

No. 21-7333

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In the  
**Supreme Court of the United States**

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ANDREW MICHAEL PENNY,  
*PETITIONER,*

v.

UNITED STATES OF AMERICA,  
*RESPONDENT,*

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

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SUPPLEMENTAL BRIEF FOR PETITIONER

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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.)

## SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner Andrew Michael Penny files this supplemental brief to advise the Court of recent authority acknowledging doubt about the Fifth Circuit’s analysis of Texas’s definition of “burglary.”

On April 12, 2022, the Bureau of Immigration Appeals invited “interested members of the public” to submit amicus curiae briefs on three questions:

1. Whether, in light of *U.S. v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc), and regardless of the specific mens rea of an underlying crime, the commission or attempted commission of a felony, theft, or an assault under Texas Penal Code § 30.02(a)(3) necessarily supersedes or implicitly contains generic burglary’s intent element, which requires an “intent to commit a crime” upon entry into a building or habitation.
2. Whether the burglary statute under Texas Penal Code § 30.02 covers more conduct than the generic offense of burglary because § 30.02(a)(3) does not on its face require proof of intent to commit a crime at any time or at any point during the offense conduct. *See Van Cannon v. United States*, 890 F.3d 656 (7th Cir. 2018)
3. Whether the respondent’s conviction for attempted burglary under Texas Penal Code § 30.02 is a “crime of violence” under section 101(a)(43)(F) of the Act that meets the “physical force” element under 18 U.S.C. § 16(a), as defined in *Johnson v. United States*, 559 U.S. 133, 140 (2010), which neither *Chavez-Mercado v. Barr*, 946 F.3d 272, 274 n.2 (5th Cir. 2020), nor the cases cited therein addressed.

BIA Amicus Invitation No. 22-12-04, available at :

<https://www.justice.gov/eoir/page/file/1493621/download>

Respondent’s Executive Office for Immigration Review issues such invitations for “issues of significance.” *See* U.S. Department of Justice Executive Office for Immigration Review, “Agency Invitations to File Amicus Briefs,” available at <https://www.justice.gov/eoir/amicus-briefs>

The first two questions in the BIA's invitation correspond directly to the first two questions presented in the petition. The Fifth Circuit relied on *Herrold* to reject Petitioner's challenge to his ACCA-enhanced sentence. Pet. App. 4a. The Petition argued that *Herrold* conflicts with *Van Cannon*. The BIA's invitation recognizes that these questions are significant and debatable.

### CONCLUSION

Petitioner asks that this Court request a response from the Government before resolving the petition for certiorari.

Respectfully submitted,

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