NO. 21-8191

IN THE

Supreme Court of the United States

MICHAEL CHRISTIAN TINLIN, KWANE DEMARCHEL WHEAT, AND CARLOS DEJUAN HUTCHINSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF JOINT PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Petitioners Michael Tinlin, Kwane Wheat, and Carlos Hutchinson, respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Eighth Circuit.

INTRODUCTION

The government brushes aside the impact of this Court's recent decision in *Taylor v. United States*, 142 S. Ct. 2015 (2022), and treats the Petitioners' claims as isolated, minor issues. The response fails to address the continued disagreement regarding the applicability of the realistic probability test post-*Taylor*. The response is also silent on how the Eighth Circuit's ruling creates a higher standard for criminal defendants than for immigration petitioners, in conflict with *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021).

Instead, the government's response focuses on whether the state statutes of conviction are facially overbroad. When analyzed more closely, it is clear the government's argument is burden shifting disguised as an improper vehicle argument.

ARGUMENT

I. THE CIRCUIT SPLIT ON THE REALISTIC PROBABILITY TEST HAS DEEPENED SINCE *TAYLOR*. THE EIGHTH CIRCUIT'S INTERPRETATION OF *TAYLOR* FLOUTS THIS COURT'S PRECEDENTS.

In its response, the government treats *Taylor's* holding as limited to interpretation of federal statutes. Opp. Br. 17. The government notes that in *United*

States v. Bragg, 44 F.4th 1067 (8th Cir. 2022), the Eighth Circuit explicitly held that *Taylor* is not applicable when analyzing a state statute of conviction under the categorical approach.[1] The government repeats the Eighth Circuit's holding in *Bragg* as definitive—that *Taylor* has no implication in the categorical approach when analyzing a prior *state* conviction, relying on federalism principles. The Sixth Circuit has indicated it agrees with the Eighth Circuit's interpretation of *Taylor*. *See United States v. Paulk*, 46 F.4th 399, 403 n.1 (6th Cir. 2022).

On the other hand, the Ninth Circuit interpreted *Taylor* as confirmation of the already majority rule—overbroad statutory language is sufficient to establish overbreadth, whether interpreting a state or federal statute. The Ninth Circuit cited *Taylor* for the proposition that when "overbreadth is evident from a [state statute's] text, we need not identify a case in which the state courts did in fact apply the statute in a nongeneric manner." *Cordero-Garcia v. Garland*, 44 F.4th 1181, 1193 (9th Cir. 2022) (citing *Taylor*, 142 S. Ct. at 2025).

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[1] *Bragg* also acknowledged that its rule in criminal cases created a higher standard than in immigration cases. The undersigned has filed a petition for writ of certiorari for Mr. Bragg on November 18, 2022, the same date this reply is being filed. Mr. Bragg was sentenced as an Armed Career Criminal based upon two plainly overbroad statutes, *United States v. Bragg*, 44 F.4th 1067 (8th Cir. 2022), including a prior version of Illinois robbery that the Solicitor General has already conceded only requires a reckless *mens rea*. *See* Brief for the U.S., *Borden v. United States*, 2020 WL 4455245, at *16 n.2 (June 8, 2020).

The Ninth Circuit's position is correct. *Taylor* explained that the actual-case requirement discussed in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), is about respecting state courts' interpretations of state law, not the charging habits of prosecutors. *Taylor* confirms that the point of the actual-case requirement is to understand how a state court interprets its statute—it is not a means of finding empirical evidence of what types of cases a prosecutor would realistically prosecute (or even more, what prosecutors have prosecuted in the past). If the state legislature has clearly drafted a statute in an overbroad manner, it is not the role of federal courts to require confirmation.

Indeed, here, federalism concerns *support* not requiring a specific case example when a statute is unambiguously overbroad on its face. Unlike *Duenas-Alvarez*, there is clearly a mismatch between the Iowa and Illinois state statutes and federal generic definition. By requiring a case example, the Eighth Circuit is stating that state legislatures do not mean what they say. This approach ignores clear directives from state legislatures, and fails to show deference and respect to states on how to define their own laws. In doing so, federal courts "could mistakenly cast doubt on the much higher volume of state criminal prosecutions under those same state statutes." *Najera-Rodriguez v. Barr*, 926 F.3d 343, 354 (7th Cir. 2019); *see also United States v. Franklin*, 895 F.3d 954, 961 (7th Cir. 2018) (vacating a panel decision regarding divisibility and certifying the question to the state supreme court because "this issue of state law is important for both the federal and state court systems, and a wrong

decision on our part could cause substantial uncertainty and confusion if the Wisconsin Supreme Court were to disagree with us in a later decision.").

The second reason *Taylor* held that *Duenas-Alvarez* did not require an actual case also applies here. In *Duenas-Alvarez*, this Court faulted the immigrant for not pointing to an actual case because, there, the elements of the relevant state and generic offenses "clearly overlapped and the only question the Court faced was whether state courts also 'applied the statute in a special (nongeneric) manner.'" *Taylor*, 142 S. Ct. at 2025 (quoting *Duenas-Alvarez*, 549 U.S. at 193 (cleaned up)). Here, the elements of the state prior convictions do not "overlap to begin with." *Id*.

II. MR. TINLIN, MR. HUTCHINSON, AND MR. WHEAT'S CASES PRESENT AN IDEAL VEHICLE FOR REVIEW.

A. The state statutes at issue are facially overbroad.

First, Mr. Hutchinson's Texas burglary statute of conviction is overbroad on its face because it does not require specific intent to commit a crime. Texas burglary includes three alternative means of committing burglary—two of which explicitly require the intent to commit an offense, and one alternative which does not.[2] Texas Penal Code Ann. § 30.02(a). Still, the government asserts that Mr. Hutchinson's case does not implicate the realistic probability circuit split, because Texas appellate courts have determined that the specific intent to commit a crime is required for all

[2] The government does not dispute that there are alternative means, and therefore all alternatives in the Texas statute must meet the generic definition of burglary. *Mathis v. United States*, 136 S. Ct. 2243 (2016).

three alternatives of Texas burglary, citing *DeVaughn v. State*, 749 S.W.2d. 62 (Tex. Crim. App. 1988) (en banc). *DeVaughn* does not hold that the third alternative of Texas burglary always requires the specific intent to commit an offense.

In *DeVaughn*, the defendant was indicted under the no-intent alternative: intentionally and knowingly entering a building or habitation, without the effective consent of the owner, and committing or attempting to commit a felony or theft. 749 S.W.2d at 63-64. The Texas Court of Criminal Appeals noted that this alternative is satisfied when a defendant "subsequently forms that intent and commits or attempts a felony or theft. *This provision dispenses with the need to prove intent at the time of the entry when the actor is caught in the act.*" *Id.* at 65 (emphasis in original). The court concluded that "the gravamen of the offense of burglary clearly remains entry of a building or habitation without the effective consent of the owner, accompanied by either the required mental state, under §§ 30.02(a)(1) and (2), . . . or the further requisite acts or omissions, under § 30.02(a)(3)." *Id.* The general logic from *DeVaughn* is—if you were caught committing the offense, you must have formed the intent to commit the offense during the unlawful entry.

Yet *DeVaughn* did not address the problem noted by Mr. Hutchinson—what about those individuals who commit a reckless offense? As Judge Kelly noted in her dissent, "the Texas court did not reject the notion that § 30.02(a)(3) includes the commission of crimes of recklessness or criminal negligence." *United States v. Hutchinson*, 27 F.4th 1323, 1329 (8th Cir. 2022) (Kelly, J. dissenting) (citing

DeVaughn, 749 S.W.2d at 64–65; id. at 64 n.3, 65 n.4). And Mr. Hutchinson has provided case examples where a defendant was convicted of Texas burglary for a reckless offense. *Rangel v. State*, 179 S.W.3d 64 (Tex. Ct. App. 2005); *Daniel v. State*, No. 07-17-00216-CR, 2018 WL 6581507, at *3 (Tex. Ct. App. Dec. 13, 2018) (unpublished); *Lopez v. State*, No. PD-0245-13, 2013 WL 6123577 (Tex. Crim. App. Nov. 20, 2013) (unpublished). Because Texas burglary allows reckless offenses, the specific intent to commit an offense was not required. *Id.* at 1329. (Kelly, J. dissenting) ("[O]ne cannot have specific intent to commit a crime with a *mens rea* of recklessness."). Yet for the government, this is not enough. Under the government's position, facially overbroad language and case examples are insufficient if the government can cast the slightest doubt on overbreadth.

The government is correct that the Fifth Circuit rejected this argument in *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019). However, the Fifth Circuit noted that other circuits have held that similarly worded statutes were broader than generic burglary. 941 F.3d at 178. The government also cites to the Fourth Circuit's decision in *United States v. Pena*, 952 F.3d 503, 510–11 (4th Cir. 2020), which did not address the intent argument.

Next, Mr. Tinlin and Mr. Wheat's statute of conviction—Iowa assault causing serious injury—is also facially overbroad. Mr. Tinlin's and Mr. Wheat's claim, in its simplest form, is that a statute that only requires a defendant to "cause mental illness" does not require the use of violent force. The government argues that because

the Eighth Circuit did not explicitly acknowledge the language was overbroad on its face, that the case is not an appropriate vehicle for review. True, the opinion did not specifically acknowledge that "causing mental illness" was overbroad. But no one has seriously contested that the language is overbroad on its face. Further, the Sixth Circuit has held that a similarly worded statute does not require violent force. *United States v. Burris*, 912 F.3d 386, 398–99 (6th Cir. 2019).

And while the Eighth Circuit did not state the statute was overbroad, the court still clearly stated that a case example was required. *United States v. Quigley*, 943 F.3d 390, 394 (8th Cir. 2019). Federal courts should not second guess the plain language of state statutes as the Eighth Circuit did below.

B. Resolution of all three claims hinge on the application of the categorical approach. The categorical approach is a creature of Supreme Court precedent, not a question of Guideline interpretation or definitions.

Finally, the government asserts that Mr. Wheat and Mr. Tinlin's cases are not a proper vehicle because they involve the sentencing Guidelines. Yet, as the government acknowledges in its brief, all three cases involve the application of the categorical approach, and that approach is the same whether analyzing the ACCA or the Guidelines. Opp. Br. 11. Mr. Tinlin, Mr. Wheat, and Mr. Hutchinson all had their sentences substantially increased based upon state statutes that are unambiguously overbroad. This Court should grant certiorari to address this error.

CONCLUSION

The Joint Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

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