ORIGINAL

22-6578

No. _____

In the

Supreme Court of the United States

Derrick Tyrone Moore,
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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QUESTIONS PRESENTED

1. Whether there is a reasonable probability of different result if the court below is directed to reconsider its judgment in light of *Wooden v. United States*, __ U.S. __, 142 S.Ct. 1063 (June 21, 2022)?

2. 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?

3. Mr. Moore was previously convicted of burglary under Texas Penal Code § 30.02(c)(2), which relies on Texas Penal Code § 30.02(a), a statute which 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)?

PARTIES TO THE PROCEEDING

Petitioner is Derrick Tyrone Moore, who was the Defendant-Petitioner in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Derrick Tyrone Moore seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the court of appeals is found at *United States v. Moore*, No. 21-11240, 2022 WL 4299726 (5th Cir. Sept. 19, 2022). It is reprinted in Appendix B to this Petition. The district court's judgment and sentence is attached as Appendix A.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on September 19, 2022. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

This Petition involves 18 U.S.C. § 924(e)(1) provides in relevant part:

> In the case of a person who violates sections 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).
>
> * * *

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and

district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

* * *

This Petition also involves Texas state law. 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. . . .

(c) . . . [A]n offense under this section is a:

(2) felony of the second degree if committed in a habitation.

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

Petitioner Derrick Tyrone Moore pleaded guilty to one count of possessing a firearm after having sustained a felony conviction. (ROA.70–52); *see also* (ROA.57). He signed a plea agreement waiving the right to appeal, but reserving, *inter alia*, the right "to bring a direct appeal of . . . a sentence exceeding the statutory maximum punishment . . . ." (ROA.188).

His Presentence Report ("PSR") determined that Mr. Moore was subject to a statutory range of 15 years imprisonment to life imprisonment under the provisions of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), which provides enhanced penalties for defendants previously convicted of three or more "violent felonies" committed on occasions different from each other. (ROA.197, 214). The PSR cited three Texas convictions for Burglary of a Habitation as the "violent felonies" triggering the ACCA enhancement, (ROA.197), although the PSR listed four such convictions. (ROA.201–02). The PSR described these four offenses as involving four different victims and occurring on four days between November 2011 and July 2012. (ROA.201–02). The PSR alleged that Mr. Moore committed the last three of these offenses together with one Hearl Johnson during July of 2012. (ROA.201–02). At the time, however, the PSR supplied the court with no documents supporting this assertion.

Petitioner objected to the application of the ACCA on four grounds. (ROA.223–25). First, he argued that the ACCA application was improper because the alleged

convictions for violent felonies were not substantiated by documents required by *Shepard v. United States*, 544 U.S. 13 (2005). (ROA.223). Second, he argued that the Texas burglary offense is not a "burglary" within the meaning of ACCA because it can be committed without the intent to commit an offense beyond trespassing and then committing a reckless offense. (ROA.223–24). On this second point, Petitioner conceded that the objection was foreclosed by *United States v. Herrold,* 941 F.3d 173 (5th Cir. 2019). (ROA.223–24). Third, citing this Court's pending decision in *Wooden v. United States*, he argued that the as-then-yet-unpresented *Shepard* documents would fail to exclude the possibility that the offenses were committed on separate occasions, although he conceded that the argument was inconsistent with the Fifth Circuit's opinion in *United States v. Ressler*, 54 F.3d 257 (5th Cir. 1995). (ROA.224). Fourth, he submitted that the application of a higher maximum and minimum was inappropriate without a jury finding that the prior offenses occurred on separate occasions. (ROA.224–25).

The Government supported the PSR's conclusions. (ROA.228–33). In responding to the defense's objection to the court, rather than a jury, determining whether the prior offenses occurred on separate occasions, the Government noted that *United States v. White*, 465 F.3d 250, 254 (5th Cir. 2006), foreclosed that argument. (ROA.232).

In its addendum, Probation also rejected Petitioner's objections to the ACCA enhancement. (ROA.266). To that addendum, Probation attached the following documents:

- The Information, Judgment, and Sentence in Case 1297461W, a Texas conviction under Tex. Penal Code § 30.02(c)(2) for burglary of the habitation of Ivan Najera occurring on July 2, 2012;
- The Indictment, Order of Deferred Adjudication, and Judgment and Sentence in Case 1263352D, a Texas conviction under Tex. Penal Code § 30.02(c)(2) for burglary of the habitation of Esperanza Barragan occurring on November 9, 2011; and
- The Information and Judgment and Sentence in Case 1300033W, a Texas conviction under Tex. Penal Code § 30.02(c)(2) for burglary of the habitation of Maria Vazquezaguilera occurring on July 5, 2012.

(ROA.269–83). In addressing the question of whether the offenses occurred on separate occasions, the Addendum stated, "Each of the Shepard documents indicate the offense of Burglary of a Habitation was committed on four separate occasions. Additionally, the defendant not only committed the offenses on four separate dates, he also had four separate victims to the offenses which further dispels a common criminal opportunity." (ROA.266).

Mr. Moore was sentenced on December 14, 2021. (ROA.153–82). At the sentencing hearing, the district court invited arguments concerning the ACCA enhancement by both Petitioner and the Government, (ROA.158–63), before overruling Petitioner's objection after concluding that the arguments were foreclosed by binding Fifth Circuit precedent. *See* (ROA.163). The court then sentenced Petitioner to 180 months' imprisonment, (ROA.175), which constituted the mandatory minimum sentence after the application of the ACCA but a downward variance from the ACCA-enhanced guideline range of 188 to 235 months. (ROA.178); *see also* (ROA.214, 287). Petitioner objected to the sentence, raising again his pre-sentencing objections to the application of the ACCA. *See* (ROA.179). But the district court overruled that objection. (ROA.179).

Mr. Moore filed a notice of appeal on December 16, 2021. (ROA.62).

B. The Appeal

In time, the Fifth Circuit set the deadline for Petitioner's initial brief for March 15, 2022. [App. C at 4], but extensions pushed the deadline for submitting Petitioner's Initial Brief's until April 12, 2022. [App. C at 5]. These dates are important because, in the months between Petitioner's December 14, 2021, sentencing and the April 12, 2022, submission of his Initial Brief to the Fifth Circuit, this Court issued the decision in *Wooden v. United States*, ___ U.S. ___, 142 S.Ct. 1063 (Mar. 7, 2022), which set forth the calculus for a court to use in determining whether potential ACCA predicate offenses occurred on separate occasions. *See Wooden*, 142 S.Ct. at 1070–71.

On April 12, 2022, Petitioner submitted his Initial Brief to the Fifth Circuit. *See generally* [App. D]. On appeal, Petitioner raised two points for review. First, he asked the Fifth Circuit to consider whether his appeal was barred by the appeal waiver contained in his plea agreement. [App. D. at 7–10]. Second, Petitioner asked the court to consider whether the district court erred in applying the ACCA. [App. D at 10–24].

Regarding the second issue, Petitioner asked the Fifth Circuit to consider two ways in which the district court's application of the ACCA was erroneous. First, Petitioner argued that, in light of *Wooden*, "[t]here was insufficient cognizable proof that the burglary of a habitation offenses occurred on separate occasions." [App. D at 11–15]. Petitioner argued that the district court's sole reliance on *Shepard* documents for determining that Petitioner's burglaries offenses occurred on prior occasions fell

short of the requirements of the Sixth Amendment and the mandate of *Wooden*. (App. D at 13–15). Second, Petitioner argued that Texas burglary is not a violent felony, although he acknowledged that the argument was foreclosed in part by *United States v. Herrold*, 941 F.3d 173, 177 (5th Cir. 2019) (*en banc*). [App. D at 16–24]. Specifically, Petitioner argued that the *Herrold* decision was based on a misunderstand of Texas law after the Fifth Circuit "overlooked a wealth of state authority demonstrating that burglary may be committed without any intent to commit a crime other than trespassing." [App. D. at 16].

The Fifth Circuit affirmed the district court's judgment citing two of its prior decisions. *See generally* [App. B]. Regarding the argument that Texas burglaries do not constitute violent felonies under the ACCA, the Fifth Circuit concluded that the argument was foreclosed by *Herrold*. [App. B, at 2]. Regarding the argument that the reliance on *Shepard* documents for concluding that the burglary convictions each occurred on separate occasions, without reference to *Wooden*, the Fifth Circuit concluded that the argument was foreclosed by its 2006 decision in *White*. [App. B, at 2].

REASONS FOR GRANTING THE PETITION

I. There is a reasonable probability of different result if the court below is directed to reconsider its judgment in light of *Wooden v. United States*, ___ U.S. ___, 142 S.Ct. 1063 (Mar. 7, 2022).

Section 924(e)(1) of Title 18 requires a person convicted of unlawful firearm possession to be sentenced to at least 15 years' imprisonment when the offender has three or more prior convictions for a "violent felony" or "serious drug offense" that were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1).

In *Wooden*, this Court held that such offenses do not occur on separate occasions merely because they happened at "discrete moment(s) in time." *Wooden*, 142 S.Ct. at 1069. Instead, "multiple crimes may occur on one occasion even if not at the same moment." *Id.* Thus, the calculus for determining whether a defendant's prior convictions occurred on separate occasions entails not merely proof that the offenses were "temporally distinct." *Id.* at 1070. *Wooden* requires the consideration of several factors before offenses can be considered to have been part of the same occasion:

> The inquiry that requirement entails, given what "occasion" ordinarily means, is more multi-factored in nature. From the wedding to the barroom brawl, . . . a range of circumstances may be relevant to identifying episodes of criminal activity. Timing of course matters, though not in the split-second, elements-based way the Government proposes. Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events. Proximity of location is also important; the further away crimes take place, the less likely they are components of the same criminal event. And the character and relationship of the offenses may make a difference: The more similar or intertwined the conduct giving rise to the offenses—the more, for example, they share a common scheme or purpose—the more apt they are to compose one occasion.

Id. at 1070–71.

The district court in this case did not conduct any such balancing test, despite the Defendant's urging it to do so in light of the pending *Wooden* decision. *See* (ROA.224). At the time, the district court did not need to have done any such analysis because, in *United States v. Ressler*, 54 F.3d 257 (5th Cir. 1995), the Fifth Circuit had previously determined that two offenses separated by some intervening time constitute offenses "committed on separate occasions." (ROA.224). Moreover, the district court, concluding that it was bound by the Fifth Circuit's precedent in *United States v. White*, 465 F.3d 250 (5th Cir. 2006), overruled Petitioner's claim to the right to have a jury, rather than the district court, determine whether his prior convictions occurred on separate occasions. *See* (ROA.158); *see also* (ROA.231) (Government's response to the Defendant's PSR objections, citing *White* as foreclosing the need for a jury determination of the separate occasions requirement). Simply put, the district court was doing ACCA mathematics using a calculator constructed before *Wooden*.

Compounding the error, after this Court issued *Wooden* in March of this year, in September the Fifth Circuit affirmed the district court's decision, without any mention of *Wooden*, over Petitioner's insistence that his ACCA enhancement could not withstand *Wooden*'s requirements. *See generally* [App. B, at 2] (citing *White*, 564 F.3d at 254).

When recent authority from this Court creates a reasonable probability of a different result, this Court should grant certiorari, vacate the judgment below, and remand in light of the new authority ("GVR"). *Wooden* meets this test – it shows that determining whether prior convictions occurred on separate occasions from one

another requires more analysis than merely considering the offenses' temporal differences.

It is true that *Wooden* was issued before the decision below. The dispositive question for GVR purposes, however, is whether the court below fully considered a recent relevant development, not solely whether that development occurred after the decision below. As this Court explained in *Lawrence v. Chater*, 516 U.S. 163 (1996), a GVR order is potentially appropriate:

> [w]here intervening developments, ***or recent developments that we have reason to believe the court below did not fully consider***, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation...

Lawrence, 516 U.S. at 167 (emphasis added). There is certainly reason to believe that the court below did not fully consider *Wooden*, which was not cited in its opinion. Because *Wooden* demonstrates error, the case should be remanded.

Furthermore, GVR is not a decision on the merits. *See Tyler v. Cain*, 533 U.S. 656, 665, n.6 (2001); *accord State Tax Commission v. Van Cott*, 306 U.S. 511, 515-16 (1939). Accordingly, any potential procedural obstacles to reversal should be decided in the first instance by the court of appeals. *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964) (*per curiam*) (GVR "has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent"); *Torres-Valencia v. United States*, 464 U.S. 44 (1983) (*per curiam*) (GVR utilized over government's objection where error was conceded; government's harmless error argument should be presented to the Court of Appeals in the first

instance); *Florida v. Burr*, 496 U.S. 914, 916-919 (1990) (Stevens, J., dissenting) (speaking approvingly of a prior GVR in the same case, wherein the Court remanded the case for reconsideration in light of a new precedent, although the claim recognized by the new precedent had not been presented below); *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945) (remanding for reconsideration in light of new authority that party lacked opportunity to raise because it supervened the opinion of the Court of Appeals). If there is doubt about the outcome in light of any possible procedural hurdles to relief, this Court should vacate and remand.

II. 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." *Id.*

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 defendant's 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 714–16 ("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 402–03. 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 410–11 (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-Petitioner 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); *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." *Id.* 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. Moore, 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, 472–73 (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* and *Wallace*, 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.

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.

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)[1] 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 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).

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[1] 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).

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.").

A. 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 that of the generic.

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." *Id.* 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, 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 underlying 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 926–28.

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 every other circuit to have considered the question, 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." *Id.* The statutory text, and the text alone, should be sufficient to demonstrate that a state crime does not categorically match the generic definition.

B. *Taylor* settles the realistic probability question in Mr. Moore's favor.

Fortunately, the decision in *Taylor* also addresses and resolves this question in Mr. Moore'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. *Id.* 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." *Id.*

CONCLUSION

This Court should grant certiorari, vacate the judgment below and remand for reconsideration in light of *Wooden*.

Alternatively, Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit and vacate the judgment below.

Respectfully submitted this 19th day of December, 2022.

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