

APPENDICES

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APPENDIX A

In the
United States Court of Appeals
For the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 27, 2026
Lyle W. Cayce, Clerk

No. 25-30192

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

JULIUS AUGILLARD

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Louisiana.
USDC No. 2:24-CR-90-1

Before CLEMENT, DOUGLAS, and RAMIREZ, *Circuit*
Judges.

PER CURIAM:*

Julius Augillard appeals his 70-month sentence for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He challenges his sentence on four grounds, including attacking the district court’s use of the “realistic probability” test in determining whether his prior state conviction constituted a “controlled substance offense” for purposes of establishing his base offense level under § 2K2.1(a)(3) of the Sentencing Guidelines. Augillard also challenges the district court’s application of the four-level enhancement under § 2K2.1(b)(6)(B) because Augillard “used or possessed any firearm or ammunition in connection with another felony offense.” Because the district court properly applied the Sentencing Guidelines and did not clearly err in its factfinding, we AFFIRM in part. That said, because the district court abused its discretion in failing to pronounce a discretionary supervised release condition, we VACATE in part Augillard’s judgment of the sentence and REMAND to the district court to amend the written judgment to conform to its oral pronouncement.

I

A grand jury charged Julius Augillard with two counts of possession of a firearm by a felon. The following facts underlie each count:

For Count One, police officers found Augillard in December 2023 asleep and trespassing in front of an apartment complex. A bag strapped across his chest contained a pistol, twelve rounds of ammunition, and small amounts of cocaine, fentanyl, heroin, and

* This opinion is not designed for publication. *See* 5TH CIR. R. 47.5.

marijuana. Augillard had prior felony convictions for possessing crack cocaine and oxycodone, possessing cocaine with intent to distribute, and possessing a firearm as a convicted felon.

For Count Two, police officers observed Augillard in February 2023 smoking a marijuana cigarette on Bourbon Street during Mardi Gras. He attempted to flee, but police caught him, and a search of his person revealed a pistol, 28.27 grams of marijuana, and 10.46 grams of cocaine. He pleaded guilty to both charges without a plea agreement.

In his Presentence Report (“PSR”), the probation officer determined that Augillard’s base offense level was 22 under § 2K2.1(a)(3) of the Sentencing Guidelines because Count Two “involved a semiautomatic firearm that is capable of accepting a large capacity magazine,” and Augillard committed the offenses following a conviction “for a crime of violence or a controlled substance.” Four levels were added under § 2K2.1(b)(6)(B) because Augillard “used or possessed any firearm or ammunition in connection with another felony offense.” Three levels were later deducted because Augillard accepted responsibility, thereby reducing his offense level to 23. Based on his criminal history category of IV, the advisory range of imprisonment was 70 to 87 months.

Augillard objected to the PSR, arguing that (1) § 2K2.1(a)(3) was not applicable to his base offense level because his 2011 Louisiana conviction for possession with intent to distribute cocaine does not constitute a “controlled substance offense” under the Sentencing Guidelines, and (2) he did not qualify for the four-level enhancement under § 2K2.1(b)(6)(B) because he was not engaged in a “drug trafficking offense in connection with his convictions.” The probation officer refuted Augillard’s objections and

declined to modify the PSR. At sentencing, the district court heard arguments from the parties and overruled both of Augillard’s objections. The district court sentenced Augillard to a term of 70 months of imprisonment and three years of supervised release. Augillard timely appealed.

II

We review the district court’s interpretation and application of the Sentencing Guidelines de novo and its factual findings for clear error. *United States v. Abrego*, 997 F.3d 309, 312 (5th Cir. 2021). The government “bears the burden of showing, by a preponderance of the evidence, the facts necessary to support an elevated base offense level.” *United States v. Luna-Gonzalez*, 34 F.4th 479, 480 (5th Cir. 2022).

III

Augillard raises four issues on appeal. We address each in turn.

A

The first issue is whether the district court erred in concluding that Augillard’s previous cocaine conviction is a “controlled substance offense” under § 2K2.1(a)(3). Augillard argues that his 2011 Louisiana conviction for possession with intent to distribute cocaine was not a controlled substance offense under § 2K2.1(a)(3) because Louisiana’s definition of a controlled substance was *broad*er than the federal definition, so he did not need to rely on an actual case establishing that facial discrepancy. The government concedes that Augillard’s Louisiana statute of conviction is facially overbroad when placed side by side with the federal definition because it does not exclude Ioflupane, but it defends the district court’s application of the “realistic probability” test to

require Augillard to cite a state court case showing that overbreadth.

The Sentencing Guidelines define a “controlled substance offense” as a “federal or state” offense “punishable by imprisonment for a term exceeding one year, that . . . prohibits the manufacture, import, export, distribution, or dispensing of a *controlled substance* (or a counterfeit substance) or the possession of a *controlled substance* (or a counterfeit substance) with the intent to manufacture, import, export, distribute, or dispense.” *United States v. Minor*, 121 F.4th 1085, 1088–89 (5th Cir. 2024) (quoting U.S.S.G. § 4B1.2(b)) (emphasis in original). Because the Guidelines do not define “controlled substance,” we take cues from the Controlled Substance Act’s (“CSA”) definition of controlled substance. *See, e.g., United States v. Gomez-Alvarez*, 781 F.3d 787, 792–94 (5th Cir. 2015) (linking the definition of controlled substance in Guideline § 2L1.2 to the definition of controlled substance provided by the CSA); *United States v. Arayatanon*, 980 F.3d 444, 453 n.8 (5th Cir. 2020) (same). After consulting the CSA’s definition, we must then employ the categorical approach, which prescribes that a “prior conviction cannot serve as a predicate offense under the Career Offender Guideline provision” if the “crime of conviction criminalizes a ‘greater swath of conduct’ than the elements of the relevant Guidelines offense.” *Minor*, 121 F.4th at 1089 (quoting *Mathis v. United States*, 579 U.S. 500, 509 (2016)). Thus, to give effect to that approach, we must look to the “the statutory definition at issue” and compare the elements of that prior state offense to the current version of the CSA. *Id.* at 1090.

Here, the parties agreed at sentencing and on appeal that Augillard’s 2011 Louisiana statute of

conviction contained a broader definition of controlled substance than the CSA's definition because Louisiana's definition of cocaine did not expressly exclude Ioflupane—a cocaine-derivative substance that, by contrast, was expressly excluded from the CSA's definition. The district court tacitly embraced the parties' agreement that the definitions did not neatly match, but it nevertheless upheld the application of § 2K2.1(a)(3)'s enhanced base offense level of 22 because Augillard was unable to pinpoint a case in which Louisiana had prosecuted anyone for Ioflupane under the Louisiana statute of conviction.¹

The basis for the district court's decision was premised on the “realistic probability” test, which derives from the Supreme Court's decision in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007).

¹ The 2011 version of the Louisiana statute generally includes cocaine derivatives, so it is not clear from the text itself whether Ioflupane would have been exempted. *Compare* La. Stat. Ann. § 40:964, Schedule II(A)(4) (2011) (“Coca leaves, cocaine, ecgonine and any salt, isomer, salt of an isomer, compound, derivative, or preparation of coca leaves, cocaine or ecgonine and any salt, isomer, salt of an isomer, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.”), *with* 21 C.F.R. § 1308.12(b)(4)(ii) (current) (“Coca leaves (9040) and any salt, compound, derivative or preparation of coca leaves (including cocaine (9041) and ecgonine (9180) and their salts, isomers, derivatives and salts of isomers and derivatives), and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, *except that the substances shall not include . . . ioflupane*” (emphasis added)). Louisiana later modified the statute to clearly exempt Ioflupane from its definition of cocaine derivatives. La. Stat. Ann. § 40:964, Schedule II(A)(4) (2016).

There, the Court applied the categorical approach when reviewing whether the Ninth Circuit properly determined that an alien's prior California conviction for car theft did not constitute a generic theft offense under 8 U.S.C. § 1227(a)(2)(A) because the California statute included aiding and abetting. *Gonzalez*, 549 U.S. at 185–88. The Court held that “to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute’s language.” *Id.* at 193. Instead, the defendant was required 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.” *Id.* (emphasis added). To successfully make that showing, the defendant “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.* Thus, the Court imposed an actual case requirement. *Id.*

The Fifth Circuit in *United States v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc), picked up where *Duenas-Alvarez* left off and employed the categorical approach to assess whether a defendant's prior Texas conviction for unlawful possession of a firearm by a felon amounted to an aggravated felony for purposes of an enhancement under § 2L1.2(b)(1)(C) of the Sentencing Guidelines. *Id.* at 220–22. By its terms, the Texas statute's definition of felon was “plainly broader than its federal counterpart.” *Id.* at 223. But Castillo-Rivera did not identify any case showing that Texas courts “*actually applied*” the Texas statute's definition of felon in a broader way. *Id.*

On review, the en banc court concluded that Castillo-Rivera failed to establish a realistic probability based on the actual case requirement. *Id.* at 222. Instead, his argument was premised on speculation that “numerous crimes *could* be considered felonies under the Texas statute . . . that are not felonies under federal law.” *Id.* at 222. But such speculation invited the same “legal imagination to a state statute’s language” that the Supreme Court squarely rejected in *Duenas-Alvarez*. *Id.* (quoting *Duenas-Alvarez*, 549 U.S. at 183, 193). The dissent in *Castillo-Rivera* sought to dispense with the actual case requirement for facially overbroad statutes, but the en banc court held that such a position could not be squared with the Supreme Court’s unequivocal directive in *Duenas-Alvarez* that a defendant must “at least” point to an actual case. *Id.* at 223 (quoting *Duenas-Alvarez*, 549 U.S. 183, 193). “In short, without supporting state case law, interpreting a state statute’s text alone is simply not enough to establish the necessary ‘realistic probability.’” *Id.* (quotations omitted). Thus, the en banc court in *Castillo-Rivera* held that there was “no exception to the actual case requirement . . . where a court concludes a state statute is broader on its face.” *Id.* at 223.

Augillard resurrects the same theory the en banc court rejected in *Castillo-Rivera*, but this time with new authority that supposedly compels a different outcome. To circumvent *Castillo-Rivera* and contend that the realistic probability test is no longer applicable to a facially overbroad statute, Augillard argues that the Supreme Court abrogated *Castillo-Rivera* in part in *United States v. Taylor*, 596 U.S. 845 (2022).

In *Taylor*, the Supreme Court reviewed whether Taylor’s attempted Hobbs Act robbery offense

constituted a crime of violence under 18 U.S.C. § 924(c)(3)(A). 596 U.S. at 848. After applying the categorical approach, the Court concluded that attempted Hobbs Act robbery did not satisfy the definition of a crime of violence. *Id.* at 850–52, 858–59. Critically, the *Taylor* Court declined to extend the realistic probability test from *Duenas-Alvarez* for two reasons. First, unlike *Duenas-Alvarez*, there were no federalism concerns because that case concerned an immigration statute that “required a federal court to make a judgment about the meaning of a state statute,” whereas the comparison of a federal statutes in *Taylor* did not. *Id.* at 859. Second, unlike *Duenas-Alvarez*, which contained elements of state and federal offenses that “clearly overlapped,” there was simply “no overlap” between the Hobbs Act and the elements under § 924(c)(3)(A). *Id.* For these reasons, the Court held, the realistic probability test was inapplicable. *See id.*

Augillard seizes on the second reason articulated in *Taylor* and presses that the realistic probability test applies only when the two statutes at issue “clearly overlap” in a relevant way. He also flags another Supreme Court decision, *Brown v. United States*, 602 U.S. 101 (2024), that he believes “leaves no doubt” that *Castillo-Rivera* is abrogated.

The government pushes back against Augillard’s interpretation, arguing that our decision in *Minor*, which was issued after *Taylor*, expressly noted that we “continue to apply that realistic probability test to state court convictions.” *Minor*, 121 F.4th at 1093 n.9. Augillard construes that statement as dictum and therefore not binding on this court. *See United States v. Segura*, 747 F.3d 323, 328 (5th Cir. 2014) (explaining that “the binding force of earlier opinions” does not extend to . . . dictum). The government,

however, presses that *Minor*'s footnote observation is binding after *Taylor*.

Without untangling that knot, we conclude today that neither *Taylor* nor *Brown* abrogated *Castillo-Rivera*. We address each case in turn, but we embrace the sound reasoning laid forth by *United States v. Kerstetter*, No. 22-10253, 2025 WL 1079071, at *4 (5th Cir. April 10, 2025) (per curiam).²

By its own terms, *Taylor* did not overrule *Duenas-Alvarez*. The Supreme Court simply declined to extend the realistic probability test in that case because there were no federalism concerns and no overlapping elements. 596 U.S. at 859. But that is a far cry from overturning or disavowing the realistic probability test. So, if *Duenas-Alvarez* remains good law, then so does *Castillo-Rivera*, which applies the actual case requirement. For this reason alone, we conclude that *Taylor* did not abrogate *Castillo-Rivera*.

Moreover, in the wake of *Taylor*, our court has routinely applied the realistic probability test in published decisions, even though those cases do not explicitly mention *Taylor* by name. *See, e.g., United States v. Russell*, 136 F.4th 606, 612 (5th Cir. 2025), *cert. denied*, 2025 WL 2824431 (U.S. Oct. 6, 2025) (No. 25-5334) (applying the realistic probability test without mentioning *Taylor* to determine whether a defendant's prior Tennessee conviction constituted a crime of violence for purposes of § 2K2.1(a)(1)); *Ponce v. Garland*, 70 F.4th 296 (5th Cir. 2023) (applying the realistic probability test without mentioning *Taylor* in the immigration context); *Alejos-Perez v. Garland*, 93

² Unpublished decisions issued in or after 1996 "are not precedent" except in limited circumstances, 5th Cir. R. 47.5.4, but they "may be persuasive authority," *Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006).

F.4th 800, 805 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 591 (2024) (same); *Khan v. Garland*, 69 F.4th 265, 269–70 (5th Cir. 2023) (same).³ Silence could suggest those cases were unaware of *Taylor*, but that seems highly implausible. Instead, our silence reflects that these cases, unlike *Taylor*, involved comparing a *state* statute of conviction with *federal* law. Thus, *Taylor* was not mentioned because it was simply inapplicable.

Brown does not rescue Augillard’s position, either. There, the Supreme Court held that “a prior state drug conviction constitutes an [Armed Career Criminal Act] predicate if the drugs on the federal or state schedules matched when the state drug offense was committed.” 602 U.S. at 119. But nowhere in that opinion does the Court mention *Duenas-Alvarez* or the realistic probability test. Thus, we are hard-pressed to conclude *Brown* abrogated *Castillo-Rivera*. See *United States Alcantar*, 733 F.3d 143, 146 (5th Cir. 2013) (“[A]n intervening change in the law must be *unequivocal*, not a mere ‘hint’ of how the Court might rule in the future.” (emphasis added)).

Much circuit authority exists for the proposition that the realistic probability test is alive and well in the aftermath of *Taylor* and *Brown*. By contrast, there is no decision of this court holding that *Castillo-Rivera* has been abrogated. Without “an intervening change in the law, one panel of our court may not overturn

³ And those are just the published cases. We have unpublished ones applying the realistic probability test after *Taylor*, too. See, e.g., *Kerstetter*, 2025 WL 1079071, at *4; *United States v. Edmond*, No. 24-30255, 2025 WL 2017287, at *2 (5th Cir. July 18, 2025); *United States v. Porterie*, No. 22-30457, 2025 WL 457999, at *4 (5th Cir. Feb. 11, 2025), *cert. denied*, 2025 WL 2824084 (U.S. Oct. 6, 2025) (No. 24-7460).

another panel’s decision.” *United States v. Clark*, 49 F.4th 889, 892 (5th Cir. 2022). We conclude that there has been no such change in the law, so we decline Augillard’s invitation to hold otherwise.

Accordingly, we hold that the district court properly applied the realistic probability test to Augillard’s 2011 Louisiana conviction for possession with intent to distribute cocaine. Because Augillard failed to locate a Louisiana case in which a defendant was prosecuted for possession of Ioflupane, he failed to satisfy the realistic probability test. *Castillo-Rivera*, 853 F.3d at 222. Thus, the district court did not err in determining that Augillard’s 2011 Louisiana conviction was a controlled substance offense.

B

The second issue on appeal is whether the district court clearly erred in finding that Augillard possessed a firearm in connection with another felony for purposes of the four-level enhancement under § 2K2.1(b)(6)(B). Augillard argues that the district court clearly erred because its decision was premised on “pure speculation and assumptions,” “not reliable, specific evidence” that he “was ‘engaged in more than just simple possession’ when he possessed marijuana and cocaine” during Mardi Gras. The government defends the four-level enhancement, arguing that the district court did not clearly err in finding that Augillard intended to distribute the individual bags of contraband.

“Due process requires that sentencing facts be established by a preponderance of the evidence.” *United States v. Windless*, 719 F.3d 415, 420 (5th Cir. 2013) (cleaned up). We “may only affirm the district court’s application of if it is ‘plausible’ in light of the

record as a whole” that Augillard’s “possession of the firearm ‘facilitated, or had the potential of facilitating,’ the drug possession.” *United States v. Jeffries*, 587 F.3d 690, 693 (5th Cir. 2009). The possession of a firearm and contraband in proximity supports the enhancement when the other felony offense is a drug *trafficking* crime. See § 2K2.1, cmt. n.14(B)(ii) (explaining that the enhancement applies “in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia”); see also *Jeffries*, 587 F.3d at 692 (noting that the enhancement “automatically applies” in that situation). By contrast, the mere possession of a firearm and contraband in proximity—alone—does not support that same presumption when the other felony offense is a drug *possession* crime. *Id.* at 692–93. Additional facts must be evinced to show the gun “emboldened” Augillard to engage in drug possession or “served to protect” the drugs. *Id.* at 694.

Here, the district court correctly found that there was “sufficient reason to believe that” Augillard “was engaged or intended to engage in more than just simple possession.” Unlike *Jeffries*, where we vacated a sentence when the defendant was arrested with a gun and a single rock of crack cocaine in his car as evidence “too sparse” to support the enhancement under § 2K2.1(b)(6)(B), the record shows more specific facts in this case. *Jeffries*, 587 F.3d at 695. In February 2023, Augillard was arrested on Bourbon Street during the Mardi Gras festivities, where he possessed a .40 caliber firearm loaded with nineteen rounds, three small baggies containing a total of 28.7 grams of marijuana, and one small baggie containing 10.46 grams of cocaine. Later that year, he was arrested again with drugs—including cocaine, heroin,

and fentanyl in “small plastic baggies”—and a loaded 9mm firearm. The sheer volume of drugs Augillard possessed during Mardi Gras, accompanied with the distinct packaging for each drug, reasonably supports the factual finding that Augillard’s possession of the *loaded* firearms had the potential to facilitate his distribution of the drugs. *Jeffries*, 587 F.3d at 693. Unlike *Jeffries*, which involved a “small quantity of drugs and a gun in the same vehicle,” *id.* at 695, Augillard possessed a much larger quantity of packaged drugs on Bourbon Street during one of the most celebrated festivals in the world while in possession of a loaded firearm.

Reviewed cumulatively, the facts in this case reasonably support the district court’s factual finding that Augillard’s possession of a gun “facilitated, or had the potential of facilitating,” the drug possession. Thus, because the district court did not clearly err in its factfinding, we AFFIRM the district court’s application of § 2K2.1(b)(6)(B) to Augillard’s sentence.

C

The third issue is whether the district court’s written judgment conflicts with its oral pronouncement. Augillard argues that the drug treatment condition in the written judgment conflicts with the district court’s oral pronouncement. The PSR recommended a series of “special” conditions of supervision, including requiring Augillard to “undergo random urinalysis.” That condition also stated: “If the defendant tests positive for the use of illegal narcotics, [he] may be required to participate in an approved outpatient treatment program for substance abuse.” At sentencing, the district court adopted that condition, and stated,

Based on the defendant's history of substance abuse, the defendant shall undergo random urinalysis. If the defendant tests positive for the use of illegal narcotics, the defendant may be required to participate in an approved outpatient treatment program for substance abuse and abide by all supplemental conditions of treatment.

The written judgment took it a step further. It required, along with the random urinalysis testing, that Augillard "shall participate in an approved outpatient treatment program for drug and/or alcohol and abide by all supplemental conditions of treatment." Augillard argues that this "broadened" the condition as pronounced, and such a conflict requires the written judgment to be revised. The government concedes this point.

Because this condition is not mandatory under 18 U.S.C. § 3538(d), the district court was required to pronounce it at sentencing. *See United States v. Diggles*, 957 F.3d 551, 559 (5th Cir. 2020) (en banc). It did not. And because Augillard did not have an opportunity to object before the district court to the new terms added in the written judgment, "we review for abuse of discretion." *United States v. Martinez*, 47 F.4th 364, 366 (5th Cir. 2022).

We agree with the parties that a conflict exists because the written judgment in this case "broadens the restrictions or requirements of supervised release" from the oral pronouncement. *United States v. Mireles*, 471 F.3d 551, 558 (5th Cir. 2006). For that reason, the district court abused its discretion in failing to pronounce that condition, *id.*, and the "oral pronouncement controls," *United States v. Nelson*, 114 F.4th 478, 481 (5th Cir. 2024) (per curiam), *cert.*

denied, 114 F.4th 478 (U.S. Nov. 4, 2024). When a discretionary condition, such as the special release one in this case, “*conflicts* with the sentence as orally pronounced,” it “must be excised on remand.” *United States v. Currier*, 160 F.4th 656, 657 (5th Cir. 2025) (emphasis in original). That bright-line remedial rule from *Currier* requires—“at a minimum”—that the conflicting discretionary condition in the written judgment here “be erased by the district court on remand.” *Id.* at 663.

Accordingly, Augillard’s judgment of sentence is VACATED in part and REMANDED to the district court to amend the written judgment to conform to its oral pronouncement.

D

The fourth and final issue is whether 18 U.S.C. § 922(g)(1) violates the Second Amendment, either facially or as applied to Augillard. That issue, as the parties properly concede, is foreclosed by our circuit precedent. *E.g.*, *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024) (facial challenge); *United States v. Kimble*, 142 F.4th 308 (5th Cir. 2025) (as-applied challenge).

IV

For these reasons, we AFFIRM the district court’s conclusion that Augillard’s previous cocaine addiction is a “controlled substance offense” under § 2K2.1(a)(3) as well as its factual finding that Augillard possessed a firearm in connection with another felony under § 2K2.1(b)(6)(B). But because the district court’s written judgment conflicts with its oral pronouncement, we VACATE in part Augillard’s judgment of sentence and REMAND to the district court to amend the written judgment accordingly.

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**P-R-O-C-E-E-D-I-N-G-S
(SEPTEMBER 26, 2024)
(REARRAIGNMENT HEARING)**

* * *

THE COURT: Okay. I'm going to overrule the objections.

The objection about the four-level enhancement, I think there's sufficient reason to believe that he was engaged or intended to engage in more than just simple possession.

The other objection, I think this issue from Judge Morgan's case – I've read her case, and I also read the appellate briefs in that case -- because that case is on appeal right now, right?

MR. THOMPSON: Sure.

THE COURT: Has there been oral argument or anything in that case? What's the status of the appeal?

MR. THOMPSON: If it's the one I'm thinking of, I believe it's pending oral argument.

THE COURT: Okay. Judge Morgan found that this reasonable probability of prosecution for this derivative, that would not apply in this type of case,

but the government -- again, I honestly have not read all these cases myself because I just saw this brief this morning. It seems that the government was able to cite a number of different cases, not just the case that was in Judge Morgan's opinion, where the courts say that in this situation that there's a need for the defendant to show that there's some reasonable probability that the state would have prosecuted someone for this category of substances that is not found in the federal statute. I don't even know how to pronounce that name.

MR. THOMPSON: I gave it a guess, ioflupane, but --

THE COURT: That's good enough.

The government points out that they have done research too -- and apparently you have too -- and there's not a single case that anybody could cite to the Court where Louisiana ever prosecuted someone for that offense, for that drug substance before. At some point both the state and the federal government excluded it, clearly. Right?

MR. THOMPSON: That's correct, Judge.

THE COURT: But when it was still part of the state statute, no one had ever been prosecuted for it as far as we know.

MR. THOMPSON: Right, not that I'm aware of. I think the defense -- their argument in sum is that *Taylor* precludes the reasonable probability test from being applied when it's facially broad.

THE COURT: Anyway, for those reasons I'm going to overrule the two objections. Let's talk about, then, adopting the guidelines.

* * *

THE COURT: Pursuant to the Sentencing Reform Act of 1984 and considering the provisions found in 18 U.S.C. § 3553, it is the judgment of the Court that the defendant, Julius Augillard, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 70 months. This term consists of 70 months as to each of Counts 1 and 2, to be served concurrently.

It is the finding of the Court that the defendant is not able to pay a fine. Accordingly, no fine is imposed.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years. This term consists of three years as to each of Counts 1 and 2, to be served concurrently.

Within 72 hours of release from custody, the defendant shall report in person to the probation office in the district to which he is released. While on supervised release, the defendant shall not commit any federal, state, or local crimes, shall be prohibited from possessing a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall not possess a controlled substance, shall cooperate in the collection of DNA, and shall comply with all other standard conditions of supervised release, including the following special conditions:

(1) Based on the defendant's history of substance abuse, the defendant shall undergo random urinalyses.

If the defendant tests positive for the use of illegal narcotics, the defendant may be required to participate in an approved outpatient treatment program for substance abuse and abide by all supplemental conditions of treatment.

(2) Based on the nature of the instant offense and the defendant's criminal history, the defendant shall submit his person, property, house, residence, vehicle, papers, or office or other areas under his control to a search conducted by a U.S. probation officer at a reasonable time in a reasonable manner. The defendant shall advise any other residents or occupants that the premises may be subject to such searches. Failure to submit to such search may be grounds for revocation.

(3) To prepare the defendant for suitable employment and assist the defendant with establishing a prosocial network, the defendant shall pursue a high school equivalency diploma and/or vocational training as directed by his probation officer.

(4) To assist the defendant with developing better decision-making skills, the defendant shall participate in an approved cognitive behavioral therapeutic treatment program and abide by all supplemental conditions of treatment.

It is further ordered that the defendant pay the mandatory special assessment of \$100 for each of the two counts or a total of \$200.

The Court also recommends to the Bureau of Prisons that while he is incarcerated, Mr. Augillard be afforded an opportunity to enroll in Bureau of Prisons educational and/or vocational programs for which he may be suited and also that he be afforded an opportunity to enroll in Bureau of Prisons substance abuse or drug treatment programs.

Because there were weapons involved here, I think he is probably not eligible to get reduction of sentence --

MR. THOMPSON: I think he is eligible for earning time credits but not RDAP, but he can participate in them.

THE COURT: Okay. So to the extent he is eligible to participate, I'm making that recommendation. I think that's it.

There was a plea agreement with the usual waivers in this case or was there not?

MR. HUBBLE: No, Judge, no plea agreement.

THE COURT: No plea agreement. Okay.

Mr. Augillard, you have a right to appeal your sentence. Any such appeal would ordinarily have to be filed within 14 days of today. If you needed an attorney to represent you for such appeal and could not afford one, the Court would appoint an attorney for you. If you needed a transcript of today's hearing or any other hearing or proceeding in your case and you could not afford that transcript, again the Court would provide those without any cost to you.

22a

APPENDIX C

In the
United States Court of Appeals
For the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 18, 2026
Lyle W. Cayce, Clerk

No. 25-30192

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

JULIUS AUGILLARD

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Louisiana.
USDC No. 2:24-CR-90-1

ON PETITION FOR REHEARING EN BANC

Before CLEMENT, DOUGLAS, and RAMIREZ, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R.40 I.O.P.), the petition for panel rehearing is DENIED. The petition for rehearing en banc is DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P.40 and 5TH CIR. R.40).

In the en banc poll, four judges voted in favor of rehearing: CHIEF JUDGE ELROD, and JUDGES RICHMAN, GRAVES, and HIGGINSON.

Thirteen voted against rehearing: JUDGES JONES, SMITH, STEWART, SOUTHWICK, HAYNES, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, WILSON, DOUGLAS, and RAMIREZ.

ANDREW S. OLDHAM, *Circuit Judge*, concurring in the denial of rehearing en banc:

Thirty-six years ago, the Supreme Court announced the categorical approach. *See Arthur Taylor v. United States*, 495 U.S. 575 (1990). Ever since, “the categorical approach has developed a reputation for crushing common sense in any area of the law in which its tentacles find an inroad.” *United States v. Escalante*, 933 F.3d 395, 406 (5th Cir. 2019); *accord post*, at 11 (ELROD, C.J., dissenting from the denial of rehearing en banc). It often leads to “counterintuitive,” “bewildering,” and grotesque results. *Alejos-Perez v. Garland*, 93 F.4th 800, 811–12 (5th Cir. 2024) (OLDHAM, J., concurring). No federal

judge has a nice thing to say about it. *See, e.g., United States v. Cervenak*, 135 F.4th 311, 342–44 (6th Cir. 2025) (en banc) (GRIFFIN, J., dissenting) (collecting citations from dozens of federal judges). And yet, the inferior federal courts all too often encourage the doctrine’s metastasis. *See Alejos-Perez*, 93 F.4th at 811 (OLDHAM, J., concurring) (describing the expansion of the categorical approach across federal criminal law, immigration law, and sentencing).

But not today. In this case, our court voted overwhelmingly to retain a small but important limit on the categorical approach. That result accords with Supreme Court precedent. And it maintains a last bastion of reality in a doctrinal area that’s increasingly reminiscent of a Miró painting.

I

As everyone knows well by now, the categorical approach is counterintuitive at best. To determine whether Defendant A committed a crime of violence (for the purpose of certain sentencing enhancements), a court cannot ask whether Defendant A himself committed a crime of violence. Rather, the categorical approach requires courts to adjudicate hypothetical and imaginary cases.¹ Why? Because the categorical approach commands us to ignore Defendant A’s *actual* violence and to focus instead on whether some

¹ It is unclear how this is consistent with Article III. “[A]djudicating hypothetical cases can be tough to reconcile with both the prohibition on hypothetical jurisdiction, *see Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998), and also the prohibition on advisory opinions, *see Correspondence of the Justices*, in WILLIAM BAUDE, ET AL., HART AND WECHSLER’S FEDERAL COURTS AND THE FEDERAL SYSTEM 67–69 (8th ed. 2025).” *Nathan v. Alamo Heights Indep. Sch. Dist.*, 173 F.4th 576, 614 (5th Cir. 2026) (OLDHAM, J., concurring).

imaginary non-defendant could *hypothetically* commit the same crime non-violently.

This leads to some absurd proceedings in federal court. To take just one example, we once debated far-fetched hypotheticals about poisoned orange juice and assisted suicide to determine whether a man committed a crime of violence by beating his brother-in-law to death with a baseball bat. *United States v. Reyes-Contreras*, 910 F.3d 169, 175, 185 (5th Cir. 2018) (en banc). And outrageously, our court once applied the categorical approach to hold that a “35-year-old who sexually abused a 14-year-old cannot be categorized as a tier II sex offender.” *Escalante*, 933 F.3d at 407.

The categorical approach is a windfall for violent criminals. It allows them to escape the reach of the law—even when their felonies are obviously violent. And the average law-abiding American would no doubt be shocked to learn that our courts deem convicted rapists, murders, carjackers, kidnappers, and domestic abusers “not violent.” See *Alejos-Perez*, 93 F.4th at 812 (OLDHAM, J., concurring) (collecting examples).

II

The actual-case rule is a glimmer of sunshine in the otherwise-bleak landscape of the categorical approach.

Here is how it works. Federal law imposes sentencing enhancements for certain predicate felonies. For example, the *Arthur Taylor* Court considered the federal Armed Career Criminal Act (“ACCA”), which imposed a sentencing enhancement for the predicate felony of “burglary.” 495 U.S. at 589, 598. What is “burglary” in the federal sense? *Arthur Taylor* held it’s burglary in “the generic sense in which

the term is now used in the criminal codes of most States.” *Id.* at 598. So if a defendant is convicted of burglary in State A, that conviction counts as a burglary conviction under ACCA—so long as the elements of burglary in State A match the elements of “generic” burglary in the States more generally. And in performing that element-matching analysis, courts must apply the categorical approach: The relevant inquiry is whether the elements categorically match—not necessarily whether the defendant committed an act that everyone on the planet earth would recognize as burglary.

But what if the relevant State’s law is *broader* than the generic offense? The categorical approach suggests a windfall for the defendant. If State B criminalizes, say, theft in a way that’s broader than the generic elements for theft in the States more generally, then the defendant could argue that his offense is not categorically considered theft. And under the categorical approach, it would not matter that the defendant obviously stole something. All that would matter, our defendant would say, is that State B has a broader definition of theft than the generic definition in the States more generally, so theft in State B does not categorically constitute theft.

The Supreme Court placed important limits on such hypothetical adjudication in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). In *Duenas-Alvarez*, the Court made clear that if a defendant argues that State B’s definition of a crime is broader than the generic definition, he 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.” *Id.* at 193. To do so, a defendant “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.” *Ibid.*

The actual-case rule imposes a reality check on the categorical approach. As the Court recognized in *Duenas-Alvarez*, the actual-case requirement ensures that the existence of a categorical match does not merely depend on “the application of legal imagination to a state statute’s language.” *Ibid.* In this way, the *Duenas-Alvarez* rule helps ameliorate the “byzantine-like” process that often forces judges to engage in “rigorous abstract reasoning” and reach results that are “almost certainly contrary to any plain reading of the statute.” *Escalante*, 933 F.3d at 406–07.

Our circuit faithfully applied this rule in *United States v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc). Citing *Duenas-Alvarez*, we rejected the defendant’s position that he did not have to point to an “actual case” in which the State has applied its criminal statute in a way that was broader than the generic offense. *Id.* at 223. The defendant’s position, we emphasized, “does not comply with the Supreme Court’s directive in *Duenas-Alvarez*.” *Ibid.* *Castillo-Rivera* has provided the governing rule in our circuit for the last nine years.

The Supreme Court has repeatedly demonstrated that the *Castillo-Rivera* approach is correct. Time and again, the Court has required defendants to show that States *actually* apply their laws in ways that are broader than the relevant federal statute. *See James v. United States*, 550 U.S. 192, 202 (2007), *overruled on other grounds by Samuel Johnson v. United States*, 576 U.S. 591 (2015) (recognizing that “while [Florida’s] statutory language is broad, the Florida Supreme Court has considerably narrowed its application in the context of attempted burglary”);

Curtis Johnson v. United States, 559 U.S. 133, 138 (2010) (“We are . . . bound by the Florida Supreme Court’s interpretation of state law, including its determination of the elements” of the statute in question); *Moncrieffe v. Holder*, 569 U.S. 184, 206 (2013) (“To defeat the categorical comparison in this manner, a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms.”).

And thankfully so. The actual-case rule that comes from *Duenas-Alvarez* and *Castillo-Rivera* means that in at least one corner of the categorical approach, a defendant can win relief only by pointing to actual cases. Imaginary hypotheticals, here at least, are insufficient. Our court wisely decided not to jettison the actual-case rule in favor of still more fanciful extensions of the categorical approach.

III

Finally, a few words about today’s dissenting opinion. I address (A) the Supreme Court’s *Justin Taylor* case and (B) the existence of the circuit split.

A

The dissenting opinion posits that the Supreme Court *sub silentio* overruled *Duenas-Alvarez* in *Justin Taylor*. *Post*, at 15–17 (ELROD, C.J., dissenting from the denial of rehearing en banc) (citing *United States v. Justin Taylor*, 596 U.S. 845 (2022)). I respectfully disagree.

The question in *Justin Taylor* was whether Hobbs Act robbery—a federal offense, not a state one—was a crime of violence under 18 U.S.C. § 924(c)(3)(A). 596 U.S. at 148. The Court rejected the Government’s argument, premised on *Duenas-Alvarez*, that federal prosecutors had never applied Hobbs Act robbery in an overbroad fashion. *Id.* at 858–59. The Court found

Duenas-Alvarez inapplicable. Because a federal court was construing a federal statute, the Court obviously had no reason to consider the elements of generic robbery in the States. *Ibid.*

But when federal judges interpret state law, the Court made clear, federalism requires us to defer to state courts' *actual* applications of state law. Far from overruling *Duenas-Alvarez*, *Justin Taylor* reaffirmed it: "Appreciating the respect due state courts as the final arbiters of state law in our federal system, [*Duenas-Alvarez*] reasoned that it made sense to consult how a state court would interpret its own State's laws." *Id.* at 859 (emphasis added). So, the fact that the *Justin Taylor* Court did not look past the text of the federal Hobbs Act says nothing about what a federal judge must do when interpreting a state statute. If anything, the *Justin Taylor* decision reaffirmed the rule announced in *Duenas-Alvarez*, and repeated in *James*, *Curtis Johnson*, and *Moncrieffe*.

It's no answer to say that the actual-case rule is limited to cases of a "facial mismatch" between the state statute and the relevant federal counterpart. *See post*, at 16 (ELROD, J., dissenting from denial of rehearing en banc). The Supreme Court in *James* rejected this attempted distinction. In that case, the question was whether Florida's attempt statute swept beyond ACCA's then-operative residual clause. 550 U.S. at 201–02. While Florida's law appeared broader "[o]n its face," the Court's inquiry did not end with statutory text. *Id.* at 202. As the Court recognized, state courts are free to "considerably narrow[]" a statute's application, so the Court followed the "consistent[] appli[cation]" of Florida law in Florida courts. *Id.* at 202–03; *see also Cervenak*, 135 F.4th at 365 (THAPAR, J., dissenting) (observing that the

actual-case rule “recognizes that no matter how clear the state statute’s text may appear ‘[o]n its face,’ the state courts are free to ‘considerably narrow[] its application’” (quoting *James*, 550 U.S. at 202)).

In this way, the Supreme Court has instructed that the actual-case rule does not disappear in the face of a facial mismatch.²

B

Next, the dissent points to the supposed existence of a circuit split. *Post*, at 17–18. Even assuming the dissenting opinion is correct about the nature and division of that split, I commend the en banc court for not trying to resolve it here. Consider three points.

First, the categorical approach has been with us for almost two generations. In that time, it has bedeviled the inferior federal courts. Predicting how it should apply is as hard as knowing the position and momentum of an electron. So if further innovation is warranted in this area, we should await direction from the Supreme Court.

Second, if and when the Supreme Court reconsiders the actual-case rule, it’s not obvious that

² The dissent claims that my citation to *Moncrieffe* is “particularly puzzling” because “[t]he Court did not look to see if there were cases in Georgia that had actually” been prosecuted in a way that was broader than the federal law. *Post*, at 18 n.3 (ELROD, C.J., dissenting from the denial of rehearing en banc). That itself is a puzzling assertion. In determining that the Georgia statute was overbroad, the Court declared, “we know that Georgia prosecutes this offense” in an overbroad way—and then cited two state court cases that proved the Georgia statute’s *actual* overbreadth. *Moncrieffe*, 569 U.S. at 194 (citing *Taylor v. State*, 581 S.E.2d 386, 388 (Ga. App. 2003), and *Hadden v. State*, 353 S.E.2d 532, 533–534 (Ga. App. 1987)); see also Brief for the Petitioner at 19, *Moncrieffe v. Holder*, 569 U.S. 184 (No. 11-702) (citing Georgia cases).

it'll overrule *Duenas-Alvarez* and *Castillo-Rivera*. True, the story of the categorical approach is generally one of ever-wider expansion. See *Mathis v. United States*, 579 U.S. 500, 536–38 (2016) (ALITO, J., dissenting). But not always. *Duenas-Alvarez*, *James, Curtis Johnson*, and *Moncrieffe* all illustrate important limits on the doctrine.

Third, it's obviously the Supreme Court's prerogative to decide whether to take a case and whether to extend a doctrine. Just as it's the Supreme Court's prerogative alone to overrule *Duenas-Alvarez*. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). But from the perspective of an inferior court, it's noteworthy that the Supreme Court has considered and refused at least 23 cert petitions challenging the actual-case rule from *Duenas-Alvarez*. See Brief for the Respondent in Opposition at 14 n.3, *Zuniga-Ayala v. Garland*, 145 S. Ct. 768 (No. 24-103) (collecting 22); *Zuniga-Ayala v. Garland*, 145 S. Ct. 768 (2024) (mem.) (the 23rd). So it's not immediately obvious why the 24th would be different.

*

I therefore concur in the en banc court's lopsided vote to deny rehearing.

JENNIFER WALKER ELROD, *Chief Judge*, joined by HIGGINSON, *Circuit Judge*, dissenting from the denial of rehearing *en banc*:

“In the nearly three decades since its inception, the categorical approach has developed a reputation for crushing common sense in any area of the law in which its tentacles find an inroad.” *United States v. Escalante*, 933 F.3d 395, 406 (5th Cir. 2019) (Elrod, J.). It often leads to “counterintuitive,” “absurd”

conclusions and “reality-defying distinctions.” *Id.* at 407 (citation omitted). But we are bound to follow the decisions of the Supreme Court. In this area, our precedent does not.

In an attempt to tame the categorical approach’s tentacles, this court in *United States v. Castillo-Rivera* imposed an “actual case” requirement: A defendant must identify an actual case in which a state prosecuted conduct falling outside the federal statute even where the state statute is, on its face, broader than its federal counterpart. *See* 853 F.3d 218 (5th Cir. 2017) (en banc). I was in the majority in that case. At the time, I believed the “actual case” requirement to be a faithful application of the law. However, the Supreme Court in *United States v. Taylor* made clear that the “actual case” requirement is not the law. 596 U.S. 845 (2022). All ten of our regional sister circuits agree. We do not need to wait for the Supreme Court to correct us when it provides us with clear guidance. Accordingly, I respectfully dissent from the denial of rehearing *en banc*.

I

Defendant Julius Augillard pleaded guilty to two counts of unlawful possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Because one count involved a semiautomatic firearm capable of accepting a large-capacity magazine and Augillard had a prior felony for a “controlled substance offense”—a 2011 Louisiana conviction for possession with intent to distribute cocaine—the district court set his base offense level at 22. *See* U.S.S.G. § 2K2.1(a)(3). It sentenced him to 70 months’ imprisonment.

Section 2K2.1 borrows the definition of “controlled substance offense” from Section 4B1.2(b): an offense “under federal or state law” that prohibits “possession

of a controlled substance” with intent to distribute. U.S.S.G. § 4B1.2(b). The Guidelines do not further define “controlled substance.” We have held that “controlled substance” in the Guidelines refers only to substances covered by the federal Controlled Substances Act. *United States v. Gomez-Alvarez*, 781 F.3d 787, 794 (5th Cir. 2015).

Here is the wrinkle: The current federal CSA expressly excludes Ioflupane (a radioactive cocaine derivative used in medical imaging), while Louisiana’s 2011 cocaine definition did not. *See United States v. Minor*, 121 F.4th 1085, 1089 (5th Cir. 2024) (holding that we compare the predicate conviction with the federal CSA schedules as they exist “at the time of the current sentencing”).¹

Augillard contends that this facial mismatch disqualifies his prior conviction under the categorical approach. Faithfully applying our *en banc* precedent, the district court and the panel held that the facial mismatch did not disqualify the prior conviction because Augillard could not point to a Louisiana prosecution for possession of Ioflupane. *See Castillo-Rivera*, 853 F.3d at 223 (holding that there is “no exception to the actual case requirement” even “where a court concludes a state statute is broader on its face”).

II

Our “actual case” requirement not only places us on the short side of a 10-1 circuit split, but, more importantly, puts our circuit’s precedent in tension with the Supreme Court’s. First, I provide some

¹ The federal CSA did not exclude Ioflupane until 2015, so if we were to compare the 2011 Louisiana Controlled Substances Act with the 2011 federal Controlled Substances Act, there would be no mismatch.

background on the categorical approach and the origins of our “actual case” requirement. I then discuss why we should have revisited the issue *en banc*.

A

The “categorical approach” is an analytical tool for classifying offenses in specific immigration and criminal law contexts where prior offenses matter. Under the categorical approach, a court must compare “the statutory definitions of the prior offenses” to the relevant federal definition. *Shular v. United States*, 589 U.S. 154, 157 (2020). “A prior state conviction . . . does not qualify” as a predicate if the definition of the crime in the relevant state statute is “broader than” that of the relevant federal category. *United States v. Stitt*, 586 U.S. 27, 32 (2017) (citing *Mathis v. United States*, 579 U.S. 500, 504 (2016)).

Applying the categorical approach, courts must identify “the least of th[e] acts’ criminalized by the state statute” and “determine whether that conduct would fall within the federal definition of the crime.” *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 389 (2017) (alteration in original) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). “If any—even the least culpable—of the acts criminalized” by the state statute falls outside the federal definition, “the statute of conviction does not categorically match the federal standard, and so cannot serve as a[] [qualifying] predicate.” *Borden v. United States*, 593 U.S. 420, 424 (2021).

In *United States v. Castillo-Rivera*, we held *en banc* that a defendant cannot “simply point to certain crimes that may be included in [the state offense] but not the [federal offense].” 853 F.3d at 222. Rather, we held that a defendant must show that the state courts

“have *actually applied*” the state statute in the way that falls outside the federal statute. *Id.*

A word on where this rule comes from: In *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007), an immigration case, Duenas-Alvarez faced removal for an “aggravated felony,” which the INA defined to include “a theft offense.” 8 U.S.C. § 1101(a)(43)(G). His predicate conviction was for vehicle theft under California law, which expressly swept in “a party or an accessory to or an accomplice in the driving or unauthorized taking.” Cal. Vehicle Code § 10851(a). The Ninth Circuit held that § 10851(a) was categorically broader than generic theft because it reached aiders and abettors, not just principal takers. *See Penuliar v. Gonzalez*, 435 F.3d 961 (9th Cir. 2006).

The Supreme Court reversed. It held that generic theft includes accomplice liability. 549 U.S. at 189–90. Then after concluding that the text of the California statute was a match, the Court turned to Duenas-Alvarez’s argument that California applies its accomplice-liability doctrine so expansively that § 10851(a) reaches conduct beyond generic theft. *Id.* at 190–93. The Court concluded that a state crime outside the generic definition “requires more than the application of legal imagination to a state statute’s language”; it requires “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.” *Id.* at 193. The offender makes that showing by “point[ing] 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.* Our court looked to this language in *Duenas-Alvarez* when devising our actual case requirement. *Castillo-Rivera*, 853 F.3d at 223.

Duenas-Alvarez was *not* about a situation where the texts of the state and federal statutes conflict. The text of the state statute in that case was consistent with the federal statute. The claimed overbreadth rested entirely on how California courts might atypically construe its aider-and-abettor doctrine. The “actual case” requirement was the Court’s solution to speculative arguments about state-court interpretation. The Court was not confronting a statute that was overbroad on its face. In other words, the Court in *Duenas-Alvarez* left open the question of whether courts should apply the “actual case” requirement when the text of the state statute demonstrates that the state statute reaches conduct that the federal statute does not.

Our *en banc* court in *Castillo-Rivera* later grappled with that open question. Our court held in an 8-7 decision that there “is no exception to the actual case requirement articulated in *Duenas-Alvarez* where a court concludes a state statute is broader on its face.” 853 F.3d at 223. “[I]nterpreting a state statute’s text alone is simply not enough to establish the necessary ‘realistic probability,’” even when, as in *Castillo-Rivera*, the text of the state statute “is plainly broader than its federal counterpart.” *Id.*

B

We should have revisited our “actual case” holding in *Castillo-Rivera en banc* for three reasons.

First, our holding in *Castillo-Rivera* is inconsistent with intervening Supreme Court precedent: *United States v. Taylor*, 596 U.S. 845 (2022).

In *Taylor*, the Supreme Court addressed whether attempted Hobbs Act robbery qualifies as a “crime of violence” under 18 U.S.C. § 924(c)(3)(A)’s elements

clause, which requires that the offense have “as an element the use, attempted use, or threatened use of physical force.” Applying the categorical approach, the Court said no. *Taylor*, 596 U.S. at 851. Attempted Hobbs Act robbery requires only: (1) an intent to take property by force or threat of force, and (2) a substantial step toward that end. *Id.* (citing *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007)). The Court posited a hypothetical in which a defendant plans to rob a store, buys supplies, plots an escape route, recruits a getaway driver, and writes a threatening note. *Id.* at 851–52. When the defendant crosses into the store, the police immediately arrest him. *Id.* at 852. There is no question that the defendant committed the crime of an attempted Hobbs Act robbery. *Id.* And there is equally no question that the defendant did not use, attempt to use, or threaten physical force. *Id.*

The government invoked *Duenas-Alvarez*, faulting the defendant “for failing to identify a single case in which it has prosecuted someone for attempted Hobbs Act robbery without proving a communicated threat.” *Id.* at 857. The Court rejected that argument, stressing the “oddity of placing a burden on the defendant to present empirical evidence about the government’s own prosecutorial habits,” particularly 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.*

The Court distinguished *Duenas-Alvarez* on two bases. First, the issue in *Duenas-Alvarez* would have required a federal court to make a judgment about the meaning of a state statute, which implicates federalism concerns. *Id.* at 858–59. Second, “in *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.’” *Id.* at 859 (quoting *Duenas-Alvarez*, 549 U.S. at 193).

Taylor thus instructs that the realistic-probability test is inapplicable when either: (1) the text of the predicate statute is a mismatch with the federal definition, or (2) where the predicate offense is a federal crime. Neither circumstance implicates the federalism concern that animated *Duenas-Alvarez*. A facial mismatch requires no prediction because there is “no overlap to begin with.” *Taylor*, 596 U.S. at 859. The court need not “make a judgment about the meaning of a state statute” at all—the court needs only to read it. *Id.* The second situation does not implicate federalism concerns because even if there is a facial match between the predicate offense and the federal statute, if the predicate offense is a federal law, federalism is not implicated because the court is making a judgment about the meaning of a federal statute, not a state one.²

Second, we are alone in a 10-1 circuit split. Every other regional circuit has rejected an “actual case” requirement when a state statute is on its face broader than its federal counterpart. *See Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017) (holding that there is no need to show “a realistic probability that the state actually will prosecute offenses involving [a] particular drug” when “drug schedules make clear that the Rhode Island offense covers at least one drug

² The concurring opinion states that I “posit[] that the Supreme Court *sub silentio* overruled *Duenas-Alvarez*” in *Taylor*. *Ante*, at 7. That is incorrect. *Taylor* calls out *Duenas-Alvarez* by name, distinguishes it, and clarifies the conditions that must be met for it to apply. 596 U.S. at 858–59.

not on the federal schedules”); *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018) (“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.”); *Salmoran v. Att’y Gen.*, 909 F.3d 73, 81–82 (3d Cir. 2018) (holding that there is no need to identify “actual prosecution where the statute expressly authorizes the state government to enforce broader conduct”); *Gordon v. Barr*, 965 F.3d 252, 260 (4th Cir. 2020) (holding that “when the state, through plain statutory language, has defined the reach of a state statute to include conduct that the federal offense does not, the categorical analysis is complete”); *United States v. Cervenak*, 135 F.4th 311, 326 (6th Cir. 2025) (en banc) (holding that the “defendant need not provide caselaw when they can point to the text of the state statute”); *Aguirre-Zuniga v. Garland*, 37 F.4th 446, 450 (7th Cir. 2022) (“If the statute is overbroad on its face under the categorical approach, the inquiry ends.”); *Gonzalez v. Wilkinson*, 990 F.3d 654, 660 (8th Cir. 2021) (similar); *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1147 (9th Cir. 2020) (holding the realistic-probability test met if “state statute expressly defines a crime more broadly than the generic offense”); *United States v. Titties*, 852 F.3d 1257, 1274–75 (10th Cir. 2017) (holding that there is no need to point to an actual case where the statute is facially overbroad); *Aspilair v. Att’y Gen.*, 992 F.3d 1248, 1255 (11th Cir. 2021) (holding that the defendant may demonstrate that statutory language itself, “rather than the application

of legal imagination to that language,” satisfies realistic-probability test).³

³ Each of these decisions post-dates the three cases that the concurring opinion cites for the proposition that the Supreme Court “has required defendants to show that States *actually* apply their laws in ways that are broader than the relevant federal statute.” *Ante*, at 6–7. And those three cases do not prove the concurring opinion’s point. The first two are consistent with my proposed approach—we look to the statutory text to determine overbreadth unless *either* party shows that the state reads the text idiosyncratically. See *James v. United States*, 550 U.S. 192, 202 (2007) (noting that the Florida Supreme Court had narrowed the reach of certain statutory text); *Johnson v. United States*, 559 U.S. 133, 138 (2010) (noting that court is bound by the Florida Supreme Court’s construction of state statute).

The third case that the concurring opinion cites, *Moncrieffe v. Holder*, 569 U.S. 184 (2013), is particularly puzzling. The holding of *Moncrieffe* was that the Georgia Controlled Substances Act was not a categorical match to the federal Controlled Substances Act because the Georgia statute did not have an exception for social sharing of marijuana without remuneration, as the federal CSA did. *Id.* at 188–89. The Court did *not* look to see if there were cases in Georgia that had actually prosecuted social sharing of a small amount of marijuana—it relied on the plain language of the statute. The language from *Moncrieffe* that the concurring opinion quotes was responding to a hypothetical situation without statutory text to guide it. Here, the plain text reveals the overbreadth of the state statute.

The concurring opinion is incorrect that *Moncrieffe* “declared, ‘we know that Georgia prosecutes this offense’ in an overbroad way.” *Ante*, at 9 n.2 (quoting *Moncrieffe*, 569 U.S. at 194). The full quote from the opinion is: “we know that Georgia prosecutes this offense when a defendant possesses only a small amount of marijuana, *see, e.g., Taylor v. State*, 260 Ga. App. 890, 581 S.E.2d 386, 388 (2003) (6.6 grams), and that ‘distribution’ does not require remuneration, *see, e.g., Hadden v. State*, 181 Ga. App. 628, 628–629 (1987).” This not the showing that *Castillo-Rivera* requires. The Court cited *Taylor* to establish that Georgia

On facts materially identical to ours—a state cocaine statute that swept in Ioflupane—the Eleventh Circuit held that the prior conviction did not qualify, despite the total absence of any Ioflupane prosecution. *United States v. Miller*, 157 F.4th 1365, 1378 (11th Cir. 2025). Three other circuits have agreed. *United States v. Wilkes*, 133 F.4th 600, 603 n.3 (6th Cir. 2025) (noting that “it does not matter” that the defendant’s conviction did not involve Ioflupane and rejecting argument that *Duenas-Alvarez* required defendant to show case in which Ioflupane possession was prosecuted); *United States v. Perez*, 46 F.4th 691, 701 (8th Cir. 2022), *abrogation on other grounds recognized by*, *United States v. Gordon*, 111 F.4th 899, 901 n.4 (8th Cir. 2024) (“Because Perez’s state statute of conviction included Ioflupane whereas the CSA specifically excludes Ioflupane as a controlled substance, the state statute is overbroad on its face, and our categorical analysis ends with the text of the statute.”); *United States v. Holliday*, 853 F. App’x 53, 55 (9th Cir. 2021).

Our across-the-board “actual case” requirement has created a geographic disparity in immigration and criminal law. *En banc* review was warranted. *See* Fed. R. App. P. 40(b)(2)(C).

Third, this issue is a “question[] of exceptional importance.” Fed. R. App. P. 40(b)(2)(D). The categorical approach applies to a variety of different

prosecutes distribution offenses involving small amounts of marijuana and *Hadden* to establish that the Georgia law does not require remuneration. But it did not identify an actual Georgia prosecution involving the relevant combination—distribution of a small amount of marijuana for no remuneration (*i.e.*, social sharing).

situations. *See, e.g., Descamps v. United States*, 570 U.S. 254 (Armed Career Criminal Act); *Moncrieffe v. Holder*, 569 U.S. 184 (2013) (INA); *United States v. Taylor*, 596 U.S. 845 (2022) (statutory sentencing enhancement for use of firearm in crime of violence); *United States v. Sereal*, 153 F.4th 493, 496–99 (5th Cir. 2025) (Sentencing Guidelines).

And as the panel opinion notes, we have, post-*Taylor*, employed the “actual case” requirement to the detriment of immigration petitioners and criminal defendants in cases regarding Guidelines enhancements, *United States v. Russell*, 136 F.4th 606, 612 (5th Cir. 2025), removability under the INA, *Ponce v. Garland*, 70 F.4th 296 (5th Cir. 2023), and the Armed Career Criminal Act, *United States v. Kerstetter*, 2025 WL 1079071 (5th Cir. Apr. 10, 2025). The district courts within our circuit (and the Board of Immigration Appeals) confront the categorical approach even more often than we do.

III

The categorical approach crushes common sense. The legally correct result here can fairly be described as counterintuitive, to say the least: A defendant’s cocaine-trafficking conviction loses its force as a predicate offense because of a radioactive diagnostic compound that, so far as anyone can tell, no person has ever abused. If the question before us was whether I would design such a system, I would vote no. But the question is not what we would prefer the law to be. Instead, it is about what the law requires.

If the categorical approach’s consequences are intolerable, the remedy lies with Congress and the Sentencing Commission, which remain free to write enhancements and removability requirements in terms of conduct rather than convictions. Until they

do, the law requires what it requires—and it requires the same thing in this circuit as it does everywhere else.

* * *

I joined the majority opinion in *Castillo-Rivera* because I believed at the time that adherence to Supreme Court precedent required it. My commitment to following Supreme Court precedent has not changed, but the Court's guidance on the categorical approach has. Accordingly, I respectfully dissent from denial of rehearing *en banc*.