NO. _____

In the Supreme Court of the United States

EDDIE LAMONT LIPSCOMB,

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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July 19, 2022

QUESTIONS PRESENTED

1. When evaluating whether a state-law offense satisfies the Armed Career Criminal Act's definition of a "violent felony," 18 U.S.C. § 924(e)(2)(B), federal courts often have to interpret and apply state court decisions.

Where state-law sources conflict with one another, does the ACCA's "demand for certainty" constrain a federal court's interpretation of state criminal law?

2. Mr. Lipscomb was previously convicted of robbery under Texas Penal Code § 29.02. That statute allows conviction when a thief recklessly causes someone to suffer injury or causes someone to fear imminent bodily injury.

Does Texas simple robbery 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)(i)?

3. Mr. Lipscomb was previously convicted of burglary under Texas Penal Code § 30.02(a). That statute allows conviction where a trespasser commits any "felony, theft, or assault" inside the premises. Many of those offenses allow conviction with a *mens rea* of recklessness, negligence, or even strict liability.

Is Texas Penal Code § 30.02(a) a generic "burglary" offense, 18 U.S.C. § 924(e)(2)(B)(ii)?

DIRECTLY RELATED PROCEEDINGS

United States v. Lipscomb, No. 3:07-CR-357 (N.D. Tex. Mar. 2, 2009; Amended Judgments July 9, 2018; Jan. 28, 2021; July 13, 2022; Judgments Revoking Supervised Release Oct. 31, 2018; Aug. 23, 2019)

United States v. Lipscomb, No. 09-10240 (5th Cir. Sept. 13, 2010)

Lipscomb v. United States, No. 10-9991 (U.S. May 16, 2011)

Lipscomb v. United States, No. 3:16-CV-1500 (N.D. Tex. July 5, 2018)

United States v. Lipscomb, No. 18-11168 (5th Cir. Dec. 8, 2020; Feb. 3, 2022)

United States v. Lipscomb, No. 18-11419, consolidated with No. 19-10948 (5th Cir., still pending)

Lipscomb v. United States, No. 20-7984 (U.S. Oct. 18, 2021)

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

PETITION FOR A WRIT OF CERTIORARI

Eddie Lamont Lipscomb respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion below, 2022 WL 327472 (Petition Appendix 1a–4a), was not selected for publication in the Federal Reporter. The Fifth Circuit issued a published decision earlier in this post-conviction appeal, 982 F.3d 927, (App. 5a–10a), and its opinion on direct appeal was also published, 619 F.3d 474 (App. 26a–58a).

The Magistrate Judge's Report and Recommendation (App. 12a–25a) and the district court's order accepting that recommendation (App. 13a) were not selected for publication.

JURISDICTION

The Fifth Circuit entered judgment on February 3, 2022. The court denied Mr. Lipscomb's timely petition for rehearing on April 20, 2022, so this petition is timely under S. Ct. R. 13.3.[1] This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of 18 U.S.C. § 924(e) and Texas Penal Code § 29.02(a) and § 30.02(a).

At all times relevant to this petition,[2] 18 U.S.C. § 924 provided, in pertinent part:

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[1] As Mr. Lipscomb explained in his Application for Extension, No. 21A616, the Fifth Circuit Clerk initially decided that his petition for rehearing was untimely, because the Clerk had erroneously designated the Government's appeal as a direct criminal action, rather than an appeal arising in a civil 28 U.S.C. § 2255 matter. While that application was pending, the Fifth Circuit entered an order changing the case type to civil, which made the rehearing petition timely. The court denied the rehearing petition that same day. App. 59a. After Mr. Lipscomb advised this Court about these developments, and conceded that the extension application was now moot, Justice Alito denied the application on April 27, 2022.

[2] Last month, Congress amended § 924(a). Among other changes, the amendment raised the default penalty for violating § 922(g) from 10 years to 15 years. Pub.L. 117-159, Div. A, Title II, § 12004(c), 13 6 Stat. 1329 (June 25, 2022).

§ 924. Penalties

(a)

* * * *

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

* * * *

(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.

Texas Penal Code § 29.02(a) provides:

Sec. 29.02. ROBBERY. (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 § 30.02(a) provides:

Sec. 30.02. BURGLARY. (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

1. Petitioner Eddie Lamont Lipscomb pleaded guilty to possessing a firearm after felony conviction in 2007. App. 2a. Normally, that charge would have carried a maximum possible sentence of 10 years in prison. 18 U.S.C. § 924(a)(2) (2006). The district court applied the Armed Career Criminal Act, 18 U.S.C. § 924(e), and sentenced him to twenty years in prison. App. 2a. A divided Fifth Circuit panel affirmed his conviction and sentence on direct appeal, and this Court denied certiorari. *United States v. Lipscomb,* 619 F.3d 474 (5th Cir. 2010) (App. 26a–58a), *pet. for cert. denied*, 563 U.S. 1000 (2011).

2. After this Court struck down the ACCA's residual clause in *(Samuel) Johnson v. United States*, 576 U.S. 591 (2015), Mr. Lipscomb moved to vacate his ACCA sentence under 28 U.S.C. § 2255. He argued that his Texas convictions for robbery (committed on two occasions) and burglary (committed on two occasions) could not count as violent felonies without

that clause. The district court agreed, vacated his sentence, re-sentenced him, and he was released. App. 2a. The Government appealed.

3. Between the time Mr. Lipscomb filed his § 2255 motion in June 2016 and the most recent decision below, the Fifth Circuit changed its mind—and its interpretive precedent—several times.[3] To overturn the district court's decision, the Fifth Circuit relied on two of its most dubious prior decisions: *United States v. Garrett*, 24 F.4th 485 (5th Cir. 2022), which held that Texas robbery-by-fear was its own divisible

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[3] On Texas robbery: *See United States v. Fennell*, 695 F. App'x 780 (5th Cir. 2017) (affirming an order holding that Texas robbery was not a violent felony); *United States v. Burris*, 896 F.3d 320, 323 (5th Cir. 2018), *as revised* (Aug. 3, 2018) (holding that neither Texas Penal Code § 29.02(a)(1) robbery-by-injury nor § 29.02(a)(2) robbery-by-fear is a violent felony, regardless of divisibility), *opinion withdrawn*, 908 F.3d 152 (5th Cir. 2018), and *on reh'g*, 920 F.3d 942 (5th Cir. 2019) (holding that *both* robbery-by-injury and robbery-by-fear are violent felonies, regardless of divisibility), *cert. granted, judgment vacated*, 141 S. Ct. 2781 (2021), *on remand*, 856 F. App'x 547 (5th Cir. 2021) (holding that robbery-by-injury is not a violent felony); *United States v. Garrett*, 24 F.4th 485 (5th Cir. 2022) (holding that robbery-by-injury and robbery-by-fear are divisible offenses, and robbery-by-fear is a violent felony).

On Texas burglary: *See United States v. Uribe*, 838 F.3d 667, 671 (5th Cir. 2016) (holding that Texas burglary is an indivisible offense, and that trespass-with-intent under Texas Penal Code § 30.02(a)(1) is generic), *overruled by United States v. Herrold*, 883 F.3d 517, 531 (5th Cir. 2018) (holding that Texas Penal Code § 30.02(a) is *indivisible* and recognizing that trespass-plus-crime under § 30.02(a)(3) is non-generic burglary), *cert. granted, judgment vacated*, 139 S. Ct. 2712 (2019), *on remand*, 941 F.3d 173 (5th Cir. 2019) (holding that § 30.02(a)(3) is generic burglary).

offense that satisfied the ACCA's elements clause (App. 3a), and *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019), which held that Texas burglary is generic burglary, even under the trespass-plus-crime theory, Texas Penal Code § 30.02(a)(3). App. 3a, 7a. As explained below, both *Garrett* and *Herrold* resolved disputed Texas-law questions in the federal Government's favor.

4. The Fifth Circuit issued its judgment on February 3, 2022. Mr. Lipscomb filed a timely petition for rehearing, *see* Fed. R. App. P. 40(a)(1)(A), and the Fifth Circuit denied that petition on April 20, 2022. App. 59a. This timely petition follows.

REASONS FOR GRANTING THE PETITION

I. The Court should grant the petition to clarify whether the ACCA's demand for certainty constrains a federal court's interpretation of conflicting state-law decisions.

When analyzing a prior state-law conviction to determine whether it qualifies for a recidivist sentencing enhancement (or an immigration consequence), federal courts sometimes have to "make a judgment about the meaning of a state statute." *United States v. Taylor*, 142 S. Ct. 2015, 2025 (2022). "Appreciating the respect due state courts as the final arbiters of state law in our federal system," this Court's precedent requires a federal court to "consult how a state court would interpret its own State's laws." *Ibid.*

Where a state's highest court has "definitively answer[ed]" a question, the federal court's task is

"easy"—"a sentencing judge need only follow what it says." *Mathis v. United States*, 579 U.S. 500, 518 (2016); *accord (Curtis) Johnson v. United States*, 559 U.S. 133, 139 (2010) (A federal sentencing court is "bound by" a state supreme court's "interpretation of state law.").

But this petition involves a more difficult situation—Texas courts have given conflicting answers on the dispositive state-law questions. This Court's categorical-approach precedents do not directly address what a federal court should do in that situation. And the lower courts disagree. By granting certiorari here, the Court can eliminate that confusion.

A. The Circuits are divided over how to resolve conflicting state-law authorities in the context of the ACCA.

This Court's categorical-approach precedents describe a "'demand for certainty' when determining whether a defendant was convicted of a generic offense." *Mathis v. United States*, 579 U.S. 500, 519, (2016) (quoting *Shepard v. United States*, 544 U.S. 13, 21 (2005)). Following that "demand," the Eighth and Tenth Circuits have held that conflicting and "inconsistent" state-court decisions must be resolved in the defendants favor, especially where *more recent* state-court decisions support the federal defendant's argument. *See 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*.") (emphasis added).

Noting that Colorado courts have been inconsistent in their use of the term "elements," the Tenth Circuit ultimately concluded that the majority of state court decisions favored indivisibility. *Id.* at 714–716 ("Decisions from Colorado's intermediate appellate court and decisions that pre-date [*People v. Williams*, 984 P.2d 56 (Colo. 1999)] do not persuade us to deviate from its holding."). In *United States v. Cantu*, 964 F.3d 924 (10th Cir. 2020), the court acknowledged that it could only hold a state statute divisible if the state-court decisions gave rise to certainty. *Id.* at 930 (vacating ACCA sentence when "Oklahoma case law makes it impossible to say with certainty that the Oklahoma statute is divisible by drug.").

The Eighth Circuit followed the same rule when analyzing state-court decisions in *United States v. Naylor*, 887 F.3d 397 (8th Cir. 2018). Although "Missouri courts have not yet decided the precise issue," the court determined many state courts resolved cases "in a manner consistent with" indivisibility. *Id.* at 402–403. The court dismissed a conflicting Missouri Supreme Court decision as dicta. *Id.* at 404. To resolve the question, the federal court had to "grapple with" decisions that pointed in both directions. *Id.* at 407 (Colloton, J., concurring). "Missouri law is patently unclear on whether the statutory terms are means or elements." *Id.* at 410–411 (Shepherd, J., dissenting). Yet the defendant prevailed.

The Fifth Circuit has chosen a different approach. Where there is no binding authority from the Texas Court of Criminal Appeals, the Fifth Circuit will not automatically resolve uncertainty in the federal

defendant's favor. The Fifth Circuit chooses whichever reading of state law it finds more persuasive. As often as not, that interpretation favors the federal government.

Garrett is the most obvious example. There, the defendant-appellant pointed to *substantial* state law authority indicating that "causing bodily injury or threatening the victim are different methods of committing the same offense." *Burton v. State*, 510 S.W.3d 232, 237 (Tex. App.—Fort Worth 2017, no pet.). In *Cooper v. State*, 430 S.W.3d 426 (Tex. Crim. App. 2014), the Court of Criminal Appeals ruled that a defendant could not be convicted of two separate offenses for robbing the same victim by injury and by threat/fear. Four of the five judges who joined the majority explicitly argued that robbery-by-injury and robbery-by-threat/fear were alternative means, not separate crimes. *Id.* at 434 (Keller, P.J., concurring); *id.* at 439 (Cochran, J., concurring). Three dissenting judges argued, based on statutory structure and analogy to assault, that the two theories represented divisible crimes. 430 S.W.3d at 443–44 (Price, J., dissenting).

After *Cooper*, Texas authorities have coalesced around the "alternative means" interpretation of Texas Penal Code § 29.02(a). *Burton* is directly on point: "it was not error for the charge of aggravated robbery to be submitted in the disjunctive because causing bodily injury or threatening the victim are different methods of committing the same offense." 510 S.W.3d at 237. Prosecutors throughout the state have charged both theories within single-count indictments, which is "the proper method of charging

different ways of committing an offense." *United States v. Perlaza-Ortiz*, 869 F.3d 375, 379 (5th Cir. 2017) (discussing Tex. Crim. Proc. Code art. 21.24). *See*, e.g., *Martin v. State*, No. 03-16-00198-CR, 2017 WL 5985059, at *3 (Tex. App. Dec. 1, 2017); *Alexander v. State*, 02-15-00406-CR, 2017 WL 1738011, at *6 (Tex. App. May 4, 2017); *Hunter v. State*, 04-19-00252-CR, 2020 WL 4929796, at *2–3 (Tex. App. July 29, 2020). Mr. Lipscomb's petition for rehearing even cited multiple *pending* indictments in Tarrant County, Texas, charging both theories within a single count. Lipscomb Pet. for Reh'g 9–10 (citing *State v. Fennell*, No. 1715460 (Tarrant Co., Tex. Dist. Ct., filed Jan. 26, 2022); *State v. Struggs*, No. 1707120 (Tarrant Co., Tex. Dist. Ct., filed Dec. 1, 2021); *State v. Hill*, No. 1690836 (Tarrant Co., Tex. Dist. Ct., filed Aug. 27, 2021); and *State v. Hooks*, No. 1690037 (Tarrant Co., Tex. Dist. Ct., filed Aug. 25, 2021).

In *Garrett*, the Fifth Circuit acknowledged the debate: "There is, unsurprisingly, more than one interpretation among the Texas courts of appeal." 24 F.4th at 490. But the Fifth Circuit did not resolve that uncertainty in the defendant's favor. According to the Fifth Circuit, all of Garrett's cited authority was "either inapposite or unpersuasive." *Ibid.* The Fifth Circuit preferred the interpretation of the *Cooper* dissenting judges, based on the Fifth Circuit's own independent interpretation of the statutory text: "We begin with the statute and find it unambiguous." the Texas authority cited by Garrett decided that the *Cooper* dissenters, and the pre-*Cooper* intermediate appellate decisions, had the better argument.

The Fifth Circuit also rejected substantial Texas-law authority in *Herrold*, and in the follow-up decision, *United States v. Wallace*, 964 F.3d 386 (5th Cir. 2020). Those defendants, like Mr. Lipscomb, argued that the trespass-plus-crime theory of burglary defined in Texas Penal Code § 30.02(a)(3) is non-generic. The Fifth Circuit attempted to side-step that question by holding that Texas law implicitly requires proof that the trespasser harbored specific intent to commit the "felony, theft, or assault" inside the premises.

The Texas Court of Criminal Appeals has never directly addressed whether the prosecution must prove that a trespasser harbored specific intent to commit a reckless, negligent, or strict-liability crime inside the building to be guilty under § 30.02(a)(3). But the court has considered and rejected that argument for a nearly identical statute:

> 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)); *see also 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.").

Numerous Texas appellate decisions describe the proof necessary to sustain a conviction under § 30.02(a)(3). An overwhelming majority recognize that a trespasser who commits a reckless assault, or even a negligent or strict liability felony, inside the premises has committed a burglary under Texas Penal Code § 30.02(a)(3). *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); *Daniel v. State*, 07-17-00216-CR, 2018 WL 6581507, at *2, *3 (Tex. App. Dec. 13, 2018) ("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." And "a person commits assault when he intentionally, knowingly, or recklessly causes bodily injury to another."); *Scroggs v. State*, 396 S.W.3d 1, 10 & n.3 (Tex. App. 2010) (same); *Wingfield v. State*, 282 S.W.3d 102, 105 (Tex. App. 2009) (same); *Alacan v. State*, 03-14-00410-CR, 2016 WL 286215, at *3 (Tex. App. Jan. 21, 2016) (same); *Crawford v. State*, 05-13-01494-CR, 2015 WL 1243408, at *2 (Tex. App. Mar. 16, 2015) (same); *Johnson v. State*, 14-10-00931-CR, 2011 WL 2791251, at *2 (Tex. App. July 14, 2011) (same); *Torrez v. State*, 12-05-00226-CR, 2006 WL 2005525, at *2 (Tex. App. July 19, 2006) (same); *Guzman v. State*, 2-05-096-CR, 2006 WL 743431, at *2 (Tex. App. Mar. 23, 2006) (same); *Brooks v. State*, 08-15-00208-CR, 2017 WL 6350260, at *7 (Tex. App. Dec. 13, 2017) (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. Oct. 3, 2013) (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").

In *Herrold*, *Wallace*, and Mr. Lipscomb's case, the Fifth Circuit did not even bother discussing all these decisions. As in *Garrett*, the court decided to follow its own interpretation of the Texas crime, as reflected in outlying or outdated decisions. *Herrold*, 941 F.3d at 179 (discussing *DeVaughn v. State*, 749 S.W.2d 62 (Tex. Crim. App. 1988); Seth S. Searcy, III and James R. Patterson, Practice Commentary 144, Vernon's Texas Codes Annotated (West 1974); and *Flores v. State*, 902 S.W.2d 618, 620 (Tex. App. 1995) ("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.")).

B. This methodological dispute is an important and recurring question of federal law—and federalism—that can only be resolved in this Court.

This Court has previously warned of the mischief that arises when a federal court has free rein to reject state-court interpretations of state law. *Cf. Schad v. Arizona*, 501 U.S. 624, 638 (1991) (plurality) (acknowledging the "impossibility of determining, as an a priori matter, whether a given combination of fact is consistent with there being only one offense," and insisting that federal courts defer to state-court

interpretations of state law). Federalism requires a deference to the way state courts would likely resolve a question, even if the federal court thinks that resolution is wrong.

Without a uniform rule to govern this very common situation, then each decision will be shaded by a judge's (or appellate panel's) preferences vis-à-vis the ACCA. For those judges who, in general, favor longer sentences, debatable state-law questions will more often be resolved in the Government's favor: some crimes will be deemed divisible, even if most state-court decisions uphold general verdicts against unanimity challenges; some offenses will be deemed generic, even if most state-court decisions do not require proof of a fact necessary to the generic crime; and other crimes will be deemed to implicitly require proof of the threatened use of force, even if there are state court decisions explicitly rejecting the premise that the crime requires a threat of force.

Thus far, Respondent has successfully resisted review of the Fifth Circuit's burglary 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 the ACCA's "demand for certainty," applies to a sentencing court's interpretation

If so, then Mr. Lipscomb would surely prevail as to *both* predicates. He lost only because the Fifth Circuit felt free to substitute its own judgment about the right interpretation of Texas law for those of the majority of Texas appellate courts who had spoken to those questions. This Court should grant the petition to make clear that any doubts about state law should be resolved in favor of the defendant.

II. The Court should grant the petition to address whether an offense that does not require a threat, or even an encounter, between the defendant and the victim has as an element the "threatened use of physical force" against that victim.

The divisibility dispute discussed above is important because one form of Texas robbery—by intentionally, knowingly, or recklessly causing bodily injury—is not a violent felony under the elements clause. But even if the Court were to resolve that question against Mr. Lipscomb, the Court's recent decision in *Taylor* unequivocally overrules *Garrett*'s *substantive* holding that Texas robbery-by-fear satisfies the elements clause.

Texas explicitly upholds convictions for robbery, even where there was no threat at all—simply a frightened victim. This Court should grant certiorari and decide the merits of the issue or, in the alternative, grant, vacate, and remand for further consideration in light of *Taylor*.

A. Texas allows conviction for robbery when the defendant places another person in fear, even if the defendant never threatened the victim.

The Texas statute defining simple robbery provides two ways for a person to commit the offense:

> (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.

Tex. Penal Code § 29.02(a). It is undisputed that subsection (a)(1) allows conviction for recklessly causing injury, which no longer qualifies as a violent felony after *Johnson* and *Borden v. United States*, 141 S. Ct. 1817 (2021). But the Fifth Circuit recently held that a conviction under subsection (a)(2) *is* a violent felony. *See Garrett*, 24 F.4th at 491.

Texas courts have made clear that "threaten[ing]" and "plac[ing] another in fear" of imminent bodily injury or death have two distinct meanings. *See, e.g., Williams v. State*, 827 S.W.2d 614, 616 (Tex. App. 1992) ("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.'"); *Jackson v. State*, 05-

15-00414-CR, 2016 WL 4010067, at *4 (Tex. App. 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 in very broad terms. In *Howard v. State*, 333 S.W.3d 137 (Tex. Crim. App. 2011), 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. *Howard*, 333 S.W.3d at 137–38. There was "no evidence in the record showing that [Howard] was aware of" the victim. *Ibid.* Yet the CCA 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.

Burgess v. State 448 S.W.3d 589 (Tex. App. 2014) is another Texas opinion affirming conviction for robbery-by-fear in the absence of any threat. There, the defendant entered a car parked outside of a post office and stole a purse. *Id.* at 595. As it turned out, a child was seated in the car and ran away screaming when the defendant entered the vehicle. The court held that Burgess was guilty of "robbery" under Texas Penal Code § 29.02(a)(2). Even if Burgess did not expect to find a child when he approached and entered the car, he learned of her presence when he entered the vehicle and took the purse. *Id.* at 601. Without communicating *anything* to the child, he caused the child to feel afraid. The child's fear resulting from his presence in the vehicle was enough for conviction. *Ibid.*

According to the Fifth Circuit, Texas robbery by threat *or by* placing the victim in fear qualifies as a violent felony. *Garrett*, 24 F.4th at 491.

B. The Fifth Circuit's decision conflicts with this Court's decision in United States v. *Taylor*.

The Fifth Circuit's holding cannot be squared with this Court's just-issued decision in *Taylor*. Interpreting a materially identical elements clause found in 18 U.S.C. § 924(c)(3)(A), *Taylor* held that the statute requires proof of a "*communicated* threat." 142 S. Ct. at 2023. This language was not designed to

reach dangerous or risky behavior—things that pose "an abstract risk to community peace and order. *Id.*

Texas has explicitly affirmed convictions *in the absence of* a communicated threat. *Taylor* says that kind of crime does not satisfy the elements clause. Thus, *Garrett* was wrong to hold that Texas robbery-by-fear is a violent felony. *See Garrett*, 24 F.4th at 491.

III. The Court should grant the petition to decide whether the trespass-plus-crime theory of burglary is a generic burglary.

Aside from the methodological dispute described above, the circuits are also divided over whether the trespass-plus-crime theory of burglary typified by Texas Penal Code § 30.02(a)(3) is a generic burglary.

"Burglary," at common law and in most America jurisdictions today, requires proof that the burglar harbored specific intent to commit some crime other than a trespass inside the premises. Texas was the first (or possibly the second)[4] jurisdiction to define a form of "burglary" that did not require proof of that intent: § 30.02(a)(3) "dispenses with the need to prove

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[4] 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).

intent" when the actor actually commits a predicate crime inside the building after an unlawful entry. *DeVaughn*, 749 S.W.2d at 65 (internal quotation omitted). Judge Sykes has helpfully dubbed this new theory "trespass-plus-crime." *Van Cannon v. United States*, 890 F.3d 656, 664 (7th Cir. 2018). Four other 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). 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. "[N]ot all crimes are intentional; some require only recklessness or criminal negligence." *Van Cannon*, 890 F.3d at 664.

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 Seventh Circuit persisted in holding that trespass-plus-crime offenses are non-generic. The Fifth and Eighth Circuits held that Texas's crime is generic.

A. The Circuits are divided.

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 Seventh Circuit has reached a conclusion opposite from the Fifth and Eighth Circuits.

In the Seventh Circuit, the trespass-plus-crime theory is not considered generic burglary. *Van Cannon*, 890 F.3d at 664; *accord Chazen v. Marske*, 938 F.3d 851, 860 (7th Cir. 2019) (reaffirming *Van Cannon*'s holding after *Quarles*).

In the Fifth and Eighth Circuits, the trespass-plus-crime offense defined in Texas Penal Code § 30.02(a)(3) is considered generic burglary. *See Herrold*, 941 F.3d at 182; *Wallace*, 964 F.3d 386, 388–389 (5th Cir. 2020); *see also United States v. Hutchinson*, 27 F.4th 1323, 1327–28 (8th Cir. 2022).

Herrold and *Hutchinson* both acknowledge that the *text* of § 30.02(a)(3) does not require proof of specific intent to commit the other crime inside the premises. But they go on to say that the defendant "has not demonstrated a 'realistic probability' that" Texas would prosecute someone under § 30.02(a)(3) who did not in fact harbor specific intent. *Hutchinson*, 27 F.4th at 1327; *Herrold*, 941 F.3d at 179.

Van Cannon rejected that precise argument: the ACCA's "elements-based approach does not countenance imposing an enhanced sentenced based on *implicit* features in the crime of conviction." 890 F.3d at 664; *see also Hutchinson*, 27 F.4th at 1330 (Kelly, J., dissenting) ("Thus, the plain language of the

Texas burglary statute and *DeVaughn* both support the conclusion that § 30.02(a)(3) does not require proof of a specific-intent crime as would be necessary to make a categorical match.").

B. The circuit split over trespass-plus-crime burglaries arises because of a broader split about this Court's "realistic probability" test.

Even though the categorical approach is supposed to focus on *elements*, rather than *brute facts*, the Fifth Circuit has repeatedly held that a defendant cannot rely on the plain text of a facially overbroad statute to show that it defines a non-generic crime. The defendant must also 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). That interpretation is also inconsistent with *Taylor*.

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 the face of the statute, 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 that Duenas-Alvarez would need to show

> 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.

2. In the First, Second, Third, Seventh, Ninth, Tenth, and Eleventh Circuits, defendants do not have to point to actual prosecutions involving non-generic facts. These Circuits 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.

Where "a state statute explicitly defines a crime more broadly than the generic definition," then the crime is non-generic, period. *See Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1147–1148 (9th Cir. 2020); *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); *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).

In *Van Cannon*, the Seventh Circuit followed the majority approach. The court looked only to the text of the Minnesota burglary statute to determine it was non-generic. *Van Cannon*, 890 F.3d at 658. And indeed, the Seventh Circuit resisted the Governments' 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: the "elements-based approach does not countenance imposing an enhanced sentence based on implicit features in the crime of conviction." *Ibid.* The statutory text, and the text alone, should be sufficient to demonstrate that a state crime does not categorically match the generic definition.

C. *Taylor* settles the realistic probability question in Mr. Lipscomb's favor.

Fortunately, the decision in *Taylor* also addresses and resolves this question in Mr. Lipscomb's favor. The Government made a similar argument there—that the defendants would need to point to prosecutions for attempted bank robbery where the defendant *did not*, in fact, threaten or attempt to use physical force. This Court explained why that was a misapplication of the realistic probability test:

> [I]n *Duenas-Alvarez* the elements of the relevant state and federal offenses clearly

> overlapped and the only question the Court faced was whether state courts also "appl[ied] the statute in [a] special (nongeneric) manner." 549 U.S. at 193. Here, we do not reach that question because there is no overlap to begin with. *Attempted Hobbs Act robbery does not require proof of any of the elements § 924(c)(3)(A) demands. That ends the inquiry,* and nothing in *Duenas-Alvarez* suggests otherwise.

Taylor, 142 S. Ct. at 2025 (emphasis added).

Just so here. For more than 30 years, this Court has "repeatedly made clear that application of ACCA involves, and involves only, comparing elements." *Mathis*, 579 U.S. at 519. The categorical approach "does not care about" facts. *Ibid.* Texas burglary under Penal Code § 30.02(a)(3) is non-generic because it "does not require proof of" specific intent to commit a felony, theft, or assault inside the premises. *Taylor*, 142 S. Ct. at 2025. "That ends the inquiry, and nothing in *Duenas-Alvarez* suggests otherwise." *Ibid.*

CONCLUSION

This Court should grant the petition and vacate the judgment of the court of appeals below.

Respectfully submitted,

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July 19, 2022