No. _____

In the

Supreme Court of the United States

ANDREW MICHAEL PENNY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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." *United States v. Shepard*, 544 U.S. 13, 21 (2005).

1. 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 "*Taylor*'s demand for certainty" apply to federal courts' application and interpretation of state-court decisional law?

2. 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, in fact, harbor specific intent?

3. The existence of three or more prior convictions for "violent felonies" dramatically aggravates the punishment for violation of § 922(g)(1). Are those facts therefore elements of an aggravated offense that much be charged in the indictment and either proven to a trial jury beyond a reasonable doubt or admitted by the defendant?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Andrew Michael Penny*, No. 5:01-CR-74 (N.D. Tex.)

2. *United States v. Andrew Michael Penny*, No. 20-10759 (5th Cir.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Andrew Michael Penny asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion in this case was not selected for publication. It can be found at 2021 WL 5815922 and is reprinted on pages 1a–4a of the Appendix to this Petition. The district court issued two written opinions, only one of which is relevant to this appeal. The first grants Mr. Penny's motion to withdraw his first guilty plea. That order is reprinted on pages 5a–9a of the Appendix. The second opinion denied Mr. Penny's pretrial motion to suppress evidence. That second opinion is not relevant to this petition, but it can be found at 2019 WL 1505415.

JURISDICTION

This Court has jurisdiction to review the Fifth Circuit's final decision under 28 U.S.C. § 1254(1). The Fifth Circuit issued its judgment on December 7, 2021.

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

After police arrested petitioner Andrew Michael Penny, they seized and searched the car he had been driving and found two firearms. App., *infra*, 2a. Federal authorities charged him with possessing a firearm after felony conviction in violation of 18 U.S.C. § 922(g)(1). Normally, that crime carries a maximum possible penalty of ten years in prison. § 924(a)(2). And, at least initially, Mr. Penny's attorney believed the default penalty would apply in this case. App., *infra*, 5a–6a. Mr. Penny entered an unconditional guilty plea on September 17, 2018. App., *infra*, 5a.

Three months later, the U.S. Probation Office filed Mr. Penny's Presentence Investigation Report. That report revealed an additional prior conviction for aggravated robbery in 1995 that the defense attorney had not considered when advising Mr. Penny of the consequences of his plea. App., *infra*, 6a–7a. The prosecutor was likewise "unaware" of the 1995 conviction when it indicted Mr. Penny and when he originally pleaded guilty. App., *infra*, 7a. The district court allowed Mr. Penny to withdraw his original plea. App., *infra*, 9a.

Mr. Penny then began preparing for trial. He filed a motion to suppress the two firearms, which the district court denied without a hearing. He ultimately entered a conditional plea, reserving the right to challenge the denial of his suppression motion and to challenge any sentence in excess of the statutory maximum. App., *infra*, 3a.

At sentencing, the district court applied the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), over Mr. Penny's objection. The Court believed that Mr. Penny had three or more prior convictions for "violent felonies." Mr. Penny preserved the two arguments addressed here, acknowledging that they were foreclosed by Fifth Circuit precedent: that his two burglary convictions were not violent felonies under the reasoning of *United States v. Van Cannon*, 890 F.3d 656 (5th Cir. 2018), and that the existence of sequence of prior convictions are elements of the offense that must be pleaded in the indictment and proven beyond a reasonable doubt. E.g., 5th Cir. R. 329, 464, 602.

The Fifth Circuit affirmed the ACCA sentence. App., *infra*, 4a. The court decided that Mr. Penny's two burglary convictions and one aggravated assault conviction were violent felonies. App., *infra*, 4a. This timely petition follows.

REASONS TO GRANT THE PETITION

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

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 v. United States*, 495 U.S. 575, 598 (1990).

Texas was the first (or possibly the second)[1] 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)

[1] 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. That aspect makes these so-called "burglary" offenses broader than generic burglary. 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 Fifth Circuit did not disagree about that, but nonetheless held that Texas Penal Code § 30.02(a)(3)—a statute materially identical to the Minneosta crime

addressed in *Van Cannon—was* generic. *Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc). 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.

II. THE DIVERGENT OUTCOMES ARISE FROM BROADER DISAGREEMENTS ABOUT HOW TO APPLY THE CATEGORICAL APPROACH.

A. The circuits are divided over how to apply this Court's decision in *Gonzales v. Duenas-Alvarez.*

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 plain 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 that a generic-looking state statute is actually non-generic must do more than apply "legal imagination to a state statute's language"; the defendant must 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 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, and so do most states' 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 interpretation 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 was actually 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 the Fifth Circuit, and sometimes in 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 underyling 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. *Id.* at 926–928.

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." *Id.* 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 v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018) (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 minority 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 "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. *Id.* 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 also 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. Penny 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*, 897 F.3d at 65 (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).

B. 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 *Taylor*'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 statute plainly allows conviction under those circumstances. 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" that 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 felon**y, 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 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 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. 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. Thus far, Respondent has successfully resisted review of the Fifth Circuit's precedent 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 some support scattered in unreported decisions, it is far from *certain* that the court 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 both questions presented should be resolved in Mr. Penny's favor.

III. IT IS TIME FOR THE COURT TO OVERRULE ITS DUBIOUS DECISION IN *ALMENDAREZ-TORRES*.

Several members of this Court—past and present—have expressed a willingness to *open* the book on reconsideration of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). There were, of course, the four justices who dissented from the original opinion—Justices Scalia, Stevens, Souter, and Ginsburg. 523 U.S. at 248–271 (Scalia, J., dissenting). Just two years later, Justice Thomas expressed regret about joining the majority—he conceded that there were "errors" in the *Almendarez-Torres* majority decision "to which I succumbed." *Apprendi v. New Jersey*, 530 U.S. 466, 520 (2000) (Thomas, J., concurring). He also joined Justice Stevens's majority decision in *Apprendi*, which recognized that it is "arguable" that *Almendarez-Torres* was wrongly decided. *Id.* at 468.

Justice Thomas has been the most prominent critic of the decision, displaying what one commentator—himself an accomplished Supreme Court advocate—describes as "the zeal of the converted on this issue." John Elwood, "Re-list watch: Will the Court reconsider *Almendarez-Torres?*" *SCOTUSblog* (Jan. 27, 2011).[2] *See*, e.g., *Sessions v. Dimaya*, 138 S. Ct. 1204, 1253–54 (2018) (Thomas, J., dissenting); *Mathis v. United States*, 136 S. Ct. 2242, 2259 (2016) (Thomas, J., concurring) (*Almendarez-Torres* should be overruled.); *Descamps v. United States*, 570 U.S. 254, 280–81 (2013) (Thomas, J., concurring) ("The only reason Descamps' ACCA enhancement is before us is 'because this Court has not yet reconsidered *Almendarez-Torres v. United States* . . . ."); *Shepard*, 544 U.S. at 27 (Thomas, J., concurring in part and concurring in judgment) (same).

Other Justices have provided less-than-glowing reviews of the decision. For example, in *Alleyne v. United States*, 570 U.S. 99, 112 n.1 (2013), Justices Ginsburg, Breyer, Sotomayor, and Kagan all joined Justice Thomas's majority opinion making it clear that the Court did not "revisit" *Almendarez-Torres*'s holding in *Alleyne* because the parties did not ask it to.

On multiple occasions, this Court has ordered the Solicitor General to respond certiorari petitions mounting an aggressive challenge to *Alemendarez-Torres*, sometimes relisting a petition several times and presumably debating whether the time has finally come to discard the increasingly indefensible outlier. *See*, e.g.,

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[2] https://www.scotusblog.com/2011/01/re-list-watch-will-the-court-reconsider-almendarez-torres/

Docket, *Ayala-Segoviano v. United States*, No. 10-5296 (U.S. pet. denied Feb. 22, 2011) (re-listed three times after Court-ordered response)[3]; Docket, *Vazquez v. United States*, No. 10-6117 (U.S. pet. denied Feb. 22, 2011) (re-listed three times after Court-ordered response).

This case in particular identifies the pragmatic problems that arise because of the *Almendarez-Torres* exception. Mr. Penny initially pleaded guilty to the indictment thinking he would face, at worst, a ten-year sentence. A late-breaking revelation of an additional conviction changed the calculus. App., *infra*, 6a. The Government was unaware of the other conviction. After the conviction was revealed (and in light of changes to Fifth Circuit precedent), he became aware he likely would be eligible for sentencing under the ACCA. He withdrew the plea, filed a motion to suppress, then ultimately entered a conditional plea.

Normally, a defendant could file a pretrial motion to dismiss an indictment to resolve purely legal questions about the scope of a federal criminal statute. If the indictment had listed the convictions upon which the Government intended to rely to support the ACCA, the parties could have litigated the ACCA questions way back in May of 2018. Fifth Circuit law was more favorable to Mr. Penny, and the parties were unaware of at least one of the convictions upon which the district court eventually relied to impose the ACCA sentence.

Moreover, the progress of this case shows the pernicious effects of the epicycles created to preserve *Almendarez-Torres*. It is extremely unusual to allow a guilty plea

[3] https://www.supremecourt.gov/search.aspx?filename=/docketfiles/10-5296.htm

where the parties and even the court do not know whether the crime is punishable by 0–10 years or 15 years–life in prison. It is extremely unusual to have such dramatic consequences depend upon the Byzantine, unpredictable analysis required by the categorical approach, which is itself an outgrowth of the *Almendarez-Torres* exception. No one can predict the future with certainty, but one can hope that our grandchildren will not still be arguing about the importance of obscure and unrelated intermediate state court appellate opinions, with decades of prison time on the line.

Mr. Penny preserved this claim in the district court and again on appeal.

Aside from the *existence* of the predicate convictions, there are also Fifth and Sixth Amendment implications to their number and sequence. Applying *Almendarez-Torres*, this Court allows a sentencing judge to make those decisions: "To determine whether two offenses occurred on different occasions, a court is permitted to examine only 'the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.'" *United States v. Fuller*, 453 F.3d 274, 279 (5th Cir. 2006) (quoting *United States v. Norwood*, 155 F. App'x 784, 785–786 (5th Cir.2005), and *Shepard v. United States*, 544 U.S. 13, 16 (2005)). This Court's decision in *Wooden v. United States*, issued earlier today, provides *substantive* guidance on how to decide whether convictions occurred on separate occasions, but does not address the constitutional objections to a court making that decision at sentencing by a preponderance of the evidence. This case thus presents an issue left open by *Wooden*.

The Court should grant certiorari to resolve it.

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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