14-11317

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

MICHAEL HERROLD,
Defendant-Appellant

On Appeal from the United States District Court
For the Northern District of Texas
Dallas Division
District Court No. 3:13-CR-225-N

UNITED STATES' RESPONSE TO APPELLANT'S PETITION FOR REHEARING EN BANC

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STATEMENT OF ISSUES PROPOSED FOR REHEARING

1. Should the Court reconsider en banc whether Texas burglary of a habitation under Texas Penal Code § 30.02(a)(1) qualifies as a generic burglary offense under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)?

2. Alternatively, should the Court reconsider en banc the divisibility of the Texas burglary statute notwithstanding its recent refusal to do so?

REASONS TO DENY THE PETITION

This Court has consistently held that the Texas offense of burglary of a habitation under Texas Penal Code § 30.02(a)(1) fits the Supreme Court's concept of contemporary generic burglary and, accordingly, qualifies as a predicate conviction under the ACCA. Herrold renews two contrary arguments, neither of which has garnered any special concurrence or dissenting opinion from the many panels that have addressed the Texas burglary statute. Nonetheless, he requests that the Court invoke the exceptional procedures of en banc review, purportedly to bring its jurisprudence in line with Supreme Court authority or decisions from other circuits. Such extraordinary review is unnecessary and unwarranted.

On the first issue, this Court's jurisprudence is not anomalous. In fact, it is consistent with the one other circuit that has considered the same Texas statute. Any tension created with decisions by other circuits does not compel en banc review, often because those circuits reviewed different, broader

burglary statutes. Moreover, the Supreme Court's definition of the "generic burglary" offense plainly encompasses the Texas burglary statute even though it protects all habitations—moveable and non-moveable.

On the second issue, this Court declined to reconsider the divisibility of Texas's burglary statute four months ago. No intervening Supreme Court decision has impugned this Court's jurisprudence, nor has any conflict arisen within this Court's cases.

1. The Court need not reconsider whether burglary of a mobile structure adapted for residential use falls within the contemporary meaning of burglary.

No intra-circuit conflict requires en banc review because this Court has consistently held that a Texas burglary conviction under Texas Penal Code § 30.02(a)(1) fits the generic definition of "burglary" contemplated by the ACCA and *Taylor v. United States*, 495 U.S. 575 (1990). Herrold therefore predicates his petition on portraying this Circuit's jurisprudence as an outlier. That is not the case.

The only circuit to have considered the Texas burglary statute agrees that it qualifies as generic burglary under *Taylor*. In *United States v. Spring*, 80 F.3d 1450, 1462 (10th Cir. 1996), the defendant similarly argued that his Texas burglary-of-a-habitation conviction did not qualify as an ACCA predicate because the statute protected vehicles adapted for overnight accommodation. The Tenth Circuit disagreed, relying on the Texas definition of a habitation

and recognizing that *Taylor*'s definition of generic burglary was sufficiently broad to encompass mobile structures used for overnight accommodation, as those structures were not "vehicles in the sense in which *Taylor* intended." *Id.*

Discounting the consistency between this Court and the Tenth Circuit, Herrold relies on cases applying different statutes to aggrandize an appearance of inter-circuit conflict. (Brief at 6 n.2.) But his cases implicate burglary statutes that reach broader than the Texas statute, which protects only a certain kind of moveable structure adapted for use as a dwelling. Of particular note, those burglary statutes extend well beyond habitations and protect vehicles or trailers used for business or other purposes. *See, e.g.*, *United States v. Mathis,* 786 F.3d 1068, 1075 (8th Cir. 2015) (considering Iowa burglary statute's inclusion of vehicles used for carrying on business or "'other activity therein'" (quoting Iowa Code § 702.12)), *rev'd,* 126 S. Ct. 2243 (2016); *United States v. Grisel*, 488 F.3d 844, 850-51 (9th Cir. 2007) (en banc) (relying on Oregon case law that demonstrates its burglary statute protects a semi-truck trailer used to collect charitable donations).

For the same reason, the Sixth Circuit's decision in *United States v. Prater*, 766 F.3d 501 (6th Cir. 2014), does not establish a conflict meriting en banc review. Unlike the Texas statute, which protects only places intended for lodging, the New York burglary statute in *Prater* protected conveyances used

for "carrying on business" and even "an inclosed motor truck, or an inclosed motor truck trailer," without regard for its intended use. *Id.* The Sixth Circuit's holding that this New York statute extends beyond *Taylor*'s generic burglary offense creates no tension, much less an irreconcilable conflict, with this Court's conclusion that Texas's burglary statute—protecting the much narrower category of habitations—fits within *Taylor*.

While no circuit has reached a contrary holding regarding Texas burglary, the government acknowledges some tension regarding the application of *Taylor*. Like this Court, the Tenth Circuit has classified the Texas burglary statute as a generic burglary offense under *Taylor*. *Spring*, 80 F.3d at 1462. And notwithstanding Maine's inclusion of vehicles adapted for overnight accommodation, the First Circuit has ruled that its burglary statute meets *Taylor*'s definition of generic burglary. *United States v. Duquette*, 778 F.3d 314, 318 (1st Cir. 2015); *see* Me. Rev. Stat. Ann. tit. 17-A § 2(10), (24). Three other circuits—the Fourth, the Eighth, and the Ninth—have held that a burglary statute reaching nonpermanent structures should not count as a generic *Taylor* offense. *See United States v. Sims*, 854 F.3d 1037, 1040 (8th Cir. 2017); *United States v. White*, 836 F.3d 437, 445-46 (4th Cir. 2016); *Grisel*, 488 F.3d at 848.[1] And the Sixth Circuit is presently considering this question as it

[1] The government has not yet decided whether to seek reconsideration in *Sims*. There, the panel held that the government had offered a reasonable argument for why

relates to a Tennessee burglary statute that protects mobile homes, trailers, tents, or vehicles designed or adapted for overnight accommodation. *See United States v. Stitt*, No. 14-6158 (6th Cir.) (en banc).

The Court should decline Herrold's invitation to reenter the debate. No square intra- or inter-circuit conflict exists with respect to Texas burglary, meaning that en banc rehearing is not warranted. Furthermore, no matter how the Court might rule on rehearing, the ultimate disposition would not alleviate the tension cataloged above.

Finally, and most importantly, en banc review is unnecessary because this Court has consistently and correctly concluded that Texas burglary—which protects mobile habitations—fits within *Taylor*'s definition of generic burglary. First, *Taylor* recognized that generic burglary covers illegal entry into "a building *or other structure*," signaling that generic burglary covers more than just buildings affixed to the ground, as Herrold would have it. *See Taylor*, 495 U.S. at 598 (emphasis added).

Second, *Taylor* explained that generic burglary extends beyond the common-law burglary definition—which, incidentally, protected dwellings,

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Arkansas burglary fell within *Taylor*'s boundaries, but deemed the matter foreclosed by its earlier decision in *United States v. Lamb*, 847 F.3d 928, 931 (8th Cir. 2017). The *Lamb* decision did not, however, analyze the question under review here—whether moveable structures adapted for overnight lodging fit within *Taylor*.

and *only* dwellings, *see Taylor*, 495 U.S. at 580 n.3—and instead encompasses burglary in "the generic sense in which the term is now used in the criminal codes of most States." *Id.* at 598. Because most states' burglary statutes protect moveable structures designed, adapted, or used as a place for overnight lodging, they necessarily qualify as a generic burglary offense under *Taylor*.[2]

Third, *Taylor* explained that Congress's understanding of burglary "approximat[ed] that adopted by the drafters of the Model Penal Code." *Id.* at 598 n.8. That guide provides additional proof that Texas's statute falls within generic burglary. At the time of *Taylor*, the Model Penal Code described burglary as entry into "a building or occupied structure, or separately secured or occupied portion thereof, with the purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter." Model Penal Code § 221.1(1) (1980). The Model Penal Code drafters stressed that its definition of burglary encompassed "structures other than buildings, e.g., mines or ships," so long as the particular structure was "adapted for overnight accommodation or for the ordinary carrying on of

[2] Before the panel, the government compiled state statutes that showed most states treat moveable structures designed, adapted, or used for personal lodging equivalent to residential burglary. (Supp. Br. of the United States, *United States v. Herrold*, No. 14-11317, at 7 n.4 (5th Cir. filed Nov. 24, 2015).) In *Stitt*, the government submitted a similar survey of burglary statutes at the time of *Taylor*, verifying that a generic burglary—as defined by a majority of state codes—encompassed protection of moveable structures, including those used for habitation. (*See* Supp. Br. of the United States, *United States v. Stitt*, No. 14-6158 (6th Cir. filed Aug. 29, 2016).)

business." *Id.* at § 221.1, cmt. 3(b). By design, the Model Penal Code's concept of protected places excluded "freight cars, motor vehicles . . . or ordinary small watercraft, and the like," but it included "home trailers or mobile offices." *Id.* Because the Texas burglary statute operates more narrowly than the Model Penal Code definition, it satisfies *Taylor*.

In response, Herrold references the Supreme Court's exclusion of "vehicles" from the generic definition of burglary. *See Mathis v. United States*, 136 S. Ct. 2243, 2250 (2016); *Shepard v. United States*, 544 U.S. 13, 15 (2005); *Taylor*, 495 U.S. at 599. But he has not demonstrated that, in excluding vehicles or automobiles generally, the Supreme Court broadly intended to refer to every variety of conveyance regardless of its purpose or use. As the Tenth Circuit correctly indicated, *Taylor*'s general reference to automobiles envisioned the typical sedan used primarily for transportation of people or goods. *See Spring*, 80 F.3d at 1462. *Taylor* did not, however, envision motorhomes and houseboats when it omitted "vehicle" from its generic burglary definition. *See* Tex. Penal Code § 30.01(3) (defining "vehicle" to specifically exclude those that meet the definition of "habitation").[3]

[3] The fact that Texas and many other states specifically account for moveable habitations in their burglary laws, distinguishing them from traditional "vehicles," corroborates the Tenth Circuit's observation that they are not "vehicles in the sense in which *Taylor* intended." *Spring*, 80 F.3d at 1462; *see, e.g.*, Alaska Stat. § 11.81.900(b)(5) (including certain vehicles or structures adapted for overnight accommodation within the definition of "building"); Minn. Stat. Ann. § 609.556(3) (including a structure or vehicle

When viewed against *Taylor*'s explanation of what "generic burglary" encompasses, Herrold's argument proves too superficial. Because *Taylor*'s concept of generic burglary points to its inclusion of mobile structures intended for habitation, there is no compelling need to reconsider the panel's judgment and this Court's longstanding case law.

2. The Court declined to reconsider the Texas burglary statute's divisibility four months ago, and no intervening authority has elevated the issue to a matter warranting en banc review.

A. This Court already refused to reconsider *Uribe*.

The Court held decades ago that Texas burglary under Texas Penal Code § 30.02(a)(1) fits within *Taylor*'s definition of generic burglary. *United States v. Silva*, 957 F.2d 157, 162 (5th Cir. 1992). It later concluded, however, that the separate statutory provision at section 30.02(a)(3) does not. *United States v. Constante*, 544 F.3d 584, 587 (5th Cir. 2008). Moving forward, the Court sanctioned the use of the modified categorical approach—*i.e.*, the consultation of conviction documents—to identify the statutory provision that supported the defendant's prior Texas burglary conviction. *See, e.g.*, *United States v. Hageon,* 418 F. App'x 295, 298 (5th Cir. 2011).

customarily used for overnight lodging within the definition of "building"); Utah Code Ann. § 76-6-201(1)(a) (defining "building" to include conveyances adapted for overnight accommodation).

In *Descamps v. United States*, 133 S. Ct. 2276 (2013), the Supreme Court clarified the circumstances where the modified categorical approach could be used to identify the statutory provision underlying the defendant's prior conviction in order to discern whether that conviction qualifies as an ACCA predicate. *See id.* at 2283-86. After *Descamps*, defendants claimed that the Texas burglary statute was indivisible, that the modified categorical rule was inapplicable, and that no prior Texas burglary conviction could therefore qualify as an ACCA predicate. The Court reconsidered the issue and reaffirmed that the Texas burglary statute was divisible and subject to the modified categorical analysis. *United States v. Conde-Castaneda*, 753 F.3d 172, 176-77 (5th Cir. 2014).

Two years later, the Supreme Court again discussed the modified categorical approach in *Mathis*, 136 S. Ct. 2243. Defendants again challenged section 30.02(a)'s divisibility based on *Mathis*. And this Court again reaffirmed that the statute is divisible. *United States v. Uribe*, 838 F.3d 667, 670-71 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 1359 (2017). The Court subsequently declined to reconsider the question en banc without a poll. *See United States v. Herrold*, No. 14-11317, 2017 U.S. App. LEXIS 6221, at *3 n.7 (5th Cir. Apr. 11, 2017) (unpublished).

Herrold argues that *Uribe* was wrongly decided, advancing the same arguments presented in Uribe's petition for rehearing. But Herrold's petition identifies no new (much less compelling) reasons for en banc review. He points to no intervening Supreme Court decision impugning *Uribe* nor any intra-circuit conflict that has arisen.

Indeed, the Court has faithfully applied *Uribe*'s holding without controversy or conflict. Several panels have followed *Uribe* without any expression of concern that it was wrongly decided or produces an incorrect result.[4] This issue is accordingly settled, as the panel here noted. *See Herrold*, 2017 U.S. App. LEXIS 6221, at *3 & n.7. Thus, the Court should reject Herrold's request to relitigate the matter to the full Court.

B. *Uribe* correctly held that the Texas burglary statute is divisible.

As with the first issue, the Court need not reconsider *Uribe* because its holding is sound. *Uribe* followed the steps prescribed by the Supreme Court in *Mathis* for distinguishing between elements and means.

[4] *See, e.g., United States v. Daniels,* No. 16-10232, 2017 U.S. App. LEXIS 8704, at *1 (5th Cir. May 18, 2017) (unpublished); *United States v. Ramirez-Villalzana*, No. 16-40529, 2017 U.S. App. LEXIS 8705, at *1-2 (5th Cir. May 18, 2017) (unpublished); *United States v. Saldivar-Vasquez*, No. 16-40484, 2017 U.S. App. LEXIS 8315, at *2 (5th Cir. May 10, 2017) (unpublished); *United States v. Arevalo*, No. 16-20112, 2017 U.S. App. LEXIS 7796, at *1 (5th Cir. May 2, 2017) (unpublished).

Mathis outlined a three-step test for determining whether statutory phrases are elements or means. When assessing a state statute, *Mathis* directed courts to first determine whether authoritative judicial decisions from the state provide an answer. *Mathis*, 136 S. Ct. at 2256. When such a decision exists—as *Mathis* predicted will often be the case—the inquiry is "easy," and "a sentencing judge need only follow what [the decision] says." *Id.*

As *Uribe* determined, such decisions do exist for Texas burglary. *Uribe* pointed to two Texas Court of Criminal Appeals decisions stating that section 30.02(a)'s statutory alternatives are "elements." *Uribe*, 838 F.3d at 670-71 (citing *Day v. State*, 532 S.W.2d 302, 305-06 (Tex. Crim. App. 1975), *abrogated on other grounds, Hall v. State,* 225 S.W.3d 524, 527-31 (Tex. Crim. App. 2007), and *Devaughn v. State,* 749 S.W.2d 62, 65 (Tex. Crim. App. 1988)). Having found the clear answer in these decisions from Texas's highest criminal court, *Mathis* mandated that this Court reach the "easy" outcome and follow the state court's pronouncement. *See Mathis*, 136 S. Ct. at 2256. *Uribe* did just that.

Rather than adhere to the Supreme Court's guidance and accept the answer provided by the Texas Court of Criminal Appeals, Herrold urges the Court to bypass the first step and jump to turf that he perceives as more favorable. But his call to skip the first step does not merely take issue with

Uribe; it attacks the heart of this Court's well-founded rule for respecting state law as pronounced by the state's highest court.

In rejecting *Uribe*'s reliance on *Day* and *Devaughn*, Herrold points only to three decisions by a single Texas intermediate court, two of which are unpublished and have no precedential value even among Texas courts.[5] (Pet. at 16 (citing *Martinez v. State*, 269 S.W.3d 777, 783 (Tex. App.—Austin 2008, no pet. h.), *Stanley v. State*, No. 03-13-00390-CR, 2015 WL 4610054 (Tex. App.—Austin July 30, 2015, pet. ref'd) (not designated for publication), and *Washington v. State*, No. 03-11-00428-CR, 2014 WL 3893060 (Tex. App—Austin Aug. 6, 2014, pet. ref'd) (not designated for publication)).) Other than his belief that these decisions support his desired outcome, Herrold does not explain why the Court should, in contravention of its usual practice, proceed with en banc review based on an intermediate court's statement that deviates from the state high court's pronouncement. *See Weaver v. Tex. Capital Bank, N.A.*, 660 F.3d 900, 906 n.4 (5th Cir. 2011) ("In determining state law, *federal courts look to final decisions of the state's highest court*. *When there is no ruling by the state's highest court*, the federal court must determine what the highest court of the state would decide. While decisions of intermediate state appellate courts

[5] *See* Tex. R. App. P. 47.7(a).

provide persuasive guidance, they are not controlling." (emphasis added, citations omitted)).

At bottom, Herrold's attempt to impugn *Uribe* fails. That decision followed the steps prescribed by *Mathis* and reached the correct conclusion.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this document was served on Herrold's attorney, J. Matthew Wright, through the Court's ECF system on May 30, 2017, and that: (1) any required privacy redactions have been made; (2) the electronic submission is an exact copy of the paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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