No. _____

In the
Supreme Court of the United States

DEVORIS LAMONT JACKSON,
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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Jackson received due process, i.e., fair warning that his burglary convictions would count as prior convictions under the Armed Career Criminal Act (ACCA), when, at the time of his offense, established and binding precedent held Texas burglary convictions did not count as prior convictions under the ACCA?

2. Whether a conviction under the Texas aggravated robbery statute qualifies as a "violent felony" under the ACCA?

3. Whether a conviction under the Texas burglary statute qualifies as a "violent felony" under the ACCA?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption. Devoris Lamont Jackson was the defendant in the district court, appellant in the Fifth Circuit, and is the Petitioner here. The United States was the plaintiff and respondent in the district court, the appellee in the court below, and is the Respondent here.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Jackson*, No. 3:18-cr-00637-L-1, U. S. District Court for the Northern District of Texas. Judgment entered Nov. 23, 2020.
2. *United States v. Jackson*, No. 20-11169, U.S. Court of Appeals for the Fifth Circuit. Judgment entered March 30, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Devoris Lamont Jackson respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Fifth Circuit appears at Appendix 1a-10a to the petition and is reported at 30 F.4th 269.

JURISDICTION

The Fifth Circuit rendered judgment on March 30, 2022. This Court has jurisdiction to review the Fifth Circuit's final decision under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

Title 18, United States Code § 924(e) provides, in relevant part:

> (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—
>
> * * * *
>
> > (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.

Texas Penal Code § 30.02(a) defines burglary as follows:

> (a) A person commits the Texas offense of burglary 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.

Texas Penal Code § 29.02 defines simple robbery as follows:

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 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.

Texas Penal Code § 29.03 defines aggravated robbery as follows:

(a) A person commits an offense if he commits robbery as defined in Section 29.02, and he:

(1) causes serious bodily injury to another;

(2) uses or exhibits a deadly weapon; or

(3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:

(A) 65 years of age or older; or

(B) a disabled person.

STATEMENT

Petitioner pleaded guilty to possession of a firearm after felony conviction. App., *infra*, at 2a. He committed the offense in August 2018. App., *infra*, at 2a. At the time of Jackson's offense, Fifth Circuit precedent did not treat his prior burglary convictions as violent felonies that could enhance his sentence under the ACCA. Over a year after Jackson's offense, this precedent was reversed.

In both district court and on appeal, Petitioner argued that he was not an Armed Career Criminal. A conviction under § 922(g)(1) generally carries a maximum prison sentence of ten years. 18 U.S.C. § 924(a)(2). However, if a defendant has at least three prior convictions for "violent felonies" that were committed on different occasions, his sentence may be enhanced under the ACCA, which carries a 15-year minimum sentence. 18 U.S.C. § 924(e). At sentencing, the district court[1] overruled Jackson's objections to the application of the ACCA and sentenced Jackson to the enhanced Guidelines sentence of 180 months (15 years). App., *infra*, at 2a.

[1] The district court had jurisdiction of this case under 18 U.S.C. § 3231.

According to the lower courts, Jackson had three "violent felony" convictions. Two were for Texas burglary, and one was for Texas aggravated robbery. App., *infra*, at 2a.

During the course of Jackson's appeal to the Fifth Circuit, this court issued *Borden v. United States*, 141 S.Ct. 1817 (2021), after which, the Fifth Circuit held that robbery committed by causing bodily injury, one of two possible predicates for Texas aggravated robbery, was not a violent felony because it included a component of recklessness. *United States v. Garrett*, 24 F.4th 485, 488-89 (5th Cir. 2022).

The Fifth Circuit[2] nonetheless affirmed Jackson's ACCA-enhanced sentence because, in the Fifth Circuit's view, there was another possible predicate allowing Texas aggravated robbery to be considered a violent felony, the type of robbery it referred to as "robbery-by-threat." App., *infra*, at 8a-10a. The court reasoned, "When the underlying robbery—here robbery-by-threat—has an element 'the use, attempted use, or threatened use of physical force against the person of another,'" it is a

[2] The Fifth Circuit had jurisdiction of the appeal under 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

"violent felony" and "the aggravating circumstance is irrelevant for ACCA purposes." App., *infra*, at 10a.

Subsequent to the Fifth Circuit's opinion, this Court decided *United States v. Taylor*, No. 20-1459, ____ S.Ct. ____ (June 21, 2022). Under *Taylor*, "robbery-by-threat" does not include "the use, attempted use, or threatened use of physical force against the person of another." Consequently, robbery-by-threat can no longer serve as a predicate which allows Texas aggravated robbery to be considered a violent felony.

With respect to Jackson's prior burglary convictions, the new Fifth Circuit precedent holding that prior burglary convictions could enhance his sentence under the ACCA is also in conflict with Supreme Court precedent regarding the generic definition of burglary. The Fifth Circuit held Texas burglary meets the generic definition even though Texas burglary does not require intent to commit a crime beyond trespassing—the crime of entering and committing a reckless or accidental crime. The Fifth Circuit did not revisit the validity of this precedent in Jackson's case, but it did determine that applying the new precedent to enhance Jackson's sentence did not violate due process even though it was not in place at the time of Jackson's offense. App., *infra*, at 1a-8a.

REASONS TO GRANT THE PETITION

I. The Fifth Circuit's Due Process decision conflicts with Supreme Court Precedent.

A. The Fifth Circuit affirmed the district court's retroactive application of unexpected law.

At the time of Jackson's offense, Fifth Circuit precedent was unequivocally clear that Jackson's prior burglary convictions could not support a determination that he was an Armed Career Criminal. As a result, the law provided for a maximum sentence of ten years imprisonment. Nonetheless, Jackson was sentenced to 15 years imprisonment because of a subsequent change in the case law surrounding the application of the ACCA.

Bouie v. City of Columbia, provides that due process precludes retroactive application of a judicial decision if it is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue." 378 U.S. 347, 354 (1964). A criminal statute must give fair warning of the conduct that it makes a crime. *Id.* at 350-51. Fair-warning principles "apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." *Johnson v. United States*, 576 U.S. 591, 596 (2015).

In this case, the law expressed prior to, and in effect on the date of, Jackson's felon-in-possession offense held that Texas burglary (like Jackson's prior burglary convictions) convictions *could* <u>*not*</u> serve as predicate convictions triggering the ACCA. The Fifth Circuit had determined that Texas's burglary statute swept more broadly than the generic form of burglary. Because Texas burglaries were considered "nongeneric," they did not support ACCA sentencing enhancement. *See United States v. Constante*, 544 F.3d at 584, 586-87 (one subsection of the Texas burglary statute, Texas Penal Code § 30.02(a)(3), was nongeneric); *see also United States v. Herrold*, 883 F.3d 517, 526 (5th Cir. Feb. 2018) (en banc) ("*Herrold I*"), *vacated and remanded by* 139 S.Ct. 2712 (2019), *different results reached on remand, reinstated in part by* 941 F.3d 173 (5th Cir. 2019) (en banc) (Texas burglary statute indivisible; therefore, no form of Texas burglary constituted "violent felony" under ACCA).

Months after Jackson was indicted, this case law was reversed, and new case law held Texas burglary convictions *could* serve as predicate convictions triggering the sentencing enhancement of the ACCA. More than a year after the Fifth Circuit's decision in *Herrold I*, this Court vacated that decision and remanded it to the Fifth Circuit for further

consideration in light of *Quarles v. United States*, 139 S. Ct. 914 (2019), a one-line opinion granting the petition for writ of certiorari in that case. A full-length opinion in *Quarles v. United States* was not issued until June 10, 2019, approximately 10 months after Jackson's offense took place. 139 S.Ct. 1872 (2019).

On October 18, 2019, approximately 14 months after Jackson's offense took place, the Fifth Circuit issued another opinion in *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc) ("*Herrold II*"). This time, the Fifth Circuit held Texas's burglary statute was generic, and therefore Herrold's prior burglaries were qualifying predicates for sentence enhancement under the ACCA, squarely overruling *Herrold I*. *Id.* at 182. The *Herrold II* Court explained that two of this Court's intervening decisions, *Quarles* and *United States v. Stitt*, foreclosed two principal grounds on which Herrold contested his ACCA sentencing enhancement. *Id.* at 182.

Jackson could not have anticipated this significant change in the law. The district court nevertheless applied the new case law in Jackson's sentencing, and held that Jackson's prior convictions for burglary were qualifying predicates for sentence enhancement under the

ACCA. App., *infra*, at 1a-3a. The Fifth Circuit affirmed the application of the ACCA, reasoning that the hallmarks of *Bouie* were not present in Jackson's case. App., *infra*, at 4a.

B. Retroactive application of case law that squarely overrules prior express and binding case law violates due process.

The Fifth Circuit explained that because different circuits had made different rulings regarding the generic or non-generic nature of the burglary statues in different states, Jackson should have anticipated that the Supreme Court would resolve the split and Jackson should have expected the law to change. App., *infra*, at 6a.

The Fifth Circuit reasoned that "finding" a retroactivity problem in Jackson's case would undermine vertical precedent anytime the Supreme Court resolves a circuit split on the interpretation of a criminal statute in favor of the government. Taking this line of reasoning to the extreme, the Fifth Circuit suggested that if it were to "find" a retroactivity problem in Jackson's case, then anytime the Supreme Court resolved a circuit split in favor of the government, it would not be able to apply the decision even to the Supreme Court defendant. App., *infra*, at 6a-7a.

This line of reasoning ignores, and is completely incompatible with, *Bouie*. Presumably a "Supreme Court defendant" litigating an interpretation of the law all the way to the Supreme Court might expect or reasonably foresee an unfavorable change in the law. Jackson, who could have shaved five years off his sentence simply by accepting a plea earlier in the course of his proceedings, was not in the same position. The reasoning espoused by the Fifth Circuit supports an argument that there is no set of circumstances under which a defendant's due process rights would be violated after a higher court overrules a lower court. Not surprisingly, the Fifth Circuit went on to note that it "has never recognized a *Bouie* violation." App., *infra*, at 7a-8a.

The Fifth Circuit's holding is also in conflict with *Marks v. United States*, 430 U.S. 188, 191-97 (1977). In *Marks*, the Supreme Court held that the retroactive application of the obscenity standards announced in *Miller v. California*, 413 U.S. 15 (1973), to the potential detriment of the petitioner violated the Due Process Clause because, at the time that the defendant committed the challenged conduct, the Supreme Court's decision in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), provided the governing law. *Marks*, 430 U.S. at 191-97. The Supreme Court held

defendant Marks could not have foreseen that his actions would later become criminal when the range of constitutionally proscribable conduct was expanded. *Id.* at 194-96; *see also* Richard S. Kay, *Retroactivity and Prospectivity of Judgments in American Law*, 62 AM. J. COMP. L. 37, 55 (2014) ("American courts generally apply reductions in criminal liability retroactively and enlargements of that liability only prospectively.").

In this case, the retroactive application of the ACCA standard announced in *Herrold II* to Jackson violates due process. Jackson could not have foreseen that his prior burglary convictions would later become qualifying predicate convictions. Jackson could not have foreseen that the Fifth Circuit would squarely overrule its prior holdings. The Fifth Circuit itself did not anticipate the change. *Herrold II* did not clarify *Herrold I* or align it with other prior precedent. It was more than a significant departure from prior law; it was a reversal of prior law.

There can be no doubt that a deprivation of the right of fair warning can not only result from an from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language, as in *Bouie*, but also from an unforeseeable and retroactive application of a 180 degree judicial reversal of the law. If due process is violated when "uncertainty as to [a]

statute's meaning is itself not revealed until the court's decision," the violation is that much greater when the court previously held the statute had the contrary meaning. *See Bouie*, 378 U.S. at 352. The reversal of the law relevant to this case was not a shift, it was a square overruling; thus, by its very nature, it was "unexpected and indefensible by reference to the law which ha[d] been expressed prior to the conduct in issue." *See id.* at 354.

Retroactive application of such an overruling increasing criminal penalties yields arbitrary and unfair results. If Jackson had been charged in August 2018 (at the time of the offense), pled guilty, and was sentenced before the law changed, his maximum sentence would have been ten years. Such retroactive application practically makes the length of Jackson's sentence contingent on the timing of his charge and the speed of the court's disposition of the case. This has nothing to do with the severity of the offense.

The retroactive application of this change in the law to Jackson violates due process. Jackson did not have fair notice that his prior convictions could result in the application of the ACCA. The change in law did not clarify the law or align it with other prior precedent; it was a

complete reversal of prior law. It was unexpected and completely at odds with the law which had been previously expressed by the Fifth Circuit. The Fifth Circuit's conclusion that the ACCA applied to Jackson should be reversed because it rests on an unforeseeable construction of the ACCA.

II. The Fifth Circuit's decision to characterize Texas aggravated robbery as a "violent felony" under the ACCA conflicts with Supreme Court Precedent.

In addition, the ACCA should not have been applied in Jackson's sentencing because the Texas statutes of aggravated robbery and burglary simply do not fit the ACCA's definition of a "violent felony."

The ACCA defines "violent felony" to include, among other offenses not relevant here, "burglary" and offenses that "have as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B). In evaluating whether an offense constitutes a "violent felony," courts evaluate the elements of the offense generally, rather than a defendant's specific conduct. *See Mathis v. United States*, 136 S.Ct. 2243, 2251-52 (2016). If the offense may be committed in a way that falls outside of the definition of "violent felony," it does not qualify. *Id.* at 2251.

A. Under *Mathis*, the Texas robbery statute is indivisible, and, therefore, Texas's aggravated robbery is not an ACCA predicate.

This Court has held that elements are what count in determining what type of conviction can give rise to an ACCA sentence. *Mathis v. United States*, 136 S.Ct. 2243, 2248-49 (2016) ("Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements. . . . And ACCA, as we have always understood it, cares not a whit about them.").

In Texas, the first element of aggravated robbery—simple robbery—can be proven by showing a mens rea of recklessness. *See* Tex. Penal Code § 29.02(a). In *Borden v. United States*, 141 S.Ct. 1817 (2021), this Court held that an offense requiring no more than a mens rea of recklessness cannot count as a "violent felony" under the ACCA. Consequently, after *Borden*, aggravated robbery under Texas Penal Code § 29.03(a)(2) can no longer count as a "violent felony" under the ACCA.

The Fifth Circuit has held that Texas's simple robbery statute is divisible into two predicates, robbery-by-injury (including recklessness) and robbery-by-threat (not including recklessness), and consequently, aggravated robbery does not include recklessness when a case involves

what the Fifth Circuit describes as a separate predicate, robbery-by-threat. App., *infra*, at 9a-10a. Below, the Fifth Circuit reasoned, because "the underlying robbery—[in Jackson's case] robbery-by-threat—has an element 'the use, attempted use, or threatened use of physical force against the person of another,'" it did not matter that robbery-by-injury included recklessness. App., *infra*, at 9a-10a.

This analysis conflicts with *Mathis*'s divisibility analysis. In *Mathis*, this Court set out different methods to determine divisibility. *See* 136 S.Ct. at 2256. Significantly, the Court held that when a state court ruling answered whether a jury must, or need not, unanimously agree on a particular alternative listed in the statue to convict, a sentencing judge should "follow what it says." *Id.* In this case, like *Mathis*, state court decisions answer the divisibility question.

Under state law, Texas's simple robbery statute is not divisible into robberies by threat and robberies by injury. Texas's Court of Criminal Appeals has held that a defendant may not be convicted of both of these two alternatives as to the same act and victim. *See Cooper v. State*, 430 S.W.3d 426, 427 (Tex. Crim. App. 2014). Four judges who joined the majority in *Cooper*, concluded that the Texas simple robbery statute does

not include separate crimes. *See id.* at 434 (Keller, P.J., concurring) ("But this discussion leads me to conclude that the 'threat' and 'bodily injury' elements of robbery are simply alternative methods of committing a robbery."); *id.* at 439 (Cochran, J., concurring) ("I agree with Presiding Judge Keller that 'the "threat" and "bodily injury" elements of [assault] and robbery are simply alternative methods of committing an [assault] or robbery.'"). *See also Burton v. State*, 510 S.W.3d 232, 237 (Tex. App.—Fort Worth 2017, no pet.) (jury did not have to unanimously find either bodily-injury- or fear-robbery because "causing bodily injury or threatening the victim are different methods of committing the same offense").

In other words, the two alternatives constitute but one crime. Under *Mathis*, the statute is therefore indivisible. *See* 136 S.Ct. at 2256 (when state high court opines on the number of offenses in a statute, "a sentencing judge need only follow what it says."). If robbery by injury lacks the use, attempted use, and threatened use of physical force against the person of another, then the Texas robbery statute as a whole lacks the requirement. As aggravated robbery includes simple robbery, it therefore falls outside the ACCA.

Furthermore, state court authority provides that the aggravating factors in Texas's aggravated robbery statute are indivisible. In *Woodward v. State*, Texas's First Court of Appeals expressly denied the defendant any right to jury unanimity on the question of whether he committed aggravated robbery by deadly weapon, serious bodily injury, or by robbing a senior or disabled victim. 294 S.W.3d 605, 608-09 (Tex. App.—Houston [1st Dist.] 2009), *reversed on other grounds by Cooper*, 430 S.W.3d 426.

B. Under *Taylor*, Texas's aggravated robbery is not an ACCA predicate.

Even if the Texas simple robbery statute were divisible, this Court's recent holding in *United States v. Taylor* precludes the use of robbery-by-threat as a predicate for an ACCA violent felony. *See* No. 20-1459, ____ S.Ct. ____ (June 21, 2022). *Taylor*'s analysis overrules the Fifth Circuit's decision here. The "alternate predicate" that the Fifth Circuit refers to as "robbery-by-threat" does not actually require a threat; it allows for conviction when the defendant places another in fear. *See* Texas Penal Code § 29.02(a).

"The general, passive requirement that another be 'placed in fear' cannot be equated with the specific, active requirement that the actor

'threaten another with imminent bodily injury.'" *Williams v. State*, 827 S.W.2d 614, 616 (Tex. App.—Houston [1st Dist.] 1992); *see also Jackson v. State*, No. 05-15-00414-CR, 2016 WL 4010067, at *4 (Tex. App.—Dallas 2016) ("This is a passive element when compared to the dissimilar, active element of threatening another."). Placing another in fear does not require a threat at all. *See Williams*, 827 S.W.2d at 616 ("The factfinder may conclude that an individual perceived fear or was 'placed in fear,' in circumstances where no actual threats were conveyed by the accused."); *see also Cooper*, 430 S.W.3d at 433–34 & n.47 (Keller, P.J., concurring) (citing the unanimous view of the courts of appeals that "a threat is not actually required to establish robbery" because the statute allows conviction for placing another in fear).

The Texas Court of Criminal Appeals has interpreted the passive "places another in fear" aspect of the Texas robbery statute in very broad terms. In *Howard v. State*, the court decided that the defendant committed robbery without even interacting with the victim—there was no evidence that the defendant even knew of the victim's existence. The victim, a convenience store clerk, hid in a back office and watched the theft on a video screen. 333 S.W.3d 137, 138 (Tex. Crim. App. 2011).

There was "no evidence in the record showing that [Howard] was aware of" the victim. *Id.* Yet the court affirmed his conviction. The Court reasoned that the term "knowingly" in the phrase "knowingly . . . places another in fear" does not "refer to the defendant's knowledge of the actual results of his actions, but knowledge of what results his actions are reasonably certain to cause." Thus, "robbery-by-placing-in-fear does not require that a defendant know that he actually places someone in fear, or know whom he actually places in fear." *Id.* at 140. Howard never "threatened" the clerk but he was guilty of robbery. Thus, the threatened use of physical force cannot be an element of Texas robbery.

Similarly, the facts of *Burgess v. State* demonstrate that an actual threat is not required. There, the defendant entered a car parked outside of a post office and stole a purse. *Burgess v. State*, 448 S.W.3d 589, 595 (Tex. App.—Houston [14th Dist.] 2014). A child was seated in the car and ran away screaming when the defendant entered the vehicle. *Id.* The court held that Burgess was guilty of "robbery" under subsection (a)(2) because, even if the defendant did not know a child was in the car as he approached, he learned of her presence when he entered the vehicle and took the purse. *Id.* at 601. He did not communicate anything to the

child, and thus he did not "threaten" the child. That didn't matter. It didn't matter that he was oblivious to the child's presence until after entering the vehicle and grabbing the purse. The child's fear resulting from his presence in the vehicle was enough for conviction. *See id.*

Still, the Fifth Circuit held that Texas robbery by threat or placing in fear qualifies as a violent felony. *Garrett*, 24 F.4th at 488-89. *Garrett* and the Fifth Circuit's holding in this case cannot be squared with this Court's decision in *United States v. Taylor*, No. 20-1459, ____ S.Ct. ____ (June 21, 2022). *Taylor* held that a conviction for attempted Hobbs Act robbery does not qualify as a crime of violence under 18 U.S.C. § 924(c) because it lacks as an element of the use, attempted use, or threatened use of force. *Id.* at *4. *Taylor* distinguished between a defendant's intention to take property by force or threat and an actual threat. *Id.* The Court specifically rejected the government's argument that a threat is just an "objective or abstract risk." *Id.* at *6. A threatened use of force "require[es] a communicated threat." *Id.* It cannot simply be "conduct that poses an abstract risk to community peace and order, whether known or unknown to anyone at the time." *Id.* That is exactly what the Texas robbery statute criminalizes—placing another in fear, regardless

of whether the defendant actually threatened the victim or whether the defendant and victim interacted at all. *See Howard*, 333 S.W.3d at 137–38; *Burgess*, 448 S.W.3d at 601. The Fifth Circuit's ruling stands in stark conflict with *Taylor*.

For these reasons, this Court should hold that Texas simple robbery, however committed, is not a "violent felony." This Court also should hold that Texas aggravated robbery, however committed, is not a "violent felony." As stated above, a defendant commits Texas aggravated robbery when he or she commits simple robbery and one of three circumstances is present: when the defendant uses or exhibits a deadly weapon, when the defendant causes serious injury, or when the defendant robs a senior or disabled victim. Tex. Penal Code § 29.03(a). The last of these alternatives—involving a senior or disabled victim—also takes the offense outside the definition of a "violent felony" because the senior or disabled status of the victim does not make force an element.

For these reasons, this Court should conclude that aggravated robbery does not require force or threatened force and is therefore not a "violent felony."

III. The Fifth Circuit's decision to characterize Texas burglary as a "violent felony" under the ACCA conflicts with Supreme Court Precedent and Seventh Circuit Precedent.

For purpose of the ACCA, a "burglary" means a crime with "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 599 (1990). The en banc Fifth Circuit in *Herrold II* has now held that Texas burglary of a habitation satisfies this definition, notwithstanding that it may be committed without an intent to commit a crime other than trespassing at the moment of entry. *See Herrold II*, 943 F.3d at 179.

In *Herrold II*, the defense argued that Texas burglary never requires intent to commit a crime beyond trespassing—the crime of entering and committing a reckless or accidental crime. *See id.* at 177-78. The Fifth Circuit rejected the argument, but it overlooked a large amount of relevant state authority which clearly supported the argument. *See State v. Duran*, 492 S.W.3d 741, 743 (Tex. Crim. App. 2016); *Daniel v. State*, 07-17-00216-CR, 2018 WL 6581507, at *3 (Tex. App.—Amarillo Dec. 13, 2018, no pet.); *Alcan v. State*, 03-14-00410-CR, 2016 WL 286215, at *3 (Tex. App.—Austin Jan. 21, 2016, no pet.);

Crawford v. State, 05-13-01494-CR, 2015 Tex. App. LEXIS 2436, at *2 (Tex. App.—Dallas Mar. 16, 2015, no pet.); *Battles v. State*, 13-12-00273-CR, 2013 WL 5520060, at *1 & n.1 (Tex. App.—Corpus Christi Oct. 3, 2013, pet. ref'd); *Johnson v. State*, 14-10-00931-CR, 2011 WL 2791251, at *2 (Tex. App.—Houston [14th Dist.] July 14, 2011, no pet.); *Scroggs v. State*, 396 S.W.3d 1, 10 & n.3 (Tex. App.—Amarillo 2010, pet. ref'd, untimely filed); *Wingfield v. State*, 282 S.W.3d 102, 105 (Tex. App.—Fort Worth 2009, pet. ref'd); *Torrez v. State*, 12-05-00226-CR, 2006 WL 2005525, at *2 (Tex. App.—Tyler July 19, 2006, no pet.); and *Guzman v. State*, 2-05-096-CR, 2006 WL 743431, at *2 (Tex. App.—Fort Worth Mar. 23, 2006, no pet.); *see also Lomax v. State*, 233 S.W.3d 302 (Tex. Crim. App. 2007).

Jackson respectfully submits that *Herrold II* was wrongly decided for this reason. *See Mathis*, 136 S.Ct. at 2251 (if offense may be committed in a manner falling outside of generic definition, it does not qualify as an ACCA predicate offense). Texas's burglary statute includes situations outside the scope of generic burglary.

Jackson also submits that *Herrold II* was wrongly decided because the Texas offense of burglary of habitation does not require that the

burgled structure be closed to the public. *See Walker v. State*, 648 S.W.2d 308, 310 (Tex. Crim. App. 1983) (en banc). Indeed, it has been held violated when the defendant has real but invalid consent to enter. *See Gordon v. State*, 633 S.W.2d 872 (Tex. Crim. App. 1982). By contrast, generic burglary requires a true breaking. *See Descamps v. United States*, 570 U.S. 254, 277-78 (2013).

Finally, *Herrold II* is at odds with the holding of the Seventh Circuit in *Van Cannon v. United States*, 890 F.3d 656 (7th Cir. 2018). In *Van Cannon*, the Seventh Circuit held that a similar statute from Minnesota was non-generic, because like the Texas statute, it permitted conviction for burglary whenever a trespasser "commit[ed] a crime while in the building." *Id.* at 663 (describing Minn. Stat. § 609.582). The Seventh Circuit therefore held that this "trespass plus-crime" theory of burglary "covers more conduct than *Taylor*'s definition of generic burglary," *Van Cannon*, 890 F.3d at 665, which requires "intent to commit a crime." *Taylor*, 495 U.S. at 598–599. The Seventh Circuit recently affirmed that this holding survived *Quarles*. *See Chazen v. Marske*, 938 F.3d 851, 860 (7th Cir. 2019).

CONCLUSION

Petitioner respectfully asks that this Court grant this petition and set the case for a decision on the merits.

Respectfully submitted,

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