No. _____

IN THE

Supreme Court of the United States

MONQUEL PAULK,

Petitioner,
vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Daniel S. Harawa
Counsel of Record
WASHINGTON UNIVERSITY
SCHOOL OF LAW
One Brookings Dr.
Campus Box 1120
St. Louis, MO 63130
314-935-4689
dharawa@wustl.edu

QUESTIONS PRESENTED

The Armed Career Criminal Act (ACCA) imposes a 15-year mandatory minimum sentence on defendants with three or more "violent felony" convictions. 18 U.S.C. § 924(e). To determine whether a prior conviction qualifies as an ACCA predicate, courts apply the categorical approach, determining whether the elements of the statute of conviction "match" the elements of the federal predicate offense. *Mathis v. United States*, 579 U.S. 500, 503-05 (2016). If the elements are broader, there is no match and the prior conviction does not qualify as an ACCA predicate. *See id.* at 509.

In *Gonzalez v. Duenas Alvarez*, the Court held that when a state crime's elements *appear* to match the elements of the federal generic crime, a defendant must show a "realistic probability . . . that the State would apply its statute to conduct that falls outside the generic definition" by pointing to "other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." 549 U.S. 183, 193 (2007). However, last year in *United States v. Taylor*, when deciding whether a *federal* crime qualified as an ACCA predicate, this Court made clear that when the statute of conviction's elements are broader than the elements of the federal predicate, "that ends the inquiry"—a defendant does not need satisfy the realistic probability inquiry set forth in *Duenas-Alvarez*. *United States v. Taylor* 142 S. Ct. 2015, 2025 (2022).

The questions presented are:

I. Is the reasoning of *Taylor* irrelevant to deciding whether an overbroad state crime qualifies as an ACCA predicate, as the Sixth Circuit held below?

II. Did *Duenas-Alvarez* announce a blanket rule that a defendant must satisfy the realistic probability inquiry even when a state crime is plainly broader than the federal generic crime, as the Fifth, Sixth, and Eighth Circuits have held, or is the realistic probability inquiry obviated when the state crime is plainly broader than the federal generic offense, as the First, Second, Third, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits have held?

RELATED PROCEEDINGS

United States v. Paulk, No. 1:20-cr-00146 (W.D. Mich. Sep. 23, 2020)

United States v. Paulk, No. 21-02722 (6th Cir. Jul. 19, 2021)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Monquel Paulk respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 46 F.4th 399. App. 2a-7a. The order of the Court of Appeals denying rehearing is not published in the federal reporter. App. 1a. The relevant proceedings in the district court are unpublished. App. 8a-14a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit denied Mr. Paulk's petition for rehearing en banc on Nov. 2, 2022. On January 26, 2023, the Court extended the time to file a petition for a writ of certiorari to April 1, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924, in relevant part, provides:

(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—

. . .

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . 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.

Michigan Compiled Laws § 750.110a, in relevant part, provides:

(4) A person is guilty of home invasion in the third degree if the person does either of the following:

(a) Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor.

(b) Breaks and enters a dwelling or enters a dwelling without permission and, at any time while the person is entering, present in, or exiting the dwelling, violates any of the following ordered to protect a named person or persons:

(i) A probation term or condition.

(ii) A parole term or condition.

(iii)A personal protection order term or condition.

(iv) A bond or bail condition or any condition of pretrial release.

STATEMENT OF THE CASE

I. The District Court Sentenced Mr. Paulk As An Armed Career Criminal.

On March 3, 2021, in the United States District Court for the Western District of Michigan, Monquel Paulk pleaded guilty to being a felon in possession of a firearm under 18 U.S.C. § 922(g). App. 8a. According to his Presentence Investigation Report, Mr. Paulk's Sentencing Guidelines range for this charge would have been 92 to 115 months. Final Presentence Report at 6-7, *United States v. Paulk*, No. 1:20-cr-00146 (W.D. Mich. 2020).

But the Presentence Investigation Report also concluded that Mr. Paulk was subject to an enhanced sentence under the Armed Career Criminal Act. *See* 18 U.S.C. § 924(e). Under ACCA, a defendant qualifies for an enhanced sentence if they have three or more prior "violent felony" or "serious drug offense" convictions. *Id.* Once a defendant is found to have qualified for the armed career criminal enhancement, they are subject to a mandatory minimum sentence of fifteen years' imprisonment.

The Presentence Investigation Report found that Mr. Paulk had three "violent felony" convictions: (1) a 2010 Michigan Assault with a Dangerous Weapon conviction; (2) a 2012 Michigan Third-Degree Home Invasion conviction; and (3) a 2020 Michigan Unarmed Robbery conviction. Final Presentence Report at 4, *Paulk,* No. 1:20-cr-00146. Mr. Paulk did not object to the armed career criminal designation before the district court, and the district court accepted the Report's conclusion that Mr. Paulk was subject to the ACCA enhancement. *Id*. at 8. The district court therefore sentenced Mr. Paulk to the statutory mandatory minimum of 15 years' imprisonment.

App. 9a. In other words, because of the ACCA enhancement, Mr. Paulk is spending at least five extra years of his life behind bars.

II. Mr. Paulk Challenged His Armed Career Criminal Designation On Appeal.

On appeal, Mr. Paulk argued that he was not eligible for an enhanced sentence under ACCA because his Third-Degree Michigan Home Invasion conviction did not qualify as a "violent felony."[1] Brief for Defendant-Appellant at 9. ACCA defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another [the "elements clause"]; 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 [the "enumerated offense" clause].

18 U.S.C. §§ 924(e)(2)(B)(i), (ii). Mr. Paulk specifically argued that his crime did not qualify as violent felony under the enumerated offense clause because Michigan Third-Degree Home Invasion is not a "burglary" as defined by ACCA.[2] Brief for Defendant-Appellant at 19-20.

---

[1] This Court examined Michigan's Third-Degree Home Invasion statute in *Quarles v. United States*, 139 S. Ct. 1872 (2019) when determining whether "remaining in" burglary qualified as generic burglary under ACCA. *Id.* at 1875. In resolving this question, the Court noted that Quarles "alternatively suggest[ed] that Michigan's home-invasion statute actually does not require that the defendant have *any* intent to commit a crime at *any* time while unlawfully present in a dwelling." *Id.* at 1880 n.2. But because "Quarles did not preserve that argument, [the Court did] not address it." *Id.*

[2] The Government never argued that Michigan Third-Degree Home Invasion qualifies as a "violent felony" under ACCA's elements clause. Nor has it argued that Michigan Third-Degree Home Invasion fits within any of ACCA's other enumerated offenses.

This Court has held that a "burglary" under ACCA has two "basic" elements: (1) "an unlawful or unprivileged entry into, or remaining in a building or structure," (2) "with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990) (hereinafter "*Taylor (1990)*"); *see also Mathis v. United States*, 579 U.S. 500, 504 (2016). Mr. Paulk argued that Michigan Third-Degree Home Invasion is broader than generic burglary because the prosecution does not have to prove that a defendant intended to commit a crime to secure a Third-Degree Home Invasion conviction.

Looking first at subsection (a) of the statute,[3] Mr. Paulk explained that a person is guilty of Third-Degree Home Invasion whenever they unlawfully enter a dwelling and commit a misdemeanor while inside—the state does not have to prove that the person *intended to* commit that misdemeanor. Brief for Defendant-Appellant at 20-21. Second, he pointed out that under subsection (b), a person is guilty of Third-Degree Home Invasion whenever they unlawfully enter a dwelling and violate certain court orders—the state need not prove that the person *intended* to violate the court

[3] The full statute reads:

A person is guilty of home invasion in the third degree if the person does either of the following:

(a) Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, *or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor*.

(b) *Breaks and enters a dwelling or enters a dwelling without permission and, at any time while the person is entering, present in, or exiting the dwelling, violates any of the following ordered to protect a named person or persons:*

(i) A probation term or condition.

(ii) A parole term or condition.

(iii)A personal protection order term or condition.

(iv) A bond or bail condition or any condition of pretrial release.

Mich. Comp. Laws § 750.110a(4) (2022) (emphasis added to parts of the statute that do not require proof of intent).

order or that the violation of the court order would constitute a separate crime. *Id.* at 26-27.

Mr. Paulk then noted that the legislative history of the Third-Degree Home Invasion statute supports the conclusion that it is broader than generic burglary. Michigan created the crime of Third-Degree Home Invasion in 1999 when it revamped its Home Invasion statute. 1999 Mich. Legis. Serv. P.A. 44 (H.B. 4356); Brief for Defendant-Appellant at 21. Prior to the 1999 amendment, there were only two degrees of Home Invasion under Michigan law; both hewed closely to the traditional understanding of burglary.[4] When amending the statute, Michigan lawmakers explained that they were purposefully broadening its scope and making it easier to prosecute home invasion by relieving the state of its burden of having to prove intent.[5]

---

[4] The statute previously read:

(2) A person who breaks and enters a dwelling with intent to commit a felony larceny in the dwelling or a person who enters a dwelling without permission with intent to commit a felony larceny in the dwelling is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:

(a) The person is armed with a dangerous weapon.

(b) Another person is lawfully present in the dwelling.

(3) A person who breaks and enters a dwelling with intent to commit a felony larceny in the dwelling or a person who enters a dwelling without permission with intent to commit a felony larceny in the dwelling is guilty of home invasion in the second degree.

Mich. Comp. Laws § 750.110a(2-3) (pre-1999).

[5] As the Michigan House Fiscal Agency explained,

> [T]he bills will make it easier to prosecute assault cases involving an unlawful entry into a home and will provide an additional means of dealing with people who violate probation, parole, personal protection orders, bail or bond conditions or any other conditions of pretrial release. The bills will also make it more difficult for offenders to avoid the penalties for first or second degree home invasion by claiming they had no intent to commit a crime when they entered the dwelling. It is hoped that the penalties will have the effect of deterring some would-be offenders from engaging in these activities - but if not, the bills will at least make it easier to prosecute these crimes and to thereby keep such people off the street.

House Analysis Third Degree Home Invasion, House Fiscal Agency (Apr. 15, 1999), https://www.legislature.mi.gov/documents/1999-2000/billanalysis/House/htm/1999-HLA-4355-A.htm.

Finally, beyond the statutory text and its legislative history, Mr. Paulk highlighted that the sole time the Michigan Supreme Court interpreted the elements of Third-Degree Home Invasion, it did *not* hold that intent to commit a crime was a necessary element. *People v. Wilder*, 780 N.W.2d 265, 269-70 (Mich. 2010); Brief for Defendant-Appellant at 18-19. Instead, the Michigan Supreme Court broke down the elements of Third-Degree Home Invasion as follows:

> Element One: The defendant *either:*
> 1. breaks and enters a dwelling or
> 2. enters a dwelling without permission.
>
> Element Two: The defendant:
> 1. intends when entering to commit a misdemeanor in the dwelling, or
> 2. at any time while entering, present in, or exiting the dwelling commits a misdemeanor, or
> 3. while entering, present in, or exiting the dwelling violates any of the following ordered to protect a named person or persons:
> a. probation term or condition, or
> b. parole term or condition, or
> c. personal protection order term or condition, or
> d. bond or bail condition or any condition of pretrial release.

People v. Wilder, 780 N.W.2d 265, 269–70 (Mich. 2010).

Thus, Mr. Paulk argued that (1) because on its face, Michigan Third-Degree Home Invasion does not require intent to commit a crime, (2) the Michigan Legislature confirmed that it intended to make it easier to prosecute Home Invasion by obviating an intent requirement, and (3) the Michigan Supreme Court construed the elements of Third-Degree Home Invasion in a way that does not require the prosecution to have to prove intent, Michigan Third-Degree Home Invasion is broader than generic burglary. As such, Michigan Third-Degree Home Invasion is not a categorical match with generic burglary and is not a violent felony under ACCA. And as Mr.

Paulk explained in response to an argument by the Government, because the elements of Third-Degree Home Invasion are broader than the elements of generic burglary, he did not have to point to an actual case to show that there is realistic probability that Michigan would apply its statute to non-generic conduct. Reply Brief for Defendant-Appellant at 15-16.

III. The Sixth Circuit Affirmed Mr. Paulk's Conviction Under The Reasoning that He Failed to Show There Is A Realistic Probability That Michigan Would Prosecute Non-Generic Burglary.

The Sixth Circuit nevertheless affirmed Mr. Paulk's enhanced sentence. The Sixth Circuit did not question the fact that Michigan Third-Degree Home Invasion is broader than generic burglary. Instead, the Sixth Circuit demanded that "[t]o succeed, Paulk must 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.'" App. 6a. (quoting *Duenas-Alvarez*). The Sixth Circuit then held that because Mr. Paulk did not "point[] to any Michigan caselaw involving a third-degree home invasion conviction predicated on [nongeneric burglary]," he did not "demonstrate[] a 'realistic probability' that Michigan would charge an individual with third-degree home invasion based on [nongeneric conduct]." App. 7a. According to the Sixth Circuit, Mr. Paulk "demonstrated at best a theoretical possibility that Michigan would apply its statute to conduct that falls outside the bounds of the generic definition of burglary," which was "insufficient." App. 7a.

After oral argument was held but before the Sixth Circuit issued its opinion, this Court decided *United States v. Taylor*, 142 S. Ct. 2015 (2022) (hereinafter *"Taylor*

(2022)"). *Taylor (2022)* marked the first time in which this Court discussed the application of the realistic probability inquiry in a criminal case, and the only case other than *Duenas-Alvarez* in which this Court has discussed "realistic probability" inquiry at all.[6]

Within a week of this Court handing down *Taylor (2022)*, Mr. Paulk filed a letter under Federal Rule of Appellate Procedure 28(j) alerting the Sixth Circuit to this Court's decision. In the letter, Mr. Paulk explained that *Taylor (2022)* clarified that, under the categorical approach, a realistic probability analysis is *not* required when the text of the statute is clearly broader than the generic offense. 28(j) Letter Alerting the Panel to *United States v. Taylor* at 1. He then reiterated that the elements of Michigan Third-Degree Home Invasion are broader than the elements of generic burglary. *Id.* at 2.

Without ordering supplemental briefing and despite *Taylor (2022)* being only the second case in which this Court had discussed the realistic probability inquiry, the Sixth Circuit issued its decision soon after, dismissing *Taylor (2022)* in a footnote. App. 6a n.1. In that footnote, the Sixth Circuit held that *Taylor (2022)* did not "modify" the realistic probability inquiry set forth in "*Duenas-Alvarez* for two reasons. First, *Duenas-Alvarez* interpreted a state statute," while *Taylor (2022)* was analyzing "only whether the elements of one federal law align with those prescribed in another." *Id*. "Second, in *Duenas-Alvarez*, the 'elements of the relevant state and federal offenses clearly overlapped,' and the question before the Court was whether the state

[6] Oral argument was held on June 8, 2022. App. 2a. The Court decided *Taylor (2022)* on June 21, 2022.

offense was overbroad," while in *Taylor (2022)*, this Court said that "'there [was] no overlap to begin with.'" App. 6a n.1 (citations omitted). The Sixth Circuit concluded that because Michigan Third-Degree Home Invasion is "a state statute that overlaps, in large part, with the elements of generic burglary," "*Duenas-Alvarez*, not *Taylor*, applies." *Id*.

IV. Mr. Paulk Moved For Rehearing And Rehearing En Banc, Asking The Sixth Circuit To Fully Consider *Taylor (2022)*.

Mr. Paulk petitioned for rehearing or rehearing en banc in an effort to get the Sixth Circuit to more closely consider *Taylor (2022)*. He argued that *Taylor (2022)* "clarified that *Duenas-Alvarez*'s actual-case requirement is triggered *only* when there is ambiguity about the reach of state law," and that the Sixth Circuit wrongly "construed *Duenas-Alvarez* as *always* requiring a defendant to point to a case showing that a state prosecuted a crime for nongeneric conduct to satisfy the realistic probability inquiry, even when, as is the case here, the state statute is broader than the generic offense." Petition for Rehearing En Banc at 3. He also argued that the Sixth Circuit's decision ignored *Taylor (2022)*'s discussion of the "'oddity' of having defendants prove the government's 'prosecutorial habits,' and the 'practical challenges of such a burden in a world where most cases end in plea agreements and not all of those cases make their way into easily accessible commercial databases.'" *Id.* at 9-10. Finally, he noted that the Sixth Circuit's requiring proof an actual prosecution when the state statute was clearly broader than the generic crime conflicted with this Court's categorical approach precedents, *id.* at 17, and deepened a split among the circuit courts, *id.* at 15.

An amicus brief filed by the Federal Public Defenders of the Sixth Circuit amplified Mr. Paulk's arguments about why the Sixth Circuit misconstrued *Taylor (2022)* and echoed *Taylor (2022)*'s concerns about requiring defendants to produce empirical evidence about how prosecutors charge crimes, explaining that "even if it were somehow knowable that no prosecutor had ever charged a particular form of home-invasion, that could change tomorrow." Amicus Brief of the Federal Public and Community Defenders at 9. Plus, explained the Defenders, it is extremely difficult for defendants to access information about how prosecutors charge crimes and what plea deals they enter into as none of that information is neatly collected in a single repository, and even when the information is collected, *how* it is collected varies from jurisdiction to jurisdiction. *Id.* at 8-9.

The Sixth Circuit denied the petition.

REASONS FOR GRANTING THE PETITION

Just last year in *Taylor (2022)*, this Court for the first time addressed the proper application of the realistic probability inquiry in a criminal case. Mr. Paulk's case was one of the first cases in which a court of appeals grappled with *Taylor (2022)*. Yet, without briefing, the Sixth Circuit held that *Taylor (2022)* has no application to deciding whether a state crime is broader than its generic counterpart, and thus contrary to lessons of *Taylor (2022)*, required Mr. Paulk to point to an actual case in which the state prosecuted non-generic burglary even though the Michigan Home-Invasion statute is undeniably broader than the generic crime. Indeed, the Sixth Circuit thought *Taylor (2022)* so unimportant that it dismissed the opinion in a footnote. But a close reading of *Taylor (2022)* makes clear that its reasoning is not as limited as the Sixth Circuit held. This Court should grant certiorari, vacate the judgment below, and remand this case to the Sixth Circuit so that it can give *Taylor (2022)* the close look it deserves.

But if this Court does not grant certiorari and vacate the judgment below, then it should grant certiorari to resolve the split among the courts of appeals over whether the realistic probability inquiry applies when a state statute is plainly broader than the federal generic crime. Before *Taylor (2022)*, the split was shallow, with only the Fifth Circuit applying the realistic probability inquiry when faced with a plainly overbroad state statute. Since *Taylor (2022)*, the split has depended, with both the Sixth and Eighth Circuits holding that *Taylor (2022)* has nothing to say about the proper

application of the realistic probability inquiry when deciding whether a state conviction qualifies as a federal predicate. This Court's intervention is warranted.

This case is important. It is one of the first post-*Taylor (2022)* rulings and does not give proper deference or consideration to this critical new precedent. As a result, there is significant risk that if left uncorrected, the Sixth Circuit's misunderstanding of *Taylor (2022)* will infect other circuits. And a misunderstanding of how the realistic probability inquiry applies risks not only affecting the thousands of people sentenced under ACCA each year, but also all other defendants subject to federal sentencing enhancements and non-citizens subject to removal proceedings.

This Court should grant certiorari, vacate the judgment of the Sixth Circuit, and remand for further consideration. Alternatively, the Court should grant certiorari and resolve what is an acknowledged and recently deepened circuit split.

I. The Court Should Grant Certiorari, Vacate The Judgment Of The Sixth Circuit, And Remand So The Sixth Circuit Can Fully Consider The Import Of *Taylor (2022)*.

Since 1984 when Congress first enacted the Armed Career Criminal Act, "the enhancement provision *always* has embodied a categorical approach to the designation of predicate offenses." *Taylor (1990)*, 495 U.S. at 588.[7] Under the categorical approach, trial courts focus exclusively on the *elements* of the crime of conviction, while ignoring the defendant's conduct or the particular facts of the case. *Id.* at 601. A prior conviction qualifies as a predicate "violent felony" or "controlled substance offense"

[7] The categorical approach has been in use in other contexts for over a century. *United States ex rel. Mylius v. Uhl*, 210 F. 860, 862–63 (2d Cir. 1914) (using the categorical approach to determine whether a English libel conviction constituted a deportable offense).

"if, but only if, its elements are *the same as, or narrower*, than those of the generic offense." *Mathis v. United States*, 579 U.S. 500, 503 (2016) (emphasis added).

Violent felonies consist of two categorical buckets—offenses involving "force against a person," as well as various "enumerated" offenses Congress identified as "the stuff of armed career criminals," such as "arson" and "burglary." *Borden v. United States*, 141 S. Ct. 1817, 1834, 1841-43 (2021). When deciding whether a prior conviction qualifies as a "violent felony" under ACCA's enumerated offense clause, the categorical approach analysis is straightforward—a sentencing court simply must compare the elements of the statute of conviction to the elements of the "generic" offense. *Taylor (1990)*, 495 U.S. at 601. And as this Court explained in *Taylor (1990)* when explicating the elements of generic burglary, "If the state statute is *narrower* than the generic view . . . there is no problem because the conviction necessarily implies that the defendant has been found guilty of all the elements of generic burglary." *Id.* at 599 (emphasis added); *see also Descamps v. United States*, 579 U.S. 254, 269 (2013); *Mathis*, 579 U.S. at 504. But when the state statute is *broader* than the generic crime, the prior conviction cannot serve as the basis for the ACCA enhancement because there is no categorical match. *Mathis*, 579 U.S. at 509 (explaining that a "mismatch of elements saves the defendant from an ACCA enhancement").[8]

But confusion set in among the lower courts after this Court's decision in *Gonzales v. Duenas-Alvarez*. 549 U.S. 183 (2007). In *Duenas-Alvarez*, this Court held that

[8] Even at the time of *Taylor (1990)*, the "Courts of Appeals uniformly [recognized] that §924(e) mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor (1990)*, 495 U.S. at 600).

when the elements of the statute of conviction "match" the elements of the generic offense, there is a presumption that the statute is also being applied in a generic way. *Id*. at 193. However, when a defendant argues that despite a state statute *appearing* to "match" the generic offense on its face, the state statute is in fact being *applied* in a way to encompasses nongeneric conduct, *Duenas-Alvarez* held that a defendant must show that there is a "realistic probability" that the state is in fact *applying* its statute "in the manner for which he argues." *Id.* at 193. To make that showing, the defendant must point to an actual instance "in which state courts in fact did apply the statute in the special (nongeneric) manner." *Id.*

Duenas-Alvarez's "realistic probability" requirement is properly understood as a way for defendants to show that a statute is not a categorical match despite the statute appearing to be match on its face. *Duenas-Alvarez* did *not* as create an additional hurdle that a defendant must clear any time they challenge an ACCA enhancement**.** Put another way, *Duenas-Alvarez*'s actual-case requirement kicks in only when "a federal court [must] make a federal judgment about the meaning of a state statute." *Taylor (2022)*, 142 S. Ct. at 2025. When the state statute is clear, no further inquiry is necessary.

This Court's post-*Duenas-Alvarez* precedents confirm the limits of *Duenas-Alvarez*. For example, in *Mathis*, this Court reiterated that "the elements-based approach remains the law," and refused to "introduce inconsistency and arbitrariness into [its] ACCA decisions by [ ] declining to follow its requirements." *Mathis*, 579 U.S. at 520-21. Same as here, the defendant in *Mathis* argued that his conviction under a

state burglary statute did not qualify as a generic burglary under ACCA. This Court agreed, explaining, "A crime counts as 'burglary' under the Act if its *elements* are the same as, or narrower than, those of the generic offense. But if the crime of conviction covers *any* more conduct than the generic offense, then it is not an ACCA 'burglary.'" *Id.* at 504 (emphasis added). Not distinguishing between how the categorical approach applies to state versus federal convictions, this Court emphasized that "all that counts under the Act . . . are 'the elements of the statute of conviction.'" *Id.* at 509. The categorical approach simply requires a court to "line up" the generic elements of the crime alongside the statute of conviction's elements to determine whether they "match." *Id.* at 504-05. And the Court explained that a statute "matches" the generic offense "if, but only if, its elements are *the same as, or narrower*, than those of the generic offense." *Id.* at 503 (emphasis added). Then the Court conducted this very inquiry and held that "[b]ecause the elements of Iowa's burglary law are broader than those of generic burglary, Mathis's convictions under that law cannot give rise to an ACCA sentence." *Id.* at 518. Notably, the Court reached this decision without conducting a realistic probability inquiry or even discussing *Duenas-Alvarez*. *See also Mellouli v. Lynch*, 575 U.S. 798 (2015) (holding a Kansas drug paraphernalia conviction did not qualify as a predicate controlled substance offense under the Immigration and Nationality Act (INA) without conducting a realistic probability inquiry).

This Court's categorical approach cases teach that if the state statute's elements are broader than the generic offense or encompass *any* additional conduct,

there is an "elemental mismatch" and the prior conviction under that state statute cannot serve as the basis for an ACCA enhancement. Still, a minority of circuit courts have "wrench[ed] . . . *Duenas-Alvarez* from its context," *United States v. Aparicio-Soria*, 740 F.3d 152, 157 (4th Cir. 2014) (quotation marks omitted), interpreting that decision as holding that defendants must *always* satisfy the realistic probability inquiry even when the prior statute of conviction is broader than the generic crime.

Last year in *Taylor (2022)*, this Court sought to clear up the confusion, discussing for the first time the application of the realistic probability inquiry in a criminal case (having only discussed it once before in *Duenas-Alvarez,* an immigration case). The defendant in *Taylor (2022)* argued his prior conviction for attempted Hobbs Act robbery should not qualify as a "crime of violence" because it was missing an essential element — the "use, attempted use, or threatened use of force." *Taylor (2022)*, 142 S. Ct. at 2020. This Court agreed, rejecting the government's argument that a defendant must make a realistic probability showing by "present[ing] evidence about how his crime of conviction is normally committed or usually prosecuted." *Id*. at 2024. Writing for the Court, Justice Gorsuch reiterated that the categorical approach is exclusively concerned with whether the elements of the crime match, not with how a government normally prosecutes the offense: "§ 924(c)(3)(A) doesn't ask [how] the crime is *sometimes* or even *usually*" committed . . . . It asks whether the government must prove, as an *element* of its case," all the elements of the relevant predicate. *Id.* at 2024. Because the statute of conviction lacked an essential element, the Court held that the two statutes did not "overlap" and thus there was no need for a realistic probability

showing. *Id.* at 2024-25. In reaching this conclusion, *Taylor (2022)* made clear that not only is requiring proof of prosecution inconsistent with the elements-based focus of the categorical approach, the Court also noted the "oddity of placing a burden on the defendant to present empirical evidence about the government's own prosecutorial habits," and the "practical challenges such a burden would present [to defendants] in a world where most cases end with plea agreements." *Id.*

A. The Sixth Circuit Disregarded *Taylor (2022)*.

Despite *Taylor (2022)* taking pains to explain the limited circumstances in which the realistic probability inquiry should apply, the Sixth Circuit ignored *Taylor (2022)'s* teachings.

In a footnote and without briefing, the Sixth Circuit cursorily dismissed *Taylor (2022)*, insisting it "does not modify" the requirement for defendants to make a realistic probability showing when applying the categorical approach. The Sixth Circuit gave two reasons for why *Taylor (2022)* did not affect its analysis: (1) the Sixth Circuit thought that *Taylor (2022)*'s explanation of the realistic probability inquiry was irrelevant because *Taylor (2022)* concerned whether a *federal*, not a state, crime qualified as an ACCA predicate, and (2) in *Taylor (2022)*, this Court explained that there was "no overlap to being with" between the federal statute and the ACCA predicate, while, according to the Sixth Circuit, Michigan's Third-Degree Home Invasion statute "overlaps, in large part, with the elements of generic burglary." App. 6a. Both reasons reveal a fundamental misunderstanding of *Taylor (2022)*.

True, in *Taylor (2022)*, the Court was addressing whether a conviction under a *federal* statute qualified as a predicate offense for ACCA purposes. But that does not render *Taylor (2022)*'s understanding of the realistic probability inquiry irrelevant to deciding whether a *state* statute qualifies as a predicate for an ACCA enhancement for at least three reasons.

First, the elemental focus of the categorical approach applies to both state and federal statutes, and nothing in this Court's ACCA precedents or in the text of the statute suggests that there should be some distinction between how the categorical approach applies when dealing with state versus federal statutes. To the contrary, the categorical approach was adopted with "the vagaries of state law" in mind, *Taylor (1990)*, 495 U.S. at 588, and most convictions that serve as predicates for an ACCA enhancement are for state, not federal, crimes.[9] Indeed, as *Taylor (2022)* explained, requiring defendants to provide proof of a how a crime is prosecuted not only poses sometimes insurmountable logistical challenges, it "effectively backtracks" from how the categorical approach is generally conducted. *Taylor (2022)*, 142 S. Ct. at 2024. This is true whether or not a prior conviction was for a state versus federal offense. The state versus federal factual distinction did not give the Sixth Circuit license to outright dismiss *Taylor (2022)* in a sparse footnote.

In fact, the *only* reason *Duenas-Alvarez* required proof of actual prosecution was because the respondent there was arguing that the state prosecuted its statute

[9] Jennifer Lee Barrow, *Recidivism Reformation: Eliminating Drug Predicates*, 135 HARV. L. REV. F. 418, 439 (2022) ("It is important to remember that ACCA predicates are usually state law offenses.").

in ways that were broader than the statute's language seemed to allow. 549 U.S. at 191. For that reason, out of respect for state law and how state courts interpret their laws, the Court wanted proof that the courts applied the law as the respondent contended. *See Taylor (2022)*, 142 S. Ct. at 2025. But the federalism concerns are inverted when, as here, the state statute is clearly broader or has been interpreted by the state courts as being broader than the generic crime. Under these circumstances, federalism demands that federal courts recognize and honor a state's right to define and prosecute crimes as it sees fit. "Nothing in *Duenas-Alvarez* . . . indicates that [a] state-law crime may be treated as if it is narrower than it plainly is." *Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017). Indeed, a federal court unduly narrowing state law "could cause substantial uncertainty and confusion," upheaving state prosecutions. *United States v. Franklin*, 895 F.3d 954, 961 (7th Cir. 2018).

This is especially true here. Michigan deliberately expanded its home invasion statute to allow for convictions without proof of intent to commit a crime. And the Michigan Supreme Court confirmed that intent to commit a crime is not necessarily an element of Third-Degree Home Invasion. *See Wilder*, 780 N.W.2d at 269-70. The Sixth Circuit *trampled* federalism principles when it disregarded all of this and demanded that Mr. Paulk provide proof that Michigan would prosecute the statute as written, without even asking Michigan for its view of its own law by certifying the case to the Michigan Supreme Court.[10] Michigan made clear by expanding its statute

[10] Mr. Paulk suggested to the Sixth Circuit that if it was unclear about the elements of the Third-Degree Home Invasion, it should certify the question to the Michigan Supreme Court.

that it did not want its home-invasion statute to be limited to the "generic" understanding of burglary. The Sixth Circuit's approach here offended the very federalism concerns that animated the realistic probability inquiry articulated in *Duenas-Alvarez*.

Second, every reason that *Taylor (2022)* gave for eschewing the realistic probability inquiry when construing federal statutes applies equally, if not more so, to state laws. In the state law context, it is just as "odd[]" to place the burden on a defendant to produce evidence about the government's prosecutorial habits. *See Taylor (2022)*, 142 S. Ct. at 2024. And the "practical challenges" of such an approach are magnified in the state law context. *Id.*

Michigan provides the perfect example of this. In Michigan, each county is represented by its own elected prosecuting attorney, and each local prosecutor may have a different view of the law and different enforcement priorities. The elected prosecuting attorneys in Michigan's 83 counties cannot be expected to refrain from prosecuting conduct plainly covered by a statute *forever*, and in fact, they would be free to charge conduct covered under the statute at any moment. Depending on the circumstances of a particular jurisdiction, a local prosecuting attorney may want to prosecute home-invasion as widely as possible, and even if they do not, their successor might wish to. As the Federal Defenders from the Sixth Circuit explained: "The categorical approach is complicated enough without having to revisit the same statutory offenses year after year, to account for new data." Amicus Brief of the Federal Public and Community Defenders at 9.

More to the point, in Michigan, there is no uniform database reflecting how each case is charged or the facts underlying each charge, so it is hard (if not impossible) for a defendant to discern the factual basis for every single charge. It is just as hard (if not impossible) for a defendant to discern the factual basis for every single conviction because most cases in Michigan (like everywhere else) are resolved by plea. Very few Michigan convictions are appealed, and of those appealed, fewer still will garner a published opinion that will appear on searchable legal databases. Thus, requiring a defendant to prove how a state prosecutes its crime, as the Sixth Circuit did here, will require a defendant to have the pure luck to stumble on proof of a prosecution under the hardest of circumstances. This is precisely the difficulty *Taylor (2022)* sought to avoid.

Third, the Sixth Circuit dismissed *Taylor (2022)* by misinterpreting what the Court meant when it discussed whether statutes "overlap." In distinguishing the facts of *Taylor (2022)* from the facts of *Duenas-Alvarez*, *Taylor (2022)* noted that the statute in *Duenas-Alvarez* "overlapped" with the federal predicate, while in *Taylor (2022)* "there [was] no overlap to begin with." *Taylor (2022)*, 142 S. Ct. at 2025. The Court explained that in cases like *Duenas-Alvarez* in which the statutes "clearly overlap," a realistic probability showing might be necessary. *Id.* But in cases like *Taylor (2022)*, in which there is "no overlap to begin with," the defendant need not point to an actual case to prove overbreadth. *Id.*

The Sixth Circuit interpreted *Taylor (2022)*'s "no overlap" language to mean that a realistic probability showing is necessary in any case in which the statutes

even "*partially* overlap." *See* App. 6a (emphasis added). But *Taylor (2022)* rejected this same logic. *Taylor (2022)* conceded that many, if not most, attempted Hobbs Act robberies involve the use of force as necessary to be an ACCA predicate under the elements clause. *Taylor (2022)*, 142 S. Ct. at 2022. ("Without question, many who commit the crime of attempted Hobbs Act robbery do use, attempt to use, or threaten to use force"). Still, because attempted Hobbs Act robbery did not *require* the proof of force as an *element* of the crime, *Taylor (2022)* explained that there was "no overlap to being with" between attempted Hobbs Act robbery and ACCA's elements clause.

The same is true here. While it may be true that "many who commit the crime" of Third-Degree Home Invasion commit generic burglary, Third-Degree Home Invasion does not *require* the proof of intent to commit a crime as an *element* of the offense. Thus, there is "no overlap" in parlance of *Taylor (2022)*, or there is an elemental "*mis*-match" in the words of *Mathis*. *See Mathis*, 579 U.S. at 509.

B. Applying The Categorical Approach, Michigan Third-Degree Home Invasion Does Not Qualify As A Generic Burglary Under ACCA.

Applying the categorical approach as required by this Court's precedents, Mr. Paulk's Third-Degree Home Invasion conviction cannot qualify as a "burglary" under ACCA. Generic burglary has "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, *with intent to commit a crime*." *Taylor (1990)*, 495 U.S. at 598 (emphasis added).

Michigan's Third-Degree Home Invasion statute clearly does not match the generic definition of burglary because it lacks the essential element of "intent to commit

a crime." Mich. Comp. Laws § 750.110a(4). Under subsection (a), a person can commit Third-Degree Home Invasion by committing a misdemeanor while unlawfully inside a dwelling without the state having to prove, as an element, that the defendant *intended* to commit that misdemeanor.[11] And under subsection (b), a person can commit Third-Degree Home Invasion if they violate certain court orders—again, the state does not have to prove the defendant intended to commit a crime. There is a clear elemental mismatch; thus, a Michigan Third-Degree Home Invasion conviction cannot serve as an ACCA predicate. Just as the absence of the "force" element disqualified attempted Hobbs Act robbery from serving as a predicate offense for an ACCA enhancement in *Taylor (2022)*, the absence of the intent element precludes Mr. Paulk's Third-Degree Home Invasion conviction from serving as a predicate offense for an ACCA enhancement here.

Without counting this conviction, Mr. Paulk would have been ineligible for the ACCA enhancement. This Court should grant certiorari, vacate the judgment below, and remand to the Sixth Circuit for it to more fully consider the import of *Taylor (2022)*.

[11] In the case of strict liability misdemeanors, misdemeanors with a mens rea of recklessness and negligence, and violations of court-ordered conditions, one can commit Third-Degree Home Invasion without having any intent to commit a crime. *Cf. Borden v. United States*, 141 S. Ct. 1817 (2021) (holding ACCA does not cover crimes that only require a mens rea of recklessness or negligence).

II. The Court Should Alternatively Grant Certiorari To Resolve The Acknowledged Circuit Split Over How The Realistic Probability Inquiry Applies To Overbroad State Statutes.

The Sixth Circuit's decision deepens an acknowledged circuit split over how the realistic probability inquiry applies to state statutes that are broader than the federal generic offense. *See Alexis v. Barr*, 960 F.3d 722, 734 (5th Cir. 2020) (Graves, J., concurring) (hoping the "Supreme Court can resolve the circuit split").

Before *Taylor (2022)*, the First, Second, Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits had all held that when a state crime is clearly broader than its generic federal counterpart, a defendant (or noncitizen respondent in removal proceedings) does not have to provide proof that the state has applied its statute to non-generic conduct—the proof is in the language of statute or in how that statute has been construed by the state courts.

First Circuit: "Nothing in *Duenas-Alvarez* . . . indicates that [a] state-law crime may be treated as if it is narrower than it plainly is." *Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017) (holding a Rhode Island drug conviction was not a predicate aggravated felony under the INA).

Second Circuit: "The realistic probability test is obviated by the wording of the state statute, which on its face extends to conduct beyond the definition of the corresponding federal offense." *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018) (holding a New York conviction for marijuana distribution was not a predicate aggravated felony under the INA).

Third Circuit: "When "the textual breadth of a [state] statute is more expansive than the federal generic crime . . . a petitioner need not show that there is a realistic chance that the statute will actually be applied in an overly broad manner." *Cabeda v. Att'y Gen. of United States*, 971 F.3d 165, 176 (3d Cir. 2020) (holding a Pennsylvania conviction for involuntary deviant sexual intercourse was not a predicate aggravated felony under the INA).

Fourth Circuit: "We do not need to hypothesize about whether there is a 'realistic probability' that [state] prosecutors will charge defendants engaged in non-[generic conduct]; we know that they can because the state's highest court has said so." *United States v. Aparicio-Soria*, 740 F.3d 152, 158 (4th Cir. 2014) (holding a Maryland resisting arrest conviction was not a predicate aggravated felony under the INA).

Seventh Circuit: "After applying the categorical approach, if the court determines that the statute is ambiguous or has indeterminate reach, *only then* will the court turn to the realistic probability test." *Aguirre-Zuniga v. Garland*, 37 F.4th 446, 450 (7th Cir. 2022) (emphasis added) (holding an Illinois delivery of methamphetamine conviction was not a predicate aggravated felony under the INA).

Ninth Circuit: "When "a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination,' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute's greater breadth is evident from its text." *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) (internal

citation omitted) (holding an Oregon second-degree burglary conviction does not qualify as a "burglary" for ACCA purposes due to the statute defining "building" more broadly than the generic definition).

Tenth Circuit: "The Supreme Court requires us to begin the analysis where *Mathis* does—at the means/elements inquiry . . . . The Court did not seek or require instances of actual prosecutions for the means that did not satisfy the ACCA. The disparity between the statute and the ACCA was enough." *United States v. Titties*, 852 F.3d 1257, 1269 & 1275 (10th Cir. 2017) (holding an Oklahoma conviction for pointing a firearm at another did not qualify as an ACCA predicate based on the statute criminalizing both violent and nonviolent conduct).

Eleventh Circuit: "*Duenas-Alvarez* does not require [a realistic probability] showing 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. U.S. Atty. Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) (holding a Georgia theft conviction did not qualify as a predicate aggravated felony under the INA).

In any of these circuits, the court would have looked at the Michigan Third-Degree Home Invasion statute, saw that it was broader than generic burglary, and held that the statute was not a categorical match and thus could not serve as an ACCA predicate. In other words, in any of these circuits, Mr. Paulk would not have been subject to the ACCA enhancement and would get out of prison at least five years sooner.

Before *Taylor (2022)*, only the Fifth Circuit, in an 8 to 7 en banc decision, had adopted the approach the Sixth Circuit took here, reading *Duenas-Alvarez* as requiring defendants to point to an actual prosecution for nongeneric conduct even when the state crime was clearly broader than the federal generic crime. *See United States v. Castillo-Rivera,* 853 F.3d 218 (5th Cir. 2017) (en banc). But as the dissenting judges explained then, "*Duenas-Alvarez* does not, as the majority opinion holds, require a defendant to disprove the inclusion of a statutory element that the statute plainly does not contain using a state case." *Id.* at 239 (Dennis, J., dissenting). And in a later case, Judge Graves emphasized how anomalous the Fifth Circuit's approach was, explaining that the Fifth Circuit "diverge[s] from at least seven other circuit courts," and noting that the "Third Circuit [had even] collected cases to demonstrate that the Fifth Circuit is alone in its unwavering application of the realistic probability test." *Alexis*, 960 F.3d at 733 & n.1 (Graves, J., concurring) (citing *Zhi Fei Liao v. Att'y Gen.*, 910 F.3d 714, 723 n.11 (3d Cir. 2018)).

The Fifth Circuit is no longer alone. The Sixth Circuit has joined its ranks by requiring Mr. Paulk to point to an actual prosecution despite not quarreling with the notion that the Michigan Third-Degree Home Invasion statute is plainly broader than generic burglary. And the Eighth Circuit has also now adopted an unwavering approach to the realistic probability test. *See United States v. Bragg*, 44 F.4th 1067, 1076 (8th Cir. 2022) (dismissing *Taylor (2022)* as not overruling its "controlling 'realistic probability' precedents" because *Taylor (2022)* only considered "whether the elements of one federal law align with those prescribed in another").

While this Court in *Taylor (2022)* tried to clarify the correct application of the realistic probability inquiry,[12] the discord among the courts of appeals has only deepened. This Court should grant certiorari to resolve the circuit split over how the realistic probability inquiry applies when a state statute is broader than its federal generic counterpart.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand for further proceedings. Alternatively, the Court should grant the petition and decide the questions presented.

Respectfully submitted,

Daniel S. Harawa
Counsel of Record
WASHINGTON UNIVERSITY
SCHOOL OF LAW
Appellate Clinic
One Brookings Dr.
Campus Box 1120
St. Louis, MO 63130
314-935-4689
dharawa@wustl.edu

April 3, 2022

[12] The Fifth Circuit's minority approach to the realistic probability inquiry was highlighted in the briefing in *Taylor (2022)*. *See* Brief for Respondent at 44, *Taylor v. United States*, 142 S. Ct. 2015 (2022) (No. 20-1459).