No. 21-8230

IN THE SUPREME COURT OF THE UNITED STATES

DAVID MATTHEWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

TYLER ANNE LEE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether Texas robbery-by-threat, Tex. Penal Code Ann. § 29.02(a)(2) (West 2017), "has as an element the use, attempted use, or threatened use of physical force against the person of another" under 18 U.S.C. 924(e)(2)(B)(i).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Matthews, No. 17-cr-121 (Feb. 14, 2018)

United States Court of Appeals (5th Cir.):

United States v. Matthews, No. 18-10235 (Feb. 2, 2022)

Supreme Court of the United States:

Matthews v. United States, No. 20-5584 (June 21, 2021)

IN THE SUPREME COURT OF THE UNITED STATES

No. 21-8230

DAVID MATTHEWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is available at 2022 WL 317667. A prior opinion of the court of appeals (Pet. App. 4a-5a) is not published in the Federal Reporter but is reprinted at 799 Fed. Appx. 300.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2022. A petition for rehearing was denied on March 24, 2022 (Pet. App. 3a). The petition for a writ of certiorari was filed

on June 22, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Pet. App. 6a. The district court sentenced petitioner to 265 months of imprisonment, to be followed by five years of supervised release. Id. at 6a-7a. The court of appeals affirmed. Id. at 4a-5a. This Court subsequently vacated the court of appeals' decision and remanded the case for further consideration in light of Borden v. United States, 141 S. Ct. 1817 (2021). 141 S. Ct. 2782. On remand, the court of appeals affirmed. Pet. App. 1a-2a.

1. In March 2017, police officers in Grand Prairie, Texas, arrested petitioner for a domestic violence offense. Presentence Investigation Report (PSR) ¶¶ 7-8. In connection with that arrest, officers searched petitioner's vehicle and discovered a Blaser 12-gauge shotgun. PSR ¶ 8.

A federal grand jury in the Northern District of Texas charged petitioner with one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Pet. App. 13a; Indictment 1-2. Petitioner pleaded guilty to that offense. See Pet. App. 6a.

The Armed Career Criminal Act of 1984 (ACCA) provides for enhanced statutory penalties for certain convicted felons who unlawfully possess firearms and whose criminal histories include at least three prior convictions for a "serious drug offense" or a "violent felony." 18 U.S.C. 924(e)(1). The ACCA's "elements clause," 18 U.S.C. 924(e)(2)(B)(i), defines "'violent felony'" to include "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another."

The Probation Office determined that petitioner qualified for sentencing under the ACCA because he had at least three prior convictions for a "violent felony": a 1998 conviction for robbery; a 1999 conviction for burglary of a habitation; a 2006 conviction for burglary of a habitation; and a 2010 conviction for robbery. See PSR ¶¶ 20, 21, 39, 40, 43, 53, 56, 97. Based on petitioner's criminal history category of VI and his total offense level of 30, the Probation Office calculated an advisory Sentencing Guidelines range of 180 to 210 months of imprisonment. PSR ¶ 101. The district court sentenced petitioner to 265 months of imprisonment. Pet. App. 6a.

3. The court of appeals affirmed. Pet. App. 4a-5a. The court rejected petitioner's claim that his Texas burglary and robbery convictions were not violent felonies, observing that his burglary argument was foreclosed by United States v. Herrold, 941 F.3d 173 (5th Cir. 2019) (en banc), cert. denied 141 S. Ct. 273

(2020), and that his robbery argument was foreclosed United States v. Burris, 920 F.3d 942 (5th Cir. 2019). Pet. App. 5a. This Court subsequently granted certiorari, vacated the court of appeals' judgment, and remanded the case for further consideration in light of Borden v. United States, 141 S. Ct. 1817 (2021), which had held that crimes requiring only a mens rea of recklessness cannot qualify as violent felonies under the ACCA, see id. at 1825. 141 S. Ct. 2782.

On remand, the court of appeals again affirmed in an unpublished per curiam disposition. Pet. App. 1a-2a. The court acknowledged that one form of Texas robbery, robbery-by-injury, Tex. Penal Code Ann. § 29.02(a)(1) (West 2017), requires only a mens rea of recklessness, but explained that robbery-by-threat, id. § 29.02(a)(2), requires an intentional or knowing mens rea. Pet. App. 2a. And the court observed that in United States v. Garrett, 24 F.4th 485 (5th Cir. 2022), it held that "the Texas robbery statute is divisible," and that "a robbery-by-threat conviction qualifies as a 'violent felony'" under the ACCA's elements clause. Pet. App. 2a. The court then found that "[a]t least one of [petitioner's] robbery convictions is for robbery-by-threat," which, in combination with "his two qualifying burglary convictions" qualified petitioner for sentencing under the ACCA. Ibid. (citing Herrold, 941 F.3d at 182).

ARGUMENT

Petitioner contends (Pet. 7-10) that Texas robbery-by-threat is not a violent felony under the ACCA.* The court of appeals' unpublished decision is correct and does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. To determine whether a prior conviction constitutes a "violent felony" under the ACCA, courts apply a "categorical approach," which requires analysis of "the elements of the crime of conviction" rather than the defendant's particular offense conduct. Mathis v. United States, 579 U.S. 500, 504 (2016). If the statute of conviction lists multiple alternative elements establishing multiple distinct crimes, it is "'divisible,'" and a court may apply a "'modified categorical approach'" that "looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, [the] defendant was convicted of." Id. at 505-506 (citation omitted); see Shepard v. United States, 544 U.S. 13, 26 (2005).

In this case, the relevant Texas robbery statute, Tex. Penal Code Ann. § 29.02(a) (West 2017), provides that a person commits robbery

* The pending petition in Lipscomb v. United States, No. 22-5159, presents a similar challenge to the classification of a Texas robbery offense.

> if, in the course of committing theft * * * and with intent to obtain or maintain control of the property he:
> (1) Intentionally, knowingly, or recklessly causes bodily injury to another; or
> (2) Intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

In determining that petitioner's prior robbery conviction qualifies as violent felony, the court of appeals observed that its decision in United States v. Garrett, 24 F.4th 485 (5th Cir. 2022), had found Tex. Penal Code Ann. § 29.02(a) (West 2017) to be divisible into two crimes, robbery-by-injury and robbery-by-threat. 24 F.4th at 489-491. There, the court explained that Texas robbery-by-threat is a violent felony under the ACCA because it involves intentionally or knowingly threatening or placing another in fear of imminent bodily injury or death, which "plainly constitutes the threatened use of physical force." Id. at 491 (citation and internal quotation marks omitted).

Petitioner errs in contending that Texas robbery-by-threat does not require an actual threat. Petitioner relies (Pet. 19-21) on state-law cases where defendants were convicted of robbery under Section 29.02(a)(2) without speaking to the individuals who were placed in fear. In the two examples cited by petitioner, the victim witnessed the defendant's conduct and was placed in fear by "implicit threats" communicated through that conduct. Howard v. State, 333 S.W.3d 137, 137–138 (Tex. Crim. App. 2011); see Burgess v. State, 448 S.W.3d 589, 601-602 (Tex. App. 2014). Those examples are consistent with United States v. Taylor, 142 S. Ct. 2015

(2022), which expressly recognized that threats can be communicated verbally or nonverbally, id. at 2022. Moreover, it is difficult to see how a victim could be placed "in fear of imminent bodily injury or death" under the Texas statute without a threatened use of force.

This Court frequently denies certiorari when petitions seek review of a lower court's determination of the interpretation of a state-law crime for purposes of determining whether it qualifies as an ACCA predicate. See, e.g., Myers v. United States, No. 19-6720 (Mar. 30, 2020); Lamb v. United States, No. 17-5152 (Apr. 2, 2018); Gundy v. United States, No. 16-8617 (Oct. 2, 2017); Rice v. United States, No. 15-9255 (Oct. 3, 2016). Instead, this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004). No sound reason exists to depart from that "settled and firm policy" here. Bowen v. Massachusetts, 487 U.S. 879, 908 (1988).

2. Contrary to petitioner's contention (Pet. 7-10), the decision below does not conflict with Taylor, 142 S. Ct. 2015, which held that attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951, is not a "crime of violence" under the elements clause in 18 U.S.C. 924(c)(3)(B). 142 S. Ct. at 2025. Petitioner contends (Pet. 18-21) that Texas robbery-by-threat can be committed where a defendant places another person in fear without

ever threatening them, whereas Taylor requires a "communicated threat." 142 S. Ct. at 2023. But Taylor simply rejected the argument that a defendant's conduct can be threatening even if no one was placed in fear and the "threat" would have been evident only to an omniscient objective observer. See id. at 2022-2023. Texas robbery-by-threat, in contrast, requires that the defendant make "actual or threatened overtures of violence to the person of another, such that the threatened or injured party was put in fear." Williams v. State, 827 S.W.2d 614, 616 (Tex. App. 1992); see Tex. Penal Code Ann. § 29.02(a)(2) (West 2017).

Petitioner also errs in contending (Pet. 11-17) that federal courts are required to resolve inconsistent state-court decisions in a defendant's favor when determining whether a state statute is divisible. Petitioner's reliance (Pet. 16) on Mathis v. United States, 579 U.S. 500 (2016), does not support his rigid approach to state decisional law. In describing how to analyze the divisibility of a state statute, Mathis provided direction to courts in the event that "state law fails to provide clear answers." 579 U.S. at 518 (emphasis added). But rather than instructing federal courts simply to decide the issue for the defendant at that point, it directs them toward a "peek" into a defendant's record of a prior conviction. Ibid. If that record does not conclusively reveal whether a defendant was convicted of a generic offense, then the "demand for certainty" may not be satisfied. Id. at 519 (citation omitted). But the Court made

clear that indeterminacy should be "more the exception than the rule." Ibid.

Petitioner asserts (Pet. 9) that the Eighth and Tenth Circuits have adopted the approach that he favors, but the decisions that he cites do not support that assertion. Although those decisions each refer to "certainty" about state law, Fifth Circuit decisions have done the same. See United States v. Perlaza-Ortiz, 869 F.3d 375, 378 (2017) (citation omitted) (applying Sentencing Guidelines provisions that require analysis similar to ACCA); United States v. Lobaton-Andrade, 861 F.3d 538, 542 (2017) (per curiam) (same). And neither the Eighth nor the Tenth Circuit has defined "certainty" in the rigid manner that petitioner proposes; indeed, both acknowledge -- consistent with Mathis -- that state court decisional law may not itself resolve all possible doubt. See, e.g., United States v. Cantu, 964 F.3d 924, 929-929 (10th Cir. 2020); United States v. Naylor, 887 F.3d 397, 401 (8th Cir. 2018) (en banc); see also United States v. Degeare, 884 F.3d 1241, 1248 n.1 (10th Cir. 2018) (declining to define "certainty" beyond a requirement that the sources not merely be in "equipoise").

The ultimate basis for the disposition of each of the cited decisions was not any rigid rule of "certainty," but instead a determination that state law sources did not in fact support the government's interpretation of the particular state statute. See Cantu, 964 F.3d at 930, 932 (describing particular state decision as "dispositive" and finding it "potent support for the proposition

that the alternative ways in which the statutory violation can be committed (by distributing any one of a number of controlled substances) are alternative means, rather than alternative elements"); Naylor, 887 F.3d at 404-405 ("Missouri case law involving the Missouri second-degree burglary statute, along with the Supreme Court of Missouri's well-established guidance for interpreting disjunctive phrases in criminal statutes, strongly supports a conclusion that the phrase 'building or inhabitable structure' describes means of committing a single crime."); Jimenez v. Sessions, 893 F.3d 704, 712 (10th Cir. 2018) ("Colorado case law demonstrates that the intended crime is not an element, although we acknowledge the jurisprudence is somewhat mixed.").

Nor does the court of appeals' decision conflict with cases petitioner cites (Pet. 13-14) in which the Seventh and Ninth Circuits certified divisibility questions to state courts. In those cases, the courts of appeals considered the statutory text and state-court cases and determined that ambiguity remained. See United States v. Franklin, 895 F.3d 954, 960-961 (7th Cir. 2018) (per curiam) (noting that "[i]n most cases we simply do our best to decide the cases before us," but certifying because "the question of State law is a close one"); United States v. Lawrence, 905 F.3d 653, 658-659 (9th Cir. 2018) (finding divisibility question "ambiguous" under state case law). The court of appeals here, however, found the Texas robbery statute "unambiguous." Garrett, 24 F. 4th at 489. None of the circumstance-specific

decisions cited by petitioner would compel disagreement with the Fifth Circuit's classification of Texas robbery.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

TYLER ANNE LEE
Attorney

NOVEMBER 2022