NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL J. KHOURY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

On Petition For a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit
Submitted in Behalf of
Petitioner, Michael J. Khoury

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Does burglary of a vehicle or trailer being used as a dwelling place qualify as generic burglary under the Armed Career Criminal Act, 18 U.S.C. 924(e)(2)(B)(ii), where this Court has defined generic burglary, as "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime," and has held that vehicles are not buildings or structures for purposes of this definition?

This Court has pending two petitions by defendants, and two petitions by the Government, presenting essentially the same issue: *United States v. Stitt*, No. 17-765 (6th Circuit); *United States v. Sims*, No. 17-766 (Eighth Circuit); *Klikno v. United States*, No. 17-5018 (7th Circuit); and *Smith v. United States*, No. 17-7517 (7th Circuit) (consolidated with the instant case for decision).

2) In determining whether a state statute is broader than a generic offense, this Court 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," and this realistic probability may be demonstrated 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." Where the language of the state statute is plainly broader than the generic offense, must a litigant demonstrate that the State previously applied the statute in a non-generic way, in order to show the statute is over-broad?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael J. Khoury, by his court-appointed counsel Todd M. Schultz, Assistant Federal Public Defender, petitions this Court for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Seventh Circuit, issued on December 13, 2017.

ORDERS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit denying Petitioner relief is reported at *Smith v. United States,* 877 F.3d 720 (7th Cir. 2017), reproduced at Appendix 1. The District Court issued its order granting in part and denying in part Petitioner's request for relief under 28 U.S.C. § 2255 on January 26, 2017. Order (Doc. 55), *United States v. Khoury*, 15-cr-30013 (S.D. of IL. Jan. 26, 2017), reproduced at Appendix 6. The District Court entered its amended final judgment in a Criminal Case on May 11, 2017. Amended Judgment (Doc. 52), *United States v. Khoury*, No. 15-cr-30013 (S.D of IL May 11, 2017), reproduced at Appendix 14.

JURISDICTION

On December 13, 2017, the Seventh Circuit Court of Appeals issued a written opinion affirming the District Court's judgment. *United States v. Smith*, 877 F.3d 720 (7th Cir. 2017). (Appendix 1). No Petition for Rehearing was filed. This Petition is timely filed within 90 days of December 13, 2017. Review by certiorari is sought pursuant to Title 28, United States Code, Section 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e) (2012)

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
> (2) As used in this subsection--
> (A) the term "serious drug offense" means--
> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and
> (C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

720 ILCS 5/19–1(a) (West 1993)

(a) A person commits burglary when without authority he knowingly enters or without authority remains within a building, housetrailer, watercraft, aircraft, motor vehicle as defined in The Illinois Vehicle Code, railroad car, or any part thereof, with intent to commit therein a felony or theft. This offense shall not include the offenses set out in Section 4–102 of The Illinois Vehicle Code, nor the offense of residential burglary as defined in Section 19–3 hereof.

720 ILCS 5/19–3(a) (West 1993)

(a) A person commits residential burglary who knowingly and without authority enters the dwelling place of another with the intent to commit therein a felony or theft.

720 ILCS 5/2-6 (West 1993) (formerly Ill.Rev.Stat., ch. 38, ¶ 2-6 (1987).

(a) Except as otherwise provided in subsection (b) of this Section, "dwelling" means a building or portion thereof, a tent, a vehicle, or other enclosed space which is used or intended for use as a human habitation, home or residence.

(b) For the purposes of Section 19-3 of this Code, "dwelling" means a house, apartment, mobile home, trailer, or other living quarters in which at the time of the alleged offense the owners or occupants actually reside or in their absence intend within a reasonable period of time to reside.

625 ILCS 5/1-209 (West 1993)

Trailer. Every vehicle without motive power in operation, other than a pole trailer, designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that no part of its weight rests upon the towing vehicle.

625 ILCS 5/1–217 (West 1993)

Vehicle. Every device, in, upon or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power, devices used exclusively upon stationary rails or tracks and snowmobiles as defined in the Snowmobile Registration and Safety Act. For the purposes of this Code, unless otherwise prescribed, a device shall be considered to be a vehicle until such time it either comes within the definition of a junk vehicle, as defined under this Code, or a junking certificate is issued for it. For this Code, vehicles are divided into 2 divisions: First Division: Those motor vehicles which are designed for the carrying of not more than 10 persons. Second Division: Those vehicles which are designed for carrying more than 10 persons, those designed or used for living quarters and those vehicles which are designed for pulling or carrying property, freight or cargo, those motor

vehicles of the First Division remodeled for use and used as motor vehicles of the Second Division, and those motor vehicles of the First Division used and registered as school buses.

STATEMENT OF THE CASE

This case involves application of 18 U.S.C. § 924(e)(1), the Armed Career Criminal Act ("ACCA"), which provides an enhanced penalty of 15 years to life for certain individuals convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). An ACCA penalty only applies to individuals who have three or more prior convictions for violent felonies or serious drug offenses, and explicitly states that violent felonies include burglaries.

This Court prescribes a categorical approach for determining whether a prior conviction qualifies as a predicate conviction under the ACCA. That is, regardless of a defendant's actual offense conduct, the elements of the prior offense must match or be narrower than those of the predicate offense. Also, the prior offense must not be overly broad, in that it must not be possible to commit the prior offense without satisfying the elements of the predicate offense. *Mathis v. United* States, 136 S.Ct. 2243, 2250 (2016). One way a litigant may demonstrate an offense is overly broad is to show a realistic probability that a state would apply its statute to conduct outside the generic definition of the predicate offense 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." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

This Court construes the ACCA's predicate offense of burglary as "generic burglary," which it defines as "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575 (1990). This Court has held that vehicles are not buildings or structures for purposes of this definition. *Shepard v. United States,* 544 U.S. 13, 15-16 (2005) and

Mathis v. United States, 136 S.Ct. 2243, 2250 (2016).

In Petitioner Khoury's case, on December 18, 2015, he was convicted of violating 18 U.S.C. § 922(g)(1), and sentenced under the ACCA, based on his prior convictions for Illinois residential burglary, under a 1982 version of that statute that covered burglaries of "a house, apartment, mobile home, trailer, or other living quarters" used as a residence. On September 26, 2016, Petitioner Khoury filed a motion to vacate his sentence under 28 U.S.C. § 2255, asserting an error under the United States Sentencing Guidelines, and also an error in applying the ACCA, because his prior Illinois residential burglary convictions did not qualify as generic burglaries. (Doc. 1, 16-cv-01085, Dist. Ct., S.D. of Illinois).

On January 26, 2017, the District Court denied relief on Petitioner Khoury's ACCA claim, but granted resentencing on his guidelines claim. (*Khoury v. United States,* 2017 WL 373295 (S.D. Ill. Jan. 26, 2017)). On May 11, 2017, the District Court resentenced Petitioner in his criminal case based on a correction in his Sentencing Guideline calculations, shortening his 188 month term to 180 months, the minimum allowed by the ACCA. (Doc. 53, 15-cr-30013).

Petitioner appealed to the Seventh Circuit Court of Appeals, which consolidated his case for decision with *Smith v. United States*, appeal no. 17-1730 (petition for cert. filed Jan. 17, 2018). The Seventh Circuit noted, "the United States waived all procedural defenses in order to facilitate appellate resolution of the question, which affects many other sentences. None of the procedural matters is jurisdictional, so the waivers are conclusive." Both cases involved defendants convicted of 18 U.S.C. § 922(g) and sentenced to the minimum term of fifteen years pursuant to the ACCA, both defendants filed collateral attacks, and both defendants qualify for ACCA enhancement only if the 1982 version of Illinois residential burglary statute satisfies the "generic burglary" definition established under this Court's precedent. *United States v. Smith*, 877 F.3d 720, 721-22 (7th Cir. 2017).

The Seventh Circuit found the Illinois residential burglary statute was a match for generic burglary, and was not overly broad. The Seventh Circuit examined the Illinois statute, which defined residential burglary as "knowingly and without authority statute enters the dwelling place of another with the intent to commit therein a felony or theft." 720 ILCS 5/19-3(a). The only issue was whether the "dwelling" requirement, which was defined in the statute, allowed the Illinois offense to be committed in a way not covered this Court's definition of generic burglary in *Taylor*, which requires the location to be in "buildings or structures."

The Seventh Circuit examined Illinois' definition of "dwelling" in 720 ILCS 5/2-6:

> (a) Except as otherwise provided in subsection (b) of this Section, "dwelling" means a building or portion thereof, a tent, a vehicle, or other enclosed space which is used or intended for use as a human habitation, home or residence.
> (b) For the purposes of Section 19-3 [residential burglary] of this Code, "dwelling" means a house, apartment, mobile home, trailer, or other living quarters in which at the time of the alleged offense the owners or occupants actually reside or in their absence intend within a reasonable period of time to reside.

The Seventh Circuit found "a house, apartment, mobile home, trailer, or other living quarters" in subsection (b), applicable to residential burglaries, falls within *Taylor*'s reference to "building or structure." It reasoned Illinois case law excluded all burglaries involving vehicles from the scope of Illinois residential burglary, except for "occupied trailers." Although the Seventh Circuit acknowledged trailers were "movable," it declined to find the statute overly broad on this basis, because "[t]he proper treatment of trailers as a matter of federal law remains to be determined," and most state statutes have expanded their definition of burglary beyond the common law definition. The Seventh Circuit further explained its holding was based on its view that this Court's definition of generic burglary was only "provisional:"

> *Taylor v. United States* set out to create a federal common-law definition of "burglary." This counsels against reading its definition as if it were a statute. All common law is provisional . . . on defendant's view almost all states' existing

> burglary statutes are outside the scope of federal generic burglary . . . We think it unlikely that the Justices set out in *Taylor* to adopt a definition of generic burglary that is satisfied by no more than a handful of states—if by any . . . In reaching this conclusion we have considered not only that common-law understandings are open to modification as circumstances reveal potential weaknesses but also the Supreme Court's own explanation for its definition. The Justices told us that "Congress meant 'burglary' the generic sense in which the term is now used in the criminal codes of most States" . . . and set out to produce a definition capturing that sense.

Smith, 877 F.3d at 723-24.

The Seventh Circuit also rejected the argument that the phrase "other living quarters" included non-buildings or structures such as houseboats or tents, because the "state judiciary has never held that it *does* include those items," and "the bare possibility that it might," was not sufficient. It further surmised because Illinois holds burglaries of vehicles other than occupied trailers, which are covered by paragraph (a) of the dwelling definition, are not residential burglaries, that holding also "logically covers boats and tents as well," also are listed in paragraph (a) but not explicitly in paragraph (b) of the definition. *Smith*, 877 F.3d at 723.

REASONS FOR GRANTING THE WRIT

1). The Seventh Circuit's opinion clearly conflicts with this Court's unambiguous construction of the term "burglary" in the Armed Career Criminal Act, precedent which this Court has repeatedly reaffirmed over the past 28 years.

In *Taylor v. United States*, 495 U.S. 575 (1990), this Court construed the definition of the term "burglary" in the ACCA and concluded:

> Although the exact formulations vary, the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.

Id. at 598.

Nothing about this Court's construction of "burglary" in *Taylor* or its subsequent precedent

renders the definition unsound today. The *Taylor* Court arrived at its holding by examining the legislative history of the ACCA, 18 U.S.C. § 924(e), and found Congress included burglary as a triggering offense "because of its inherent potential for harm to persons. The fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate." *Id.* at 588. *Taylor* also found Congress had in mind a generic modern view of burglary "roughly corresponding to the definitions of burglary in a majority of the States' criminal codes;" *Taylor* then fashioned a definition generally consistent with a definition of burglary in a previous version of the statute, omitted from the current version, noting "[t]he legislative history as a whole suggests that the deletion of the 1984 definition of burglary may have been an inadvertent casualty of a complex drafting process." *Id.* at 588-89.

Thus, the Seventh Circuit's opinion in *Smith* contradicts *Taylor* by assigning a dynamic definition to the term "burglary," that shifts focus from the plain language of *Taylor*'s definition, and is not supported by the reasoning behind *Taylor*'s holding. The Seventh Circuit misinterpreted *Taylor* as intending to fashion a common law definition that includes most state's burglary statutes, based on a current survey of those statutes: "[a]ll common law is provisional." *Smith*'s focus on what most states call burglary to define that term also ignores *Taylor*'s observation, that Congress, in including burglary, was concerned with the "inherent potential for harm to persons" when "an offender enters a **building** to commit a crime," and "creates the possibility of a violent confrontation." *Taylor*, 495 U.S. at 588 (emphasis added).

Smith also ignores *Taylor's* stated intention that its definition was only "roughly corresponding" to the definition in the majority of states. *Smith* further ignores *Taylor's* observation that its definition of burglary was consistent with the definition of burglary in a prior version of the statute, which the

Taylor Court believed Congress only inadvertently omitted from the current version of the statute: "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense" *Taylor*, 495 U.S. at 581. Instead, *Smith* ties the definition of burglary to the "vagaries of state law," an approach rejected by *Taylor* as inconsistent with the statute's history: "the enhancement provision always has embodied a categorical approach to the designation of predicate offenses. In the 1984 statute, 'robbery' and 'burglary' were defined in the statute itself, not left to the vagaries of state law." *Taylor*, 495 U.S. at 588.

Empowered by its holding that the ACCA definition of "burglary" must be determined by a particular court's survey of current common law, the *Smith* Court also defies this Court's holding that vehicles are not within the scope of generic burglary, finding instead that occupied trailers are "structures" for purposes of *Taylor's* generic definition of burglary. 877 F.3d at 723. Leading up to this conclusion, the *Smith* Court acknowledged the defendants' argument that "vehicles" are excluded from generic burglary under this Court's precedent, and conceded trailers are "movable." It further stated, [t]he proper treatment of trailers as a matter of federal law remains to be determined." *Id.* at 723-25. The *Smith* Court then defined burglary as, "a compact version of standards found in many states' criminal codes, including that of Illinois," and found, "[p]eople live in trailers, which are "structures" as a matter of ordinary usage. Trailers used as dwellings are covered by the Illinois residential-burglary statute . . . [and] Defendants were properly sentenced as armed career criminals." *Id.* at 723-25.

The *Smith* Court essentially acknowledges that trailers may be vehicles, but finds that fact is not determinative with regard to occupied trailers; rather, it reasoned those vehicles fit within a loose definition of "structure," and deemed their inclusion in the definition of burglary to be consistent

with "standards found in many states' criminal codes, including that of Illinois." *Smith*'s reliance on the definition of burglary in many states' criminal codes cannot be reconciled with this Court's analysis in *Taylor*, where this Court rejected the government's argument that any conviction labeled "burglary" qualifies as "burglary." The *Taylor* Court found the argument untenable because burglary in several states included unlawful entry into automobiles. *Taylor*, 495 U.S. at 590-92. *Taylor*'s holding leaves no doubt an automobile falls outside of the meaning of "structure," for purposes of the generic definition of burglary, despite that any automobile, including trailers, could be viewed as fitting within a broad definition of "structure." *E.g.* Concise Oxford English Dictionary (10th ed. rev. 2002) (Defining "structure" as "a building or other object constructed from several parts.").

Similarly, in *Shepard v. United States*, 544 U.S. 13 (2005), this Court reiterated that vehicles are not buildings and cannot be the object of a generic burglary. "The [ACCA] makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), not in a boat or motor vehicle." 544 U.S. at 15-16. *Shepard* paired the term "enclosed space," rather than "structure," with the term "building" in the generic definition, without any indication it intended to change that definition. Thus, *Shepard* excluded boats and motor vehicles from generic burglary, despite that these arguably could fall within a loose definition of "enclosed space."

In *Mathis v. United States*, 136 S. Ct. 2243 (2016), this Court considered an Iowa burglary statute which included any building, structure, or vehicle, including land, water, and air vehicles. Because the *Mathis* Court found the statute indivisible, it found the inclusion of vehicles made it broader than generic burglary. *Id.* at 2251, 2257.

Thus, the Seventh Circuit's holding in *Smith* conflicts with this Court's holdings in *Taylor, Shepard,* and *Mathis*, warranting this Court's attention.

2) The Seventh Circuit's interpretation of generic burglary adds to a growing Circuit split and

its decision has the potential to affect many cases.

Smith detailed a solid split among the Circuits regarding whether burglaries of occupied vehicles and trailers fall within the definition of generic burglary:

> Treating Taylor as if it were a statute, that is what four courts of appeals have held. *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017) (en banc) (Tennessee aggravated burglary is broader than generic burglary because it covers "mobile homes, trailers, and tents" used as dwellings); *United States v. Sims*, 854 F.3d 1037, 1039–40 (8th Cir. 2017) (Arkansas residential burglary is broader than generic burglary because it "criminalizes the burglary of vehicles where people live or that are customarily used for overnight accommodations"); *United States v. White*, 836 F.3d 437 (4th Cir. 2016) (West Virginia burglary is broader than generic burglary because it protects "dwelling house[s]," defined to include "mobile home[s]" and "house trailer[s]"); *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007) (en banc) (any state law that covers non-buildings is not generic burglary). At least one court of appeals has held the opposite. *United States v. Patterson*, 561 F.3d 1170 (10th Cir. 2009), reaffirming *United States v. Spring*, 80 F.3d 1450 (10th Cir. 1996).

Smith, 877 F.3d at 724. *Smith* also cited an additional case, but the opinion was reissued since that time and decided in a way that does not impact the issue of whether vehicles used a dwellings fall within the generic definition of burglary. *See United States v. Harrold*, -- F.3d --, 2018 WL 948373 (5th Cir. 2018).

In addition, three petitions for certiorari involving this issue are already pending before this Court: *United States v. Stitt*, No. 17-765 (6th Circuit); *United States v. Sims*, No. 17-766 (Eighth Circuit); *Klikno v. United States*, No. 17-5018 (7th Circuit); and *Smith v. United States*, No. 17-7517 (7th Circuit).

Further, the Seventh Circuit opined that, if ACCA burglary was interpreted as advocated by the defendants (and consistent with four other circuits, as detailed above), "almost all states' existing burglary statutes are outside the scope of federal generic burglary." *Smith*, 877 F.3d at 724. Thus, this Court's guidance is important to resolve a Circuit split on an issue that has the potential to affect many cases.

3) The Seventh Circuit's opinion highlights an ambiguity in this Court's case law regarding the

determination of whether a statute is overly broad, and this Court's attention is required to resolve a Circuit split on the issue.

Illinois' defines the term "dwelling" for purposes of residential burglary as burglary of any of a list of locations in the statute, "a house, apartment, mobile home, trailer, or other living quarters," which meets the additional requirement, "in which at the time of the alleged offense the owners or occupants actually reside or in their absence intend within a reasonable period of time to reside." 720 ILCS 5/2-6(b) (West 1993). The definition particular to residential burglaries was the result of a 1987 amendment, the specific purpose of which was to require that the place burglarized be occupied or intended to be occupied within a reasonable time. *People v. Silva*, 628 N.E.2d 948, 951 (Ill.App. 1993) (Reviewing legislative history). (Illinois non-residential burglary, 720 ILCS 5/19–1(a), applicable to "a housetrailer, watercraft, aircraft, and motor vehicle," does not use the term "dwelling," and subsection (a) of 720 ILCS 5/2-6 appears to define "dwelling" for other purposes).

Despite the expressly broad phrasing of "other living quarters," the Seventh Circuit concluded the phrase only included "buildings or structures," and not other locations such as houseboats or tents, and so satisfied the definition of generic burglary. The Seventh Circuit relied on the absence of case law demonstrating prosecution for residential burglary that was a non-generic burglary: the "state judiciary has never held that it *does* include those items," and "the bare possibility that it might," is not sufficient. The Seventh Circuit's holding purports to follow this Court's precedent:

> 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. 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. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193–94 (2007).

The Fifth Circuit takes a position consistent with the Seventh Circuit's view in *Smith*:

> The dissent maintains that, because the Texas statute's definition of felon is plainly broader than its federal counterpart, Castillo-Rivera is not required to point to an actual case in which Texas courts applied the Texas statute's definition of felon to capture those not included under Section 922(g)(1). That position does not comply with the Supreme Court's directive in *Duenas-Alvarez*. 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. Indeed, the Court in *Duenas-Alvarez* emphasized that a defendant must "at least" point to an actual state case—the implication being that even pointing to such a case may not be satisfactory. *Duenas-Alvarez*, 549 U.S. 183, 193, 127 S.Ct. 815. 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.*

United States v. Castillo-Rivera, 853 F.3d 218, 223 (5th Cir.), cert. denied, 138 S. Ct. 501, 199 L. Ed. 2d 390 (2017).

However, the Seventh and Fifth Circuit's view are at odds with several other circuits. In *Swaby v. Yates,* 847 F.3d 62 (1st Cir. 2017), the First Circuit held that, where Rhode Island's drug schedules listed one drug not covered by the federal drug schedules, the offense was plainly overly broad, despite that the defendant failed to demonstrate a prosecution based on that one drug, and despite this Court's holding in *Duenas-Alvarez*:

> that sensible caution against crediting speculative assertions regarding the potentially sweeping scope of ambiguous state law crimes has no relevance to a case like this. The state crime at issue clearly does apply more broadly than the federally defined offense. Nothing in *Duenas–Alvarez*, therefore, indicates that this state law crime may be treated as if it is narrower than it plainly is. Nor are we aware of any circuit court case, whether from this circuit or from any other, that supports the BIA's surprising view that, in applying the categorical approach, state law crimes should not be given their plain meaning. Simply put, the plain terms of the Rhode Island drug schedules make clear that the Rhode Island offense covers at least one drug not on the federal schedules. That offense is simply too broad to qualify as a predicate offense under the categorical approach, whether or not there is a realistic probability that the state actually will prosecute offenses involving that particular drug.

Swaby v. Yates, 847 F.3d 62, 66 (1st Cir. 2017).

Similarly, the Ninth Circuit found a state child pornography statute was broader, on its face, than the federal offense, and explicitly stated that, for that reason, consideration of whether the statute had been applied in a way beyond the scope of the federal offense was unnecessary:

> Chavez–Solis argues that § 311.11(a) prohibits depictions of a broader range of "sexual conduct" than 18 U.S.C. § 2252(a)(4)(B) prohibits. We conclude that § 311.11(a) is indeed broader in this regard. Chavez–Solis also argues that Penal Code § 311.11(a) has been applied more broadly than the federal statute in cases involving child pornography found in a computer's cache. In light of our conclusion that § 311.11(a) is categorically broader than 18 U.S.C. § 2252(a)(4)(B), we decline to address this issue.

Chavez-Solis v. Lynch, 803 F.3d 1004, 1008 (9th Cir. 2015) (California statute was broader than federal child pornography offense where, on its face, it defined "lewd and lascivious act" more broadly; *Duenas-Alvarez* did not prescribe the only way to demonstrate that a statute sweeps more broadly than a generic offense, rather, the explicit terms may sufficiently demonstrate that it is over-broad.).

In *Ramos v. Attorney General*, 709 F.3d 1066 (11th Cir. 2013), the Eleventh Circuit found the Georgia theft offense was broader than the generic definition, which required an intent to deprive, where the Georgia statute expressly also allowed conviction where the offender had an intent to appropriate. The Court rejected the Government's argument that the statute was not over-broad unless the defendant can point to a prosecution outside the generic definition: "But *Duenas-Alvarez* does not require this 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. Here, the statute expressly requires alternative intents . . . One of those intents (the one at issue here) does not render the crime a theft offense. The statute's language therefore creates the 'realistic probability' that it will punish crimes that do qualify as theft offenses and crimes that do not. *Duenas-Alvarez* does not control this case." *Id.* at 1071-72. *See also Jean-Louis v. Attorney General*, 582 F.3d 462, 481 (3d Cir. 2009) (finding the "realistic probability" test

inapplicable where the statute's "elements ... are clear, and the ability of the government to prosecute a defendant under [the statute] is not disputed").

Hence, the Seventh Circuit's opinion in *Smith* widens a Circuit split regarding when *Duenas-Alvarez* requires a litigant to point to a prosecution outside the generic offense to show a statute is over-broad, and this matter warrants this Court's attention.

CONCLUSION

For the foregoing reasons, Petitioner suggests that his case warrants this Court's grant of certiorari.

Respectfully Submitted,

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APPENDIX