

CASE NO. 21-2722

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MONQUEL DEJUAN-LEE PAULK,

Defendant-Appellant.

**Brief of the Federal Public and Community Defenders for the Judicial
Districts of the Sixth Circuit as Amici Curiae in Support of Petitioner-
Appellant Monquel Paulk's Petition for Rehearing En Banc**

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IDENTITY AND INTEREST OF AMICI

The Sixth Circuit Federal and Community Public Defenders represent the eight federal defender offices in the Western District of Kentucky, Eastern and Western Districts of Michigan, Northern and Southern Districts of Ohio, and the Eastern, Middle and Western Districts of Tennessee. We litigate countless cases in which sentencing ranges turn on the categorical approach, and have a strong interest in seeing this Court correct the Panel’s significant misreading of a new Supreme Court opinion clarifying the “realistic probability” test, which impacts the categorical approach.

No party or its counsel authored this brief in whole or in part or contributed money intended to fund preparing or submitting this brief, and no person – other than amici – contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

A Panel of this Court has interpreted backwards a hot-off-the-presses Supreme Court opinion on the realistic-probability test. *United States v. Paulk*, 46 F.4th 399 (6th Cir. 2022). The error is understandable: the Supreme Court used new terminology in its opinion, *United States v. Taylor*, 142 S. Ct. 2015 (2022), and the Panel opinion came so quickly on *Taylor*'s heels that the Panel did not have the benefit of briefing or argument on the case. To grasp *Taylor*'s discussion of realistic-probability requires context—an examination of the facts and arguments presented in *Taylor* and also in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). Once that context is understood, the Panel's error is plain.

And the error is profound. The Supreme Court in *Taylor* held that when the overbreadth of a statute is clear from its elements, courts *may not* require defendants to identify an “actual case” in which a statute was applied in an overbroad way. The Panel has held that Paulk—and everyone else—*must* identify an “actual case” in every categorical-approach inquiry. This radically reconfigures the categorical approach—from a focus on elements to a focus on facts; from legislatures' choices to prosecutors' charging decisions.

Paulk's petition explains that the Panel's approach conflicts with *Taylor*, the law of nearly every circuit, and this Court's own precedent. *Amici* write to further tease out how the Panel's single footnote distinguishing *Taylor* contradicts both *Taylor* and *Duenas-Alvarez*. We also explain how the Panel's adoption of an actual-case requirement that turns on state prosecutors' charging decisions is unworkable and undermines federalism principles that the realistic-probability test was meant to protect, and how it leads to the wrong outcome here. We urge this Court to grant rehearing.

ARGUMENT

I. The Panel has mandated what *Taylor* prohibited.

The Panel in this case recognized that to constitute generic burglary, a statute must have “the ‘basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.’” *Paulk*, 46 F.4th at 402 (quoting *Taylor v. United States*, 495 U.S. 575, 599 (1990)). And it recognized that Michigan defines third-degree home invasion in a way that lacks the element “intent to commit a crime.” *Id.* (quoting Mich. Comp. Laws § 750.110a(4)). But, citing *Duenas-Alvarez*, 549 U.S. at 193, the Panel held that § 750.110a(4) nonetheless constitutes generic burglary because Paulk failed to identify “any Michigan caselaw involving a third-

degree home invasion conviction predicated on these [overbroad] fact patterns.” *Paulk*, 46 F.4th at 404. This contradicts *Taylor*, which rejects this application of *Duenas-Alvarez*, and causes the very problems that the *Taylor* court sought to avoid.

A. There is “no overlap” between Michigan home invasion and generic burglary, so no actual case is required to establish overbreadth.

In *Taylor*, the Supreme Court held that when the plain language of a statute is broader than its federal comparator, that establishes a categorical mismatch, without the need to cite an actual case. 142 S. Ct. at 2021. It characterized this as a statute having “no overlap” with the generic offense. *Id.* at 2025. The Court then contrasted statutory comparisons with “no overlap” (where no case is required to show overbreadth, such as in *Taylor* itself), with statutes that “clearly overlap[]” (where an actual case might be needed). *Id.* The Panel here purported to distinguish *Taylor* on the ground that Michigan home-invasion “overlaps, in large part” with generic burglary. *Paulk*, 46 F.4th at 403 n.1. But this misreads *Taylor*. The misreading is understandable: the terminology “no overlap” and “clearly overlap[]” are novel and their meaning is not readily apparent. But reading these terms in the context of the entire *Taylor* opinion and also *Duenas-Alvarez* clarifies that,

by “no overlap,” the Supreme Court meant *no element-to-element match*: no actual case is required to show overbreadth where, as here, the statute at issue plainly lacks at least one element of its generic counterpart.

Taking *Taylor* first, the Court described attempted Hobbs Act robbery as having “no overlap” with the force clause. *Taylor*, 142 S. Ct. at 2025. By “no overlap,” the Court could not have meant that the statute and federal comparator do not even *partially* overlap, because they do. Hobbs Act robbery can be committed by actual or threatened force, so one (common) way to commit attempted Hobbs Act robbery is by attempted use of force. *Id.* at 2020. Indeed, the *Taylor* court said that “many who commit the crime of attempted Hobbs Act robbery do use, attempt to use, or threaten to use force.” *Id.* at 2022.

What the Court meant was that there was no *complete* overlap: the elements did not match, so not every possible iteration of Hobbs Act robbery would fit within the force clause. And that is what the categorical approach is about. Because the statute’s terms provide that attempted Hobbs Act robbery can be committed by merely attempting to threaten force, “[a]ttempted Hobbs Act robbery does not *require* proof of *any* of the elements § 924(c)(3)(A) demands.” *Id.* at 2025 (first emphasis added). And, because

this overbreadth is clear from the statute itself, that “ends the inquiry, and nothing in *Duenas-Alvarez* suggests otherwise.” *Id.*

Understanding that *Taylor* uses the word “overlap” to mean complete overlap – elemental match – makes *Taylor*’s description of *Duenas-Alvarez* as involving offenses that “clearly overlapped” make sense. *Id.* *Duenas-Alvarez* did not involve degrees of elemental overlap; the state statute included every necessary element of generic theft. *Duenas-Alvarez* addressed (1) whether generic “theft” included aiding-and-abetting theft (*Duenas-Alvarez* conceded it did); and, if so, (2) whether California interpreted aiding-and-abetting in a special, non-generic manner. *Duenas-Alvarez*, 549 U.S. at 185, 190–94.

Taylor says that “[i]n *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* applied the statute in a special nongeneric manner.” That is, because the plain language of the statute disclosed no mismatch, the only way *Duenas-Alvarez* could show the statute was overbroad was by showing that it was overbroad *in its application*. *Taylor*, 142 S. Ct. at 2025.

In *Taylor*'s parlance, Michigan home invasion has “no overlap” — that is, no element-to-element match — with generic burglary. It lacks the essential intent element. Like *Taylor*, Paulk's argument is based on an elemental mismatch. Unlike *Duenas-Alvarez*, it does not depend on the application of an otherwise-matching statute in some special, nongeneric manner.

B. An actual-case requirement that turns on state prosecutors' charging decisions is unworkable.

The effect of the Panel opinion is to require an “actual case” as part of every categorical-approach inquiry, even when a statute is plainly overbroad. This dramatically alters the analysis, turning the focus from statutory elements to facts—not of the defendant's case, but about prosecutors' charging decisions.

The categorical approach has always been about elements, not facts. *Descamps v. United States*, 570 U.S. 254, 267 (2013) (describing Court's “elements-centric, ‘formal categorical approach’”). In *Taylor*, the Supreme Court reiterated this focus and commented on the “oddity of placing a burden on the defendant to present empirical evidence about the government's own prosecutorial habits” and the “practical challenges such a burden would present in a world where most cases end in plea agreements,

and not all of those cases make their way into easily accessible commercial databases.” 142 S. Ct. at 2024; *see also* Brief of NAFD as Amicus Curiae at *14–16, *United States v. Taylor*, 2021 WL 5044711 (U.S. Oct. 27, 2021). By misapplying *Taylor*, the *Paulk* Panel created the very workability problems that *Taylor* sought to avoid.

First, one can never say with confidence that a particular means of violating a criminal statute has never been prosecuted. Legal databases are not comprehensive: Westlaw and Lexis contain many state appellate opinions but there is no searchable database of Michigan trial-court orders. And state appeals don’t always garner an opinion. Also, appeals are unusual: in 2018, more than 100,000 individuals were convicted and sentenced in Michigan,¹ but fewer than 2,400 new criminal appeals were filed.² Further, even within this tiny subset of criminal appeals, the more obvious a legal proposition is—as here, where the statute plainly does not

¹ S.P. Kubiak et al., *Overview of the Criminal Legal System in Michigan: Adults and Youth* at 8 (2021), https://behaviorhealthjustice.wayne.edu/data-landscape/mi-data-landscape_sept2021_cbhj_cadl.pdf

² *Michigan Court of Appeals: 2018 Annual Report* at 5, <https://www.courts.michigan.gov/4a104b/siteassets/reports/coa/annualreports/annualreport2018.pdf>

require evidence of “intent to commit a crime” beyond trespass—the less likely it is to get addressed in any court.

Moreover, even if it were somehow knowable that no prosecutor had ever charged a particular form of home-invasion, that could change tomorrow. The elected district attorneys in Michigan’s 83 counties cannot be expected to refrain from prosecuting conduct plainly covered by a statute *forever*, so such conduct could be charged at any moment. Thus, even if state prosecutors had never charged someone with home-invasion based on a trespass followed by, say, negligently handling a firearm, *see* Mich. Comp. Laws § 752.862, that would say nothing about whether this conduct will get charged in the future. The categorical approach is complicated enough without having to revisit the same statutory offenses year after year, to account for new data.

C. Applying an actual-case requirement to a statute that plainly covers overbroad conduct undermines federalism principles the realistic-probability test was meant to protect.

As discussed in Paulk’s petition, the Supreme Court in *Taylor* rejected the government’s actual-case requirement not only because the categorical approach is about statutory elements, not prosecutorial choices, but also because the law at issue in *Taylor* was federal. 142 S. Ct. at 2025. *Duenas-*

Alvarez was predicated on a “federalism concern”: affording state courts respect as the “final arbiters of state law.” *Id.* But the Supreme Court is the final arbiter of federal law, leaving no need for the *Taylor* court to sift through cases interpreting the Hobbs Act robbery statute.

The Panel distinguished *Taylor* because it concerns a federal statute (Paulk’s prior conviction is state), as if that difference permitted it to disregard *Taylor*’s analysis entirely. But *Taylor*’s discussion of federalism reinforces that the categorical approach turns on elements, not prosecutions. If prosecutions controlled, even the Supreme Court’s interpretation of the elements of a federal statute would not establish overbreadth absent the existence of a readily identifiable prosecution. *Taylor* emphatically rejects that requirement.

Indeed, applying the actual-case requirement here undermines federalism. It affords no respect to the Michigan state legislature, which amended the state’s home-invasion statute in 1999 to intentionally permit conviction based on trespass plus the commission of *any* other crime, *regardless* of intent. 1999 Mich. Legis. Serv. P.A. 44 (H.B. 4356). And it affords no respect to Michigan courts, which have reaffirmed the statute’s plain meaning.

Courts facing tough questions about state statutes occasionally certify questions to state supreme courts rather than risk getting the answers wrong. *See, e.g., United States v. Conage*, 976 F.3d 1244, 1263 (11th Cir. 2020). As the Seventh Circuit recognized, if a federal court interprets a state statute more narrowly than state courts would, that could confuse practitioners—inadvertently thwarting state prosecutions. *United States v. Franklin*, 895 F.3d 954, 961 (7th Cir. 2018). It is obvious that Michigan’s home-invasion statute lacks an intent-to-commit-a-crime element. *See People v. Cole*, 491 Mich. 325 (2012) (“If the statutory language is unambiguous,” Michigan’s courts “must conclude that the Legislature intended the meaning clearly expressed and no further judicial construction is required or permitted.”) (cleaned up). But if this Court has doubt, it should consider certifying the question to the Michigan Supreme Court. *See, e.g., Conage*, 976 F.3d at 1263; *Franklin*, 898 F.3d at 961–62.

II. The categorical approach requires this Court to respect Michigan’s decision to define home-invasion burglary without generic burglary’s intent element.

The plain language of the Michigan statute makes this an easy case. Generic burglary must contain “at least the following” three elements:

- (1) “unlawful or unprivileged entry into, or remaining in”;

(2) “building or other structure”; and

(3) “intent to commit a crime.”

Taylor, 495 U.S. at 598.

True, courts are not to be overly restrictive in interpreting these elements. See *Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019); *United States v. Stitt*, 139 S. Ct. 399, 406–07 (2018). But the Supreme Court has never suggested that a statute entirely lacking one of the elements could constitute generic burglary. See *Descamps*, 570 U.S. at 276–77 (“unlawful entry” does not encompass mere entry). Indeed, as to the intent element, the Supreme Court in *Quarles* confirmed and emphasized the essential nature of that element: “[T]he intent to commit a crime must be contemporaneous with unlawful entry or remaining.” 139 S. Ct. at 1878. A burglary is generic “so long as the defendant forms the intent at any time while unlawfully remaining.” *Id.*

Intent—the intent to commit a further crime when unlawfully present—has always been an essential feature of burglary: it is *the* distinction between burglary and trespass. See 3 Wayne R. LaFare, *Substantive Criminal Law* § 21.1(e) (2d ed. 2016). And trespass is not generic burglary. *United States v. Skipper*, 552 F.3d 489, 492 (6th Cir. 2009) (Ohio statute criminalizing trespass in an occupied habitation is not generic burglary “because it lacks

the element of intent to commit a crime within the habitation”), *overruled on other grounds by Johnson v. United States*, 576 U.S. 591 (2015); *see also Guenther v. Marske*, 997 F.3d 735, 740-41 (7th Cir. 2021).

Moreover, in 1986, the year Congress created ACCA, the mismatch here – a burglary statute criminalizing trespass plus the commission of any other crime – existed in at most one state: Texas. Wayne R. LaFare & Austin W. Scott, *Substantive Criminal Law* § 8.13(e), p. 475 (1986). “[E]lsewhere,” wrote LaFare & Scott in 1986, if the prosecutor could not meet his burden regarding intent, the defendant’s conduct would “fall within a lesser offense, usually denominated criminal trespass.” *Id.* at § 21.1(e). Since then, three additional state legislatures have amended a burglary-related statute to replace the intent element with a commission-of-a-crime element: Minnesota (in 1988),³ Tennessee (1989),⁴ and Michigan (1999).⁵ As one article put it, these four states’ elimination of intent to commit a crime as an element

³ 1988 Minn. Laws, c. 712, §§ 9 to 12, eff. Aug. 1, 1988.

⁴ 1989 Tenn. Pub. Acts 1169, 1223 (SB 1194).

⁵ 1999 Mich. Pub. Acts, No. 44, eff. Oct. 1, 1999.

represents a “dramatic swerve” in the law.⁶ Therefore, a ruling that Michigan’s anomalous third-degree home invasion is not generic burglary will impact few burglary statutes.

Among those few statutes, the Fifth Circuit has held that state caselaw limits Texas’s burglary statute to require intent to commit a crime and found on this basis that it is not overbroad. *United States v. Herrold*, 941 F.3d 173, 179 (5th Cir. 2019) (en banc) (citing *DeVaughn v. State*, 749 S.W.2d 62, 65 (Tex. Crim. App. 1988)). Minnesota, in contrast, has no caselaw limiting its burglary statute, so the Seventh Circuit has held that Minnesota burglary is overbroad. *Guenther*, 997 F.3d at 740–41. That leaves Tennessee and Michigan, both in this circuit. This brief does not comment on Tennessee. But with Michigan home-invasion, no state caselaw interprets § 750.110a(4) narrower than its plain language. Thus, once this Court respects the Michigan legislature’s decision to expand the reach of its home-invasion statute, the conclusion that the offense is not “generic burglary” is inescapable. It lacks an essential element: intent to commit a crime.

⁶ Andrew T. Ingram, *That's Not a Burglary! Classic Crimes and Current Codes*, 58 Hous. L. Rev. 1015, 1033–34 (2021).

CONCLUSION

The Court should grant rehearing to correct the Panel's significant misinterpretation of a recent Supreme Court opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Amicus Brief has been served upon the parties through operation of the Court of Appeals Electronic Filing System.

Dated this 7th day of October, 2022.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitation of Rule 29(b)(4), Federal Rules of Appellate Procedure, as it contains 2,596 words, excluding the table of contents, table of citations, identity and interest of amici, and the certificates of counsel. Certification is based on the word count of the word-processing system used in preparing the brief, Microsoft Word 365.

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