No. _____

In the

Supreme Court of the United States

_____

Henry Joseph Stevens,

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

_____

Adam Nicholson
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
214.767.2746
Adam_Nicholson@fd.org

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. Stevens was previously convicted of robbery under Texas Penal Code § 29.03, a statute that incorporates the definition of robbery from § 29.02 of the Texas Penal Code, which allows conviction when a thief recklessly causes someone to suffer injury or causes someone to fear imminent bodily injury.

   Does Texas aggravated 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)?

PARTIES TO THE PROCEEDING

Petitioner is Henry Lee Stevens, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

PETITION FOR A WRIT OF CERTIORARI

Petitioner Henry Lee Stevens seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals was not published but is available at *United States v. Henry Joseph Stevens*, No. 20-11264, 2022 WL 17832291 (5th Cir. Dec. 21, 2022). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on December 21, 2022.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This case involves the interpretation and application of 18 U.S.C. § 924(e) and Texas Penal Code § 29.03(a) and § 29.03.

At all times relevant to this petition,[1] 18 U.S.C. § 924 provided, in pertinent part:

[1] Last year, 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), 136 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 § 29.03 provides, in relevant part:

Sec. 29.03. AGGRAVATED ROBBERY. (a) A person commits an offense if he commits a robbery as defined in Section 29.02, and he:

(1) causes serious bodily injury to another;

(2) uses or exhibits a deadly weapon; or

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

(A) 65 years of age or older; or

(B) a disabled person.

(b) An offense under this section is a felony of the first degree.

LIST OF PROCEEDINGS BELOW

1. *United States v. Henry Joseph Stevens*, 7:20-CR-24-1, United States District Court for the Northern District of Texas. Judgment and sentence entered on December 21, 2020. (Appendix B).

2. *United States v. Henry Joseph Stevens*, No. 20-11264, Court of Appeals for the Fifth Circuit. Judgment affirmed on December 21, 2022. (Appendix A).

STATEMENT OF THE CASE

On May 12, 2020, Henry Joseph Stevens was charged by felony information with one count of Possession of a Firearm by a Convicted felon, a violation of 18 U.S.C. § 922(g)(1) and 924(a)(2). (ROA.15–16). Although he waived indictment, (ROA.24), Mr. Stevens was thereafter charged by superseding information with (again) one count of Possession of a Firearm by a Convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (ROA.25–27).

Mr. Stevens entered into a plea agreement with the government, whereby he agreed to plead guilty to the one count of the superseding indictment. (ROA.118–24). A Presentence Report ("PSR") determined that Mr. Stevens was properly subject to an enhanced sentence under the Armed Career Criminal Act ("ACCA"), which provides enhanced penalties for defendants previously convicted of three or more "violent felonies" committed on occasions different from each other. (ROA.132–33, 149). The PSR named three of Mr. Stevens's prior convictions in Texas for aggravated robbery as the "violent felonies" that triggered the ACCA enhancement. (ROA.132–33).

The PSR concluded that, because of the ACCA, Mr. Stevens's offense level increased to 33 under USSG §4B1.4(b)(3), before reductions for acceptance of responsibility. (ROA.132–33). The PSR also concluded that the ACCA required a mandatory minimum term of 15 years' imprisonment. (ROA.149).

Defense counsel did not object to the PSR in advance of sentencing. *See* (ROA.177). Similarly, he raised no objection to the PSR at sentencing. *See* (ROA.111).

The district court sentenced Mr. Stevens to 180 months' imprisonment and a three-year term of supervised release. (ROA.71–72, 114).

On appeal, Mr. Stevens argued that the district court erred in two ways, including by concluding the Texas aggravated robbery offense was not a "violent felony" under the Armed Career Criminal Act ("ACCA"). However, this argument was foreclosed by the Fifth Circuit's prior ruling in *United States v. Garrett*, 24 F.4th 485 (5th Cir. 2022), and the Court of Appeals affirmed on that basis. *United States v. Stevens*, No. 20-11264, 2022 WL 17832291, at * 2 n. 4 (5th Cir. 2022).

This petition follows.

REASON FOR GRANTING THIS 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." *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 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).

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.

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.

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. Stevens, the Court's 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). The aggravated form of robbery in Texas depends on the definition in § 29.02(a). Tex. Penal Code § 29.03(a). It is undisputed that § 20.02(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. *Id.* 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. *Id.*

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.

CONCLUSION

Petitioner respectfully submits that this Court should grant this petition and vacate the judgement of the court of appeals below.

Respectfully submitted this 21st day of March, 2023.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Adam Nicholson
Adam Nicholson
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: Adam_Nicholson@fd.org

Attorney for Petitioner