiency of the evidence presented at trial must test that evidence against a hypothetically correct jury charge. *See Musacchio v. United States*, 577 U.S. 237, 245 (2016). The trial jury did not find that Mr. Davis knew he was a convicted felon on the date he supposedly possessed the gun, and the Government made no attempt to prove that fact.

A. Unlike *Greer*, this case involves a preserved challenge to the sufficiency of the evidence.

In *United States v. Greer*, 141 S. Ct. 2090 (2021), this Court upheld the conviction of a defendant who, like Mr. Davis, was tried for violation of 18 U.S.C. § 922(g)(1) before *Rehaif*. But the trial defendant in *Greer* “forfeited [his] mens rea claims by failing to properly preserve them.” *Id.* at 2096. Thus, he had to overcome the difficult burden of showing a reversible “plain error.” *Id.*

Mr. Davis, however, did preserve his sufficiency-of-the-evidence argument under Federal Rule of Criminal Procedure 29 in accordance with governing Fifth Circuit precedent. That court has long distinguished between “general” Rule 29 motions and “specific” Rule 29 motions. “Rule 29 motions need not be specific.” *United States v. McCall*, 553 F.3d 821, 830 (5th Cir. 2008). It is enough for the defendant to use “general language about the insufficiency of all of the evidence for all elements of all counts.” *Id.*; accord *United States v. Daniels*, 930 F.3d 393, 402 (5th Cir. 2019) (“When a defendant makes a general sufficiency-of-the-evidence challenge, we review the sufficiency of the evidence supporting a conviction de novo.”).

But when a defendant “assert[s] ‘specific grounds for a specific element of a specific count for a Rule 29 motion,’” he “fail[s] to preserve sufficiency challenges to” other elements. *United States v. Brown*, 727 F.3d 329, 335 (5th Cir. 2013) (quoting *United States v. Herrera*, 313 F.3d 882, 884 (5th Cir.2002) (en banc) (per curiam)). Cognizant of the distinction, Mr. Davis raised a general Rule 29 motion at trial. 5th Cir. R. 819. He renewed that motion at the close of all evidence. 5th Cir. R. 834. He reiterated the motion at re-sentencing, specifically noting that *Rehaif* overruled Fifth Circuit precedent and held that the Government must prove knowledge of status. 5th Cir. R. 1559; 5th Cir. R. 1567. The Fifth Circuit deemed the error preserved, and applied plenary appellate review. Pet. App. 4a.

B. *Greer* left this question unresolved and the lower courts remain divided over it.

Greer did not address how a federal appellate court should apply the sufficiency standard to a preserved *Rehaif* error. The circuits remain divided over how to analyze the claims under plenary review. The Fifth Circuit has held that a stipulation of felon status is sufficient evidence of knowledge, but described this as a “close call”: “absent any evidence suggesting ignorance, a jury applying the beyond-a-reasonable-doubt standard could infer that a defendant knew that he or she was a convicted felon from the mere existence of a felony conviction.” *Staggers*, 961 F.3d at 757.

The Court reached the same conclusion in *United States v. Burden*, 964 F.3d 339, 348 (5th Cir. 2020), but also acknowledged doubt about the result it reached: “Although that stipulation alone does not necessarily place the question entirely beyond debate,” there was sufficient evidence to convict.

The Sixth and Eighth Circuits have also held that stipulation to felony status is sufficient evidence to find knowledge of felony status beyond a reasonable doubt. See *United States v. Ward*, 957 F.3d 691, 696 (6th Cir. 2020) (“Ward made an *Old Chief* stipulation at trial, pursuant to which he acknowledged that he was a convicted felon on and prior to the date of the charged conduct[.]’ Ward’s lawyer also told the jury that Ward was ‘stipulating that he has a felony. So you can check that one off the box.’ The jury could have inferred from these statements that Ward also knew that he was a felon.”)¹; *United States v. Owens*, 966 F.3d 700, 709 (8th Cir. 2020) (“Although the evidence was slender, we conclude that it was legally sufficient to establish knowledge and sustain the conviction. Rational jurors, using reason and common sense in light of their own observations and experiences, could infer beyond a reasonable doubt that a felony conviction would be a significant life event that a person would know about when it happened and remember at a later date.”).

But the Seventh Circuit refused “to go quite so far as to hold that an *Old Chief* stipulation standing alone is sufficient to infer, beyond a reasonable doubt, a defendant’s knowledge of his status as a felon at the time of the charged possession of the firearm.” *United States v. Maez*, 960 F.3d 949, 967 (7th Cir. 2020). And one Fourth Circuit panel explicitly held that the existence of felon status, without more, would not allow someone to find *knowledge* of that status beyond a reasonable doubt:

Inferring that someone knew he was prohibited from possessing a firearm at the time of the offense based on a stipulation at trial that he

¹ See *Old Chief v. United States*, 519 U.S. 172, 186 (1997).

was in fact a prohibited person would render the Supreme Court's language in *Rehaif* pointless.

United States v. Medley, 972 F.3d 399, 414 (4th Cir. 2020), reh'g en banc granted, 828 F. App'x 923 (4th Cir. 2020).

As Justice Sotomayor pointed out in her separate opinion in *Greer*, this Court did not resolve how to analyze *preserved Rehaif* errors. For claims preserved by contemporaneous objection at trial, it “would be patently unfair” to place the burden on the defendant to *prove* that he lacked knowledge of his status, or to rely on evidence outside the trial record. *Greer*, 141 S. Ct. at 2102 (Sotomayor, J., concurring in part) (citing *Neder v. United States*, 527 U.S. 1, 7 (1999)).

It would be appropriate to grant review here and address whether proof of the existence of a prior felony conviction, without more, would allow a rational jury to conclude that the defendant *knew* of his status.

II. THE COURT SHOULD GRANT THE PETITION BECAUSE THE CIRCUIT COURTS HAVE REACHED IRRECONCILABLE RESULTS REGARDING IDENTICAL BURGLARY STATUTES.

A. The Fifth Circuit and the Seventh Circuit are in conflict.

Given identical inputs—a state crime labeled “burglary” committed whenever a trespasser commits some other crime inside a building, even where that crime does not require proof of specific criminal intent—the Fifth and Seventh Circuits have reached opposite conclusions. In the Seventh Circuit, the trespass-plus-crime theory is not considered generic burglary. *Van Cannon v. United States*, 890 F.3d 656, 664 (7th Cir. 2018); *accord Chazen v. Marske*, 938 F.3d 851, 860 (7th Cir. 2019). In the Fifth Circuit, the trespass-plus-crime offense defined in Texas Penal Code

§ 30.02(a)(3) is considered generic burglary. *See United States v. Herrold*, 941 F.3d 173, 182 (5th Cir. 2019) (en banc); *accord United States v. Wallace*, 964 F.3d 386, 388–389 (5th Cir. 2020).

These two circuits do not necessarily disagree about the “generic” definition of burglary. 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.”). When Congress originally passed the ACCA, it included this specific-intent element within its definition of “burglary.” Pub. L. 98-473, § 1803(2) (1984). Even after that statutory definition was inadvertently deleted, this Court agreed that intent to commit another crime remained an “element” of the “generic” definition of burglary. *Taylor*, 495 U.S. at 598.

Texas was the first (or possibly the second)² jurisdiction to define a form of “burglary” that did not require proof of specific intent to commit another felony inside the premises. 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)

² In 1969, North Carolina created a form of *reverse* burglary, which prohibited breaking *out* of a dwelling house after committing a crime therein. *See* 1969 N.C. Laws, c. 543, § 2, codified at N.C. Gen. Stat. § 14-53 (“G.S. 14-53 is rewritten to read as follows: ‘G.S. 14-53. **Breaking out of dwelling house burglary.** If any person shall enter the dwelling house of another with intent to commit any felony or larceny therein, *or being in such dwelling house, shall commit any felony or larceny therein*, and shall, in either case, *break out of such dwelling house in the nighttime*, such person shall be guilty of burglary.’”) (emphasis added).

(internal quotation omitted). Judge Sykes has helpfully dubbed this new theory “trespass-plus-crime.” *Van Cannon*, 890 F.3d at 664. Four states have now expanded their definition of “burglary” to include the trespass-plus-crime theory: Minnesota, *see* Minn. Stat. Ann. § 609.582 (eff. Aug. 1, 1988); Montana, *see* Mont. Code § 45-6-204(1)(b) & (2)(a)(ii) (eff. Oct. 1, 2009); Tennessee, *see* Tenn. Code Ann. § 39-14-402(a)(3) (eff. July 1, 1995); and Texas, *see* Tex. Penal Code § 30.02(a)(3) (eff. 1974). Three forms of Michigan “home invasion” incorporate the trespass-plus-crime theory. *See* Mich. Comp. L. § 750.110a(2), (3), (4)(a).

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 whether a crime that *did not* require proof of specific intent could count as a “burglary” in *Quarles v. United States*, 139 S. Ct. 1872, 1880 n.2 (2019). After *Quarles*, the Fifth and Seventh Circuits have reached opposite conclusions about trespass-plus-crime offense. The Seventh Circuit has held that trespass-plus-crime burglaries are non-generic, because a defendant can commit a predicate crime without ever forming the specific intent to commit that other crime: “[N]ot all crimes are intentional; some require only recklessness or criminal negligence.” *Van Cannon*, 890 F.3d at 664. The Seventh Circuit explicitly held that this principle survived *Quarles* in *Chazen v. Marske*, 938 F.3d 851, 860 (7th Cir. 2019).

The Fifth Circuit did not disagree about that, but nonetheless held that Texas Penal Code § 30.02(a)(3)—a statute materially identical to the Minnesota crime addressed in *Van Cannon*—was generic. *Herrold*, 941 F.3d at 177. The court gave two reasons for its holding that Texas burglary was non-generic, notwithstanding the fact that it does not require proof of specific intent to commit some other crime inside the premises. First, 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). Second, the court decided that Texas law “rejects” the notion that an offender could be guilty of burglary by committing a reckless, negligent, or strict liability crime inside the premises. *Herrold*, 941 F.3d at 179. The court later declared this to be a “holding” of *Herrold*. *See Wallace*, 964 F.3d at 388–389.

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.

B. The divergent outcomes arise from broader disagreements about how to apply the categorical approach.

Even though the categorical approach is supposed to compare elements to elements, the Fifth Circuit has repeatedly held that a defendant cannot rely on the text of a facially overbroad statute. The defendant must provide *proof* that the state has prosecuted someone on non-generic facts. This demand to provide *proof* that a

statute is non-generic—even where the statute is broader on its face than the generic definition—reflects the most extreme interpretation of *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

Under *Duenas-Alvarez*, a defendant claiming a state statute is non-generic may not rely on “application of legal imagination to a state statute’s language,” and must sometimes prove that “state courts in fact did apply the statute in the special (nongeneric) manner” before the statute will be regarded as non-generic. *Id.* at 193. The circuits are divided about whether, after *Duenas-Alvarez*, a defendant must advance proof in every case that the statute has been applied to non-generic facts, or whether such evidence is unnecessary when the elements of the state crime are plainly broader on their face than the generic crime’s.

In *Duenas-Alvarez*, the noncitizen attempted to prove that his prior conviction for vehicle theft under California Vehicle Code § 1851(a) was broader than the generic definition of a “theft offense,” and therefore was not an “aggravated felony” under 8 U.S.C. § 1101(a)(43)(G). 549 U.S. at 192–193. This immigration provision is governed by the same categorical approach as the ACCA’s “violent felony” definition. *Id.* at 187. The trouble was, the text of the California statute closely resembled the “theft” offenses in most other jurisdictions. *Id.* at 187, 189. California explicitly defined the offense to include accessories and accomplices, *id.* at 187, but that is also true of most theft crimes. *Id.* at 190. Duenas-Alvarez argued that California courts had construed aiding and abetting in too broad a fashion—because an accessory was held responsible for what he intended “and for what ‘naturally and probably’ result[ed]

from his intended crime.” 549 U.S. at 190. He argued that this judicial expansion transformed the otherwise generic-looking statute into a non-generic one.

This Court rejected Duenas-Alvarez’s argument, holding that California’s conception of abettor liability did not “extend significantly beyond the concept as set forth in the cases of other States.” *Id.* at 193. The Court went on to explain what Duenas-Alvarez would need to show about California law to prove that a normal-*looking* theft crime could become non-generic. That would require

more than the application of legal imagination to a state statute’s language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Id. at 193.

The circuits are divided over whether *Duenas-Alvarez*’s “realistic probability” test requires proof in *every* case that someone has actually been convicted on non-generic facts.

1. In both the Fifth and the Eighth Circuit, a defendant must point to actual prosecutions to establish the “realistic probability,” even where the state statute is plainly broader on its face than the relevant federal predicate definition. *See Herrold*, 941 F.3d at 178–179 (quoting *Castillo-Rivera*, 853 F.3d at 222–224) (“It is incumbent on the defendant to point to ‘cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.’ This is so ‘even where the state statute may be plausibly interpreted as broader on its face.’”).

The Eighth Circuit has also held that the “analysis of realistic probability must *go beyond the text of the statute* of conviction to inquire whether the government actually prosecutes offenses” under the state statute where the underlying facts are non-generic. *Mowlana v. Lynch*, 803 F.3d 923, 925 (8th Cir. 2015) (emphasis added). Even though the federal crime at issue in *Mowlana*—unlawful use or transfer of supplemental nutrition benefits—did not require a specific intent to deceive, the court accepted the Attorney General’s assurance that the Government only prosecuted defendants under that statute who *in fact* harbored an intent to deceive. *Ibid.* at 926–92

Defendants in these two circuits must point to actual prosecutions to show that facially non-generic crimes are prosecuted on non-generic facts. Defendants in the majority of circuits do not.

2. The vast majority of circuits—the First, Second, Third, Seventh, Ninth, Tenth, and Eleventh—confine the *Duenas-Alvarez* test to the circumstances that spawned it: where the defendant proposes a novel and non-obvious construction for generic-looking statutory language, he must point to a specific example proving that the state statute reaches further than its text alone would suggest.

In *Van Cannon*, the Seventh Circuit followed the majority approach. The court looked only to the *elements* of Minnesota burglary to determine it was non-generic. There was no need to perform a deep dive into the underlying facts of Minnesota burglary prosecutions to see how far the statute reached; the *text* of the “Minnesota statute” alone was enough to show that it “covers a broader swath of conduct than

generic burglary.” *Van Cannon*, 890 F.3d at 658. And indeed, the Seventh Circuit resisted *any* effort to judicially narrow the statute beyond its plain meaning—it explicitly rejected the Government’s argument that commission of a crime *implied* the formation of intent to do so: “*Taylor’s* elements-based approach does not countenance imposing an enhanced sentence based on implicit features in the crime of conviction.” *Ibid.* The text, and the text alone, should be consulted to determine whether the elements of the crime match the generic definition.

Most circuits agree with the Seventh. Where “a state statute explicitly defines a crime more broadly than the generic definition,” then the crime is non-generic, period. See *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc), abrogated on other grounds by *United States v. Stitt*, 139 S. Ct. 399 (2018). Said another way, the text of the statute alone can establish a “realistic probability” that someone could be prosecuted for non-generic conduct, without resorting to “legal imagination” or fanciful hypotheticals. See *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1147–1148 (9th Cir. 2020); accord *Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017) (Where the statutory language “clearly does apply more broadly than the federally defined offense,” then the statute is non-generic.); *Hylton*, 897 F.3d at 63 (There is no need to point to actual examples of prosecution “when the statutory language itself, rather than the application of legal imagination to that language, creates the realistic probability that a state would apply the statute to conduct beyond the generic definition.”); *Ramos v. Att’y Gen.*, 709 F.3d 1066, 1072 (11th Cir. 2013) (same); see also *Singh v. Att’y Gen.*, 839 F.3d 273, 286 n.10 (3d Cir. 2016) (The “realistic

probability” test comes into play only “the relevant elements” of the state crime and the generic definition are “identical.”); *United States v. Titties*, 852 F.3d 1257, 1274 (10th Cir. 2017).

3. The Fifth Circuit’s approach is wrong and unfair. This Court’s categorical approach cases have consistently focused on the *elements* of a state crime as defined in statutory text—or what the jury was actually required to find “in order to convict the defendant.” *Taylor*, 495 U.S. at 602. In conducting this analysis, federal courts focus on “the least of the acts *criminalized*” by the statute, not the least culpable acts ever prosecuted. *Moncrieffe*, 569 U.S. at 190–191 (quoting *Curtis Johnson*, 559 U.S. at 137) (emphasis added, internal alterations and quotation omitted).

“[A]pplication of ACCA involves, and involves only, comparing elements.” *Mathis*, 136 S. Ct. at 2257. The categorical approach “does not care about” facts. *Ibid*. The Massachusetts burglary statute in *United States v. Shepard* was non-generic because (on its face) it applied to “boats and cars.” 544 U.S. 13, 17 (2005). The Iowa burglary statute in *Mathis* was also non-generic because, on its face, it included “a broader range of places” than generic burglary, including any “*land, water, or air vehicle*.” 136 S. Ct. at 2250 (citation omitted). And the Kansas drug statute in *Mellouli* did not “relat[e] to” controlled substances, as defined in 21 U.S.C. § 802, because the Kansas crime applied to “at least nine substances not included in the federal lists.” 135 S. Ct. at 1984.

None of these cases involved an examination of “state enforcement practices,” and this Court did not treat any of these state offenses as “narrower than it plainly

is.” *Swaby*, 847 F.3d at 66; *Titties*, 852 F.3d at 1274. This Court has “*never* conducted a ‘realistic probability’ inquiry” where “the elements of the crime of conviction are not the same as the elements of the generic federal offense.” *Singh*, 839 F.3d at 286 n.10. The closest it has come is in *Moncrieffe*, 569 U.S. at 206, but that was in *dicta* responding to the Government’s worry about an argument someone else might make in a hypothetical case.

Other circuits have criticized the Fifth Circuit’s ruling in *Castillo-Rivera*. See *Hylton*, 897 F.3d at 64; *Salmoran v. Att’y Gen.*, 909 F.3d 73, 81 (3d Cir. 2018). Even within the Fifth Circuit, the excessively strict interpretation of *Duenas-Alvarez* is controversial. *Castillo-Rivera*, 853 F.3d at 239–241 (Dennis, J., dissenting) & 243–244 (Higginson, J., concurring in part and dissenting in part) (“Although I have applied the “realistic-probability” test announced in *Duenas-Alvarez*, I agree with Judge Dennis’s dissenting opinion that this added showing is unnecessary when a state statute is facially broader than its federal analog.”).

4. Time has proven that the elements-only approach is the correct one. And the wisdom of that approach is clear. Consider a state crime that draws no distinction between intentional, knowing, reckless, or negligent mental states. There is no reason to require a federal defendant to *prove* that such a statute reaches negligent or reckless conduct. The statute clearly says so. The only time extrinsic evidence of prosecution is necessary would be if the defendant were attempting to show that the state statute extended beyond its plain-text meaning.

But the minority approach is not only unnecessary; it is unwise. An approach that involves judicially narrowing state statutes to assume they conform to federally imposed boundaries is unfaithful to statutory text, casual with the proper division of authority between State legislatures and federal courts, and inconsistent with the rule of law. And the minority approach's demand that statutory meaning must be proven through empirical evidence departs from judicial function. It presumes that the state crime triggers a severe penalty, and shifts the burden to the defendant (or non-citizen) to prove otherwise.

Finally, the minority approach tilts the scale unfairly against criminal defendants. The minority approach requires that a defendant prove that a statute means what it says in order to disqualify it as an ACCA predicate. The “vast majority” of state prosecutions, like “nearly all” criminal cases, “are resolved through plea bargains,” which “are not published, nor are they readily accessible for review.” *Betansos v. Barr*, 928 F.3d 1133, 1146–47 (9th Cir. 2019).

Even appellate decisions are unlikely to shed light on a burglar's *true* mental state. Where a Texas trespasser committed a reckless, negligent, or strict liability crime inside a building, he would “have no incentive to contest” an allegation that his predicate crime was *intentional*, rather than *reckless*, because that distinction “does not matter under the law; to the contrary, he ‘may have good reason not to’—or even be precluded from doing so by the court.” *Mathis*, 136 S. Ct. at 2253. For a crime like assault—which can be committed by “intentionally, knowingly, or recklessly” causing bodily injury, Texas Penal Code § 22.01(a)(1)—those three mental states are

“conceptually equivalent.” *Gomez-Perez v. Lynch*, 829 F.3d 323, 328 (5th Cir. 2016) (quoting *Landrian v. State*, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008)). In other words, the Fifth Circuit demanded defendants like Mr. Webb prove facts about *other people’s* cases which were legally irrelevant to their conviction or sentence.

6. The division is entrenched and acknowledged. See *Hylton v. Sessions*, 897 F.3d 57, 65 (2d Cir. 2018) (recognizing circuit courts’ “nearly unanimous disagreement” with the Fifth Circuit position); see also *Vazquez*, 885 F.3d at 873–874 (acknowledging that “a statute’s plain meaning is dispositive” in “[o]ther circuits,” but not in the Fifth Circuit). And the lower courts’ divergent views lead to divergent outcomes, not just under the ACCA’s “violent felony” definition, but under every federal statute incorporating *Taylor’s* “categorical approach”—the definitions of “crime of violence” in 18 U.S.C. §§ 16, 521, 924(c)(3), and 3156; “misdemeanor crime of domestic violence” in § 921(a)(33)(A); “serious violent felony” in § 3559(c)(2)(F); the definitions of, and classifications for, “sex offenses” under SORNA, 34 U.S.C. § 20911; the U.S. Sentencing Guidelines’ definitions of “crime of violence” and “controlled substance offense,” U.S.S.G. § 4B1.2, and immigration law’s definitions of “aggravated felony,” 8 U.S.C. § 1101(a)(43), and “crime of moral turpitude,” § 1227(a)(2)(A)(i).

C. As an alternative rationale for holding that Texas burglary is categorically generic, the Fifth Circuit has embraced a strained construction of Texas law that does not satisfy the ACCA’s “demand for certainty.”

The Texas Court of Criminal Appeals has never directly addressed whether a trespasser who commits a reckless, negligent, or strict-liability crime is guilty of

burglary under § 30.02(a)(3). The court has held that it is *permissible* to convict someone under Texas Penal Code § 30.02(a)(3) where the trespasser enters and then “subsequently forms” specific intent “and commits or attempts a felony or theft.” *DeVaughn*, 749 S.W.2d at 65 (quoting Seth S. Searcy, III and James R. Patterson, *Practice Commentary* 144, Vernon’s Texas Codes Annotated (West 1974)); *see also Flores v. State*, 902 S.W.2d 618, 620 (Tex. App.—Austin 1995, pet. ref’d) (“Prosecution under section 30.02(a)(3) is appropriate when the accused enters without effective consent and, lacking intent to commit any crime upon his entry, subsequently forms that intent and commits or attempts to commit a felony or theft.”).

DeVaughn recognized that Subsection (a)(3) “supplants the specific intent” which would otherwise be required under Texas Penal Code § 30.02(a)(1) and (a)(2) with the commission of a predicate offense. *Id.* Based on this language *allowing* conviction where an offender forms specific intent after entry, the Fifth Circuit has decided that Texas *requires* proof of specific intent before convicting under Subsection (a)(3). But the plain statutory text and the Court of Criminal Appeals’s analysis of a nearly identical statute together strongly suggest that the crime is broader than generic burglary. Multiple appellate decisions from lower courts confirm that formation of specific intent is *not* an element under § 30.02(a)(3).

1. In Texas, the crimes of murder and burglary share a similar structure:

Murder (Penal Code § 19.02(b)):	Burglary (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 . . . 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 .

For murder, the Court of Criminal Appeals has held that this structure unambiguously *eliminates* the requirement to prove additional *means rea* beyond that required for commission of the predicate offense: “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.” *Lomax v. State*, 233 S.W.3d 302, 304 (Tex. Crim. App. 2007) (quoting *Aguirre v. State*, 22 S.W.3d 463, 472–473 (Tex. Crim. App. 1999)); *id.* at 307 n.14 (“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.”). It stands to reason that the court would interpret § 30.02(a)(3) the same way it interpreted

§ 19.02(b)(3)—if the predicate offense does not require specific intent, then there is no need to prove that mental state.

2. The Texas intermediate courts have not spoken with one voice, but most cases recognize that the commission of a negligent or reckless crime while trespassing would satisfy the “elements” of Subsection (a)(3), even if the trespasser never formed the intent to commit that crime. *See, e.g., Duran v. State*, 492 S.W.3d 741, 743 (Tex. Crim. App. 2016) (entry plus commission of reckless aggravated assault); *Battles v. State*, 13-12-00273-CR, 2013 WL 5520060, at *1 & n.1 (Tex. App. Oct. 3, 2013) (entry plus negligently or recklessly injuring an elderly person);

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

- *Daniel v. State*, 07-17-00216-CR, 2018 WL 6581507, at *3 (Tex. App.—Amarillo Dec. 13, 2018, no pet.): “All the State was required to prove was that he entered the residence without consent or permission and while inside, assaulted or attempted to assault Phillips and Schwab.” *Id.* And “a person commits assault when he intentionally, knowingly, *or recklessly* causes bodily injury to another.” *Id.*, 2018 WL 6581507, at *2 (emphasis added).
- *State v. Duran*, 492 S.W.3d 741, 743 (Tex. Crim. App. 2016) (recognizing reckless assault as a predicate for § 30.02(a)(3) liability);
- *Scroggs v. State*, 396 S.W.3d 1, 10 & n.3 (Tex. App.—Amarillo 2010, pet. ref’d, untimely filed) (same);
- *Wingfield v. State*, 282 S.W.3d 102, 105 (Tex. App.—Fort Worth 2009, pet. ref’d) (same);
- *Alacan v. State*, 03-14-00410-CR, 2016 WL 286215, at *3 (Tex. App.—Austin Jan. 21, 2016, no pet.) (same);

- *Crawford v. State*, 05-13-01494-CR, 2015 WL 1243408, at *2 (Tex. App.—Dallas Mar. 16, 2015, no pet.) (same);
- *Johnson v. State*, 14-10-00931-CR, 2011 WL 2791251, at *2 (Tex. App.—Houston [14th Dist.] July 14, 2011, no pet.) (same);
- *Torrez v. State*, 12-05-00226-CR, 2006 WL 2005525, at *2 (Tex. App.—Tyler July 19, 2006, no pet.) (same);
- *Guzman v. State*, 2-05-096-CR, 2006 WL 743431, at *2 (Tex. App.—Fort Worth Mar. 23, 2006, no pet.) (same)
- *Brooks v. State*, 08-15-00208-CR, 2017 WL 6350260, at *7 (Tex. App.—El Paso Dec. 13, 2017, pet. ref'd) (listing robbery by reckless causation of injury as a way to prove § 30.02(a)(3)).
- *Battles v. State*, 13-12-00273-CR, 2013 WL 5520060, at *1 & n.1 (Tex. App.—Corpus Christi Oct. 3, 2013, pet. ref'd) (recognizing that the predicate felony—injury to an elderly individual under Texas Penal Code § 22.04—could be committed with recklessness or with “criminal negligence.”

Particularly in light of the reasoning of *Lomax*, these cases eliminate the inference that Texas requires proof of “formation of specific intent” to convict under § 30.02(a)(3). Under the reasoning of *Van Cannon*, 890 F.3d at 664, and *Chazen*, 938 F.3d at 860, that makes § 30.02(a)(3) non-generic. This is even more obvious after *Borden v. United States* held that reckless conduct does not satisfy the ACCA’s elements clause. But the Fifth Circuit has held that § 30.02(a)(3) burglary *is* generic burglary. This Court should grant the petition to resolve that conflict.

3. Against this wall of authority, there are three isolated and unpublished Texas court decisions suggesting—in *dicta*—that the State must prove formation of specific intent to convict under § 30.02(a)(3). Those decisions are: *Matini v. State*, 05-03-00686-CR, 2004 WL 1089197, at *4 (Tex. App.—Dallas May 17, 2004, no pet.) (“Under Section 30.02(a)(3) of the Penal Code, the State must prove, beyond a

reasonable doubt, that the accused, without effective consent, entered a building or habitation lacking the intent to commit an assault, *but subsequently formed that intent* and then committed or attempted to commit assault.”) (emphasis added); *Chavez v. State*, 08-04-00319-CR, 2006 WL 2516464, at *3 (Tex. App.—El Paso Aug. 31, 2006, no pet.) (“Under this section, the State is not required to prove that the accused intended to commit the felony prior to entry; rather, the State has to prove that the accused, without effective consent, entered a habitation and *subsequently formed the intent to commit a felony* and then committed or attempted to commit the felony.”) (emphasis added); *Leaks v. State*, 13-03-613-CR, 2005 WL 704409, at *2 (Tex. App.—Corpus Christi Mar. 24, 2005, pet. ref’d) (“The State . . . must also prove that, after entry into the habitation, appellant *formed an intent to commit*, and did commit, a felony, theft or an assault.”) (emphasis added).

4. Respondent has successfully resisted review of the Fifth Circuit’s precedent in the past by arguing that this Court should “defer” to that court’s interpretation of Texas law. *See, e.g.,* U.S. Br. in Opp. 13, *Herrold v. United States*, No. 19-7731 (citing *Bowen v. Massachusetts*, 487 U.S. 879, 908 (1988), and *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004)). As a preliminary matter, that “deference” is never absolute—*Newdow* itself reversed the Ninth Circuit’s interpretation of California intermediate appellate decisions. 542 U.S. at 16.

But, on a broader level, this case involves an important and recurring question of *federal* law—whether “*Taylor’s* demand for certainty,” applies to a sentencing court’s interpretation of state decisional law. *Shepard*, 544 U.S. at 21. Though the

Fifth Circuit’s implausible construction of § 30.02(a)(3) finds scattered support among three unreported decisions, but no one could claim *certainly* that the Fifth Circuit correctly interpreted Texas law. No, the great weight of authority supports the plain reading of § 30.02(a)(3)—it requires only proof of commission of a crime, even if that crime was not intentional.

5. Unlike other areas where regional courts must construe state law, the ACCA’s categorical approach requires doubt about state law to be resolved in favor of the defendant. In *Mathis v. United States*, this Court held that a sentencing judge must treat a statute as indivisible (and non-generic) unless the relevant materials—including state court decisions—“speak plainly.” 136 S. Ct. at 2257. That suggests that the second and third questions presented should be resolved in Mr. Davis’s favor.

CONCLUSION

Petitioner asks that this Court 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

AUGUST 23, 2021