No. 22-5159

IN THE SUPREME COURT OF THE UNITED STATES

EDDIE LAMONT LIPSCOMB, 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

QUESTIONS PRESENTED

1. Whether Texas robbery-by-threat, Tex. Penal Code Ann. § 29.02(a)(2) (West 1974), "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).

2. Whether Texas burglary, Tex. Penal Code Ann. § 30.02(a) (West 1974), is a generic "burglary" offense under 18 U.S.C. 924(e)(2)(B)(ii).

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Lipscomb, No. 3:07-cr-357 (Mar. 2, 2009)

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

United States v. Lipscomb, No. 18-11168 (Feb. 3, 2022)

Supreme Court of the United States:

Lipscomb v. United States, No. 20-7984 (Oct. 4, 2021)

IN THE SUPREME COURT OF THE UNITED STATES

No. 22-5159

EDDIE LAMONT LIPSCOMB, 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-4a) is not published in the Federal Reporter but is available at 2022 WL 327472. The report and recommendation of the magistrate judge (Pet. App. 12a-25a) and the order of the district court accepting that recommendation (Pet. App. 11a) are unreported. A prior opinion of the court of appeals (Pet. App. 5a-10a) is reported at 982 F.3d 927.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 2022. A petition for rehearing was denied on April 20, 2022

(Pet. App. 59a). The petition for a writ of certiorari was filed on July 19, 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). Judgment 1. The district court sentenced petitioner to 240 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed, Pet. App. 26a-58a, and this Court denied certiorari, 563 U.S. 1000.

In 2016, petitioner filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. 2255. D. Ct. Doc. 69 (June 6, 2016). The district court granted petitioner's motion. Pet. App. 11a. The court of appeals reversed. Pet. App. 5a-10a. 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). 142 S. Ct. 59. On remand, the court of appeals again reversed. Pet. App. 1a-4a.

1. In March 2007, Dallas police officers stopped petitioner for failing to signal his intent to turn while driving. Presentence Investigation Report (PSR) ¶ 5. As one officer approached petitioner's vehicle, he observed, in plain view, a

sawed-off shotgun lying on the floorboard of the vehicle. Ibid. Petitioner was arrested and the firearm was recovered. Ibid.

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. 12a; Indictment 1. Petitioner pleaded guilty to that offense. Pet. App. 5a; Judgment 1.

2. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), provides for enhanced statutory penalties for certain prohibited persons who unlawfully possess firearms and whose criminal histories include at least three prior convictions for a "serious drug offense" or a "violent felony." The ACCA defines a "violent felony" to include a crime punishable by more than one year of imprisonment that satisfies one of three alternative definitions: it "has as an element the use, attempted use, or threatened use of physical force against the person of another" (known as the "elements clause"); it "is burglary, arson, or extortion, [or] involves use of explosives" (known as the "enumerated offenses clause"); or it "otherwise involves conduct that presents a serious potential risk of physical injury to another" (known as the "residual clause"). 18 U.S.C. 924(e)(2)(B).

The Probation Office determined that petitioner qualified for sentencing under the ACCA based on his 1994 conviction for robbery with threat of bodily injury, his 1994 conviction for burglary of a habitation, and his three 2004 convictions for robbery (which

were treated as a single conviction for purposes of the analysis). See PSR ¶¶ 7, 23, 24, 31, 34, 35, 39, 40, 41. Based on petitioner's criminal history category of VI and his total offense level of 35, the Probation Office calculated an advisory Sentencing Guidelines range of 292 to 365 months of imprisonment. PSR ¶ 77.

The district court sentenced petitioner to 240 months of imprisonment. Judgment 2. The court of appeals affirmed. Pet. App. 26a-31a.

3. In 2016, petitioner moved to vacate his sentence under 28 U.S.C. 2255. D. Ct. Doc. 69 (June 6, 2016). Petitioner argued that his prior felony convictions were not ACCA crimes of violence in light of Johnson v. United States, 576 U.S. 591 (2015), which held that the ACCA's residual clause is unconstitutionally vague. Id. at 597.

The district court granted petitioner's motion. Pet. App. 11a. It took the view that "the threatened use of force is * * * not an element of Texas robbery" and thus did not satisfy the elements clause. Id. at 24a. The court did not address whether Texas burglary continues to qualify as a violent felony. Id. at 24a n.12.

The court of appeals reversed. Pet. App. 5a-10a. Relying on its recent precedents addressing the relevant state statutes, it explained that petitioner's Texas robbery offense satisfies the elements clause because it "requires the 'use, attempted use, or threatened use of physical force,'" id. at 7a (quoting United

States v. Burris, 920 F.3d 942, 945 (5th Cir. 2019)), and his Texas burglary offense satisfies the enumerated offenses clause because it qualifies as "generic" burglary, ibid. (citing United States v. Herrold, 941 F.3d 173, 182 (5th Cir. 2019) (en banc), cert. denied, 141 S. Ct. 273 (2020)).

4. Petitioner filed a petition for a writ of certiorari, arguing inter alia, that his Texas robbery offenses do not qualify as a crime of violence on the theory that they can be committed with a mens rea of recklessness. See No. 20-7984 Pet. 5-9. While that petition was pending, this Court decided Borden v. United States, 141 S. Ct. 1817 (2021), which held that crimes with that mens rea do not qualify as violent felonies under the ACCA, id. at 1825. In light of that decision, this Court granted certiorari in petitioner's case, vacated the court of appeals' judgment, and remanded for reconsideration. See 142 S. Ct. 59.

On remand, the court of appeals determined in an unpublished decision that Borden did not affect the classification of the particular robbery offense underlying petitioner's 1994 robbery conviction. Pet. App. 1a-4a. Citing its decision in United States v. Garrett, 24 F.4th 485 (5th Cir. 2022), the court explained that Texas Penal Code Ann. § 29.02(a) (West 1974), is divisible into "two distinct crimes: robbery-by-injury, under § 29.02(a)(1)," which can be committed recklessly, and "robbery-by-threat, under § 29.02(a)(2)," which can be committed only intentionally or knowingly. Pet. App. 3a (citation and emphasis omitted). And it

found that petitioner's 1994 conviction was for the robbery-by-threat version of the crime, in which the mens rea element satisfies Borden. Id. at 3a-4a.

ARGUMENT

Petitioner contends (Pet. 8-29) that neither his Texas robbery offenses nor his Texas burglary offense are violent felonies. 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]

1. Petitioner principally contends (Pet. 8-17) that the court of appeals' analysis of state decisions violates a "demand for certainty" rule under which any apparent uncertainty in state decisional law automatically disqualifies a state crime as an ACCA predicate. But no such rule applies. The court of appeals' analysis of the Texas statutes and decisions interpreting them is sound and does not conflict with any decision of this Court or any other court of appeals.

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

[1] The pending petition in Matthews v. United States, No. 21-8230, presents a similar challenge to the classification of a Texas robbery offense.

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 1974), provides that a person commits robbery

> 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 convictions qualify as violent felonies, 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)(2) (West 1974) to be divisible into two crimes, robbery-by-injury and robbery-by-threat. 24 F.4th at 489-491. The court then 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). And the court of

appeals observed that in United States v. Herrold, 941 F.3d 173 (5th Cir. 2019) (en banc), it had found Texas burglary, Tex. Penal Code Ann. § 30.02(a)(3) (West 1974), to be "burglary" under the ACCA's elements clause. 941 F.3d at 177, 182.

Petitioner argues (Pet. 10-15) that Garrett and Herrold were wrongly decided. But the court of appeals' decisions interpreting Texas state law were correct and do not warrant review. In Garrett, the court of appeals explained that the Texas robbery statute is "unambiguous" in creating "two distinct crimes." 24 F.4th at 490. The court of appeals cited caselaw from the Texas Court of Criminal Appeals in an analogous context, which it viewed as "resolv[ing] the interpretation" of Texas robbery "for purposes of Texas law." Ibid. (citing Landrian v. State, 268 S.W.3d 532 (Tex. Crim. App. 2008)). The court of appeals acknowledged some inconsistency in lower state courts, but ultimately determined that even those "lower court cases considered as a whole are supportive of the notion that simple robbery is divisible into separate crimes." Ibid.

Similarly, in Herrold, the court of appeals, sitting en banc, determined that Texas burglary qualifies as generic burglary, finding a "lack of supportive Texas cases" for defendant's argument to the contrary, 941 F.3d at 178; that "Texas law rejects" the alternative interpretation, id. at 179; and that "none of the cases Herrold relies on go beyond generic burglary's unlawful-entry requirement," id. at 181. This Court denied certiorari, 141 S.

Ct. 273. As that denial of certiorari reflects, 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. 9-15), no methodological conflict exists among the courts of appeals that warrants this Court's review. Petitioner contends (Pet. 9) that that "inconsistent state-court decisions must be resolved in the defendant[']s favor." But his reliance (ibid.) 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. 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 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."). Those circumstance-specific determinations would not compel disagreement with the Fifth Circuit's classifications of Texas robbery and burglary.

3. Petitioner similarly errs in his reliance (Pet. 17-21) on this Court's recent decision in United States v. Taylor, 142 S. Ct. 2015 (2022), 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). Neither the holding nor analysis of Taylor suggests any infirmity in the court of appeals' classification of his Texas robbery and Texas burglary offenses as violent felonies under the ACCA.

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 1974).[2]

[2] 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 Taylor, which expressly recognized that threats can be communicated verbally or nonverbally. 142 S. Ct. 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.

Petitioner also contends (Pet. 29) that the court of appeals' classification of Texas burglary in Herrold impermissibly considered whether hypothetical burglary prosecutions that he posited had a "realistic probability" of occurring under the Texas law. But Taylor does not call into question that practice at least where, as here, the federal definition and the state offense "overlap[] significantly." 142 S. Ct. at 2024-2025. Indeed, Taylor recognized that it "ma[kes] sense to consult how a state court would interpret its own State's laws," "[a]ppreciating the respect due state courts as the final arbiters of state law in our federal system." Id. at 2025. And to the extent that petitioner challenges the Fifth Circuit's analysis of state law, that challenge lacks merit for the reasons explained in the government's brief in opposition to the petition for a writ of certiorari in that case. See Gov't Br. in Opp. at 11-16, Herrold v. United States, 141 S. Ct. 273 (2020) (No. 19-7731).[3]

This Court has recently and repeatedly denied petitions for writs of certiorari raising the same question regarding Texas Penal Code Ann. § 30.02(a) (West 1974). See Adams v. United States, 142 S. Ct. 147 (2021) (No. 20-8082); Smith v. United States, 141 S Ct. 2525 (2021) (No. 20-6773); Lister v. United States, 141 S. Ct. 1727 (2021) (No. 20-7242); Webb v. United States, 141 S. Ct. 1448 (2021) (No. 20-6979); Wallace v. United States, 141 S. Ct. 910

[3] We have served petitioner with a copy of the government's brief in opposition in Herrold, which is also available on this Court's online docket.

(2020) (No. 20-5588); Herrold, supra (No. 19-7731). The same result is warranted here.

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