

No. _____

In the
Supreme Court of the United States

Eric Deshan Adams,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Texas offense of burglary constitutes a “violent felony” under 18 U.S.C. §924(e), the Armed Career Criminal Act (ACCA)?

PARTIES TO THE PROCEEDING

Petitioner is Eric Deshan Adams, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Eric Deshan Adams seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Adams*, 831 Fed. Appx. 155 (5th Cir. December 15, 2020) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on December 15, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This Petition involves 18 U.S.C. § 924(e), which states in relevant part:

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

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

The Petition also involves Texas Penal Code 30.02(a), which states:

(a) A person commits an offense if, without the effective consent of the owner, the person:

(1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or

(2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or

(3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

STATEMENT OF THE CASE

A. District Court Proceedings

After his pleas of guilty, a district court convicted Petitioner Eric Deshawn Adams of one count of possessing a firearm after a felony conviction, and one count of possessing controlled substances with intent to distribute. *See* (Record in the Court of Appeals, at 117-123). The government introduced evidence that on three occasions, Petitioner had been previously convicted of habitation burglaries in Texas. *See* (Record in the Court of Appeals, at 231-271).

Over Petitioner's objection, *see* (Record in the Court of Appeals, at 400-404), the court concluded that Petitioner was subject to an enhanced mandatory minimum of 180 months imprisonment for the gun charge under 18 U.S.C. §924(e), the Armed Career Criminal Act ("ACCA"), *see* (Record in the Court of Appeals, at 212). The court therefore imposed concurrent sentences of 180 months on both counts of conviction. *See* (Record in the Court of Appeals, at 223). It emphasized, however, that the two 180-month sentences represented a "sentencing package." *See* (Record in the Court of Appeals, at 226-227). It thus stated that it would be inclined to revisit both terms of imprisonment if this Court were to hold that the firearm conviction did not require a 180-month ACCA sentence. *See* (Record in the Court of Appeals, at 226-227).

B. The Appeal

Petitioner appealed, arguing that Texas burglary may be committed without any intent to commit a crime other than trespassing, and that it has been prosecuted as such. In particular, he contended that under Tex. Penal Code §30.02(a)(3), Texas

burglary may be committed by entering a home or business with no intent to commit any crime other than trespassing, and then committing a reckless or negligent crime therein. This, he contended, is not generic burglary under ACCA. The government moved for summary affirmance, which motion the court below granted. *See* [Appendix B]; *United States v. Adams*, 831 Fed. Appx. 155 (5th Cir. December 15, 2020)(unpublished).

REASONS FOR GRANTING THIS PETITION

The courts of appeals are divided as to whether “burglary” as ACCA uses the term encompasses the entry into a structure without intent to commit a crime followed by the commission of a reckless, negligent, or strict liability crime.

Given identical inputs—a state crime labeled “burglary” committed whenever a trespasser commits some other crime inside a building, even one with a mental state short of strict criminal intent—the Fifth and Seventh Circuits reached opposite outputs. Texas introduced this novel theory of “burglary” liability. The element that has always distinguished burglary from mere trespass is the intent to commit a crime inside the building. 4 William Blackstone, *Commentaries on the Laws of England* 227 (1769) (“[I]t is clear, that [the] breaking and entry must be with a felonious intent, otherwise it is only a trespass.”). Texas’s pioneering theory “dispenses with the need to prove intent” when the actor actually commits a predicate crime inside the building after an unlawful entry. *DeVaughn v. State*, 749 S.W.2d 62, 65 (Tex. Crim. App. 1988) (internal quotation omitted). Judge Sykes has helpfully dubbed this new theory “trespass-plus-crime.” *Van Cannon v. United States*, 890 F.3d 656, 664 (7th Cir. 2018).

Five states now define burglary to include trespass-plus-crime—Minnesota, Michigan, Montana, Tennessee, and Texas—the list of predicate offenses includes non-intentional crimes. In these states, prosecutors can convict a defendant for burglary by proving that he committed a reckless, negligent, or strict liability crime

while trespassing. These burglary offenses are broader than generic burglary because they lack the element of “intent” to commit another crime inside the building.

This Court explicitly reserved judgment on this issue in *Quarles v. United States*, __U.S.__, 139 S. Ct. 1872, 1880 n.2 (2019). The issue has expressly divided the Fifth and Seventh Circuits. And it is intertwined with a deeper dispute about how to “do” the categorical approach. The Seventh Circuit has held that trespass-plus-crime burglaries are non-generic: The commission of a crime is not synonymous with forming an intent to commit that crime. “[N]ot all crimes are intentional; some require only recklessness or criminal negligence.” *Van Cannon*, 890 F.3d at 664. Significantly, the Seventh Circuit reaffirmed *Van Cannon* after *Quarles* in *Chazen v. Marske*, 938 F.3d 51 (7th Cir. 2019).

But the Fifth Circuit, reviewing a materially identical version of burglary, held that the crime was generic. *See United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc). In the Fifth Circuit, it is not enough to show that statutory language plainly embraces non-generic conduct; a defendant must also prove that the state would prosecute someone under the non-generic theory. *See United States v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc).

There is no relevant statutory difference between the Minnesota crime in *Van Cannon* and the Texas crime in *Herrold*. Any argument that Texas courts somehow require proof of specific intent is rebutted by examining Texas law. The two circuits are in direct conflict, and this Court should resolve that conflict.

Texas Penal Code § 30.02(a)(3) does not require proof of specific intent to commit another crime inside the premises. A trespasser commits “burglary” in Texas if, after an unlawful entry, he “commits . . . a felony, theft, or an assault.” Texas Penal Code § 30.02(a)(3). Often, those predicate crimes are committed intentionally. “But not all crimes are intentional; some require only recklessness or criminal negligence.” *Van Cannon*, 890 F.3d at 664. For example, in Texas, a person commits assault when he “recklessly causes bodily injury” or when he knowingly “causes physical contact” with the victim when he “*should reasonably believe* that the other will regard the contact as offensive or provocative.” Texas Penal Code § 22.01(a)(1), (3) (emphasis added). Neither of those “assault” crimes requires formation of intent. But §30.02(a)(3) counts any assault committed after unlawful entry as “burglary.”

Subsection (a)(3) also includes all felonies committed after unlawful entry. The Texas Penal Code defines several felonies that are committed without ever forming specific intent, including:

- Injury to a child / elderly person / disabled person: “A person commits” this felony if he “recklessly, or with criminal negligence” causes the victim to suffer “bodily injury,” Texas Penal Code §22.04(a);
- Endangering a child: “A person commits” the state-jail felony offense of “endangering a child” if he “recklessly, or with criminal negligence, by act or omission, engages in conduct that places a child younger than 15 years in imminent danger of . . . bodily injury, or physical or mental impairment,” Texas Penal Code §22.041; and

- Sexual assault / statutory rape: A person commits felony sexual assault if he has sexual contact or intercourse with someone who is younger than 17 years old, “regardless of whether the person knows the age of the child at the time of the offense,” Texas Penal Code §22.011(a)(2); *see also May v. State*, 919 S.W.2d 422, 424 (Tex. Crim. App. 1996)(under Texas law, statutory rape is a “strict liability offense.”).

When listing the elements of “burglary” under §30.02(a)(3), Texas appellate decisions routinely recognize that felonies with reckless or even negligent mens rea are sufficient to give rise to liability under §30.02(a)(3):

- *Daniel v. State*, 07-17-00216-CR, 2018 WL 6581507, at *3 (Tex. App.—Amarillo Dec. 13, 2018, no pet.): “All the State was required to prove was that he entered the residence without consent or permission and while inside, assaulted or attempted to assault Phillips and Schwab.” *Id.* And “a person commits assault when he intentionally, knowingly, or recklessly causes bodily injury to another.” *Id.*, 2018 WL 6581507, at *2 (emphasis added).
- *State v. Duran*, 492 S.W.3d 741, 743 (Tex. Crim. App. 2016) (recognizing reckless assault as a predicate for §30.02(a)(3) liability);
- *Scroggs v. State*, 396 S.W.3d 1, 10 & n.3 (Tex. App.—Amarillo 2010, pet. ref’d, untimely filed) (same);
- *Wingfield v. State*, 282 S.W.3d 102, 105 (Tex. App.—Fort Worth 2009, pet. ref’d) (same);

- *Alacan v. State*, 03-14-00410-CR, 2016 WL 286215, at *3 (Tex. App.—Austin Jan. 21, 2016, no pet.) (same);
- *Crawford v. State*, 05-13-01494-CR, 2015 WL 1243408, at *2 (Tex. App.—Dallas Mar. 16, 2015, no pet.) (same);
- *Johnson v. State*, 14-10-00931-CR, 2011 WL 2791251, at *2 (Tex. App.—Houston [14th Dist.] July 14, 2011, no pet.) (same);
- *Torrez v. State*, 12-05-00226-CR, 2006 WL 2005525, at *2 (Tex. App.—Tyler July 19, 2006, no pet.) (same);
- *Guzman v. State*, 2-05-096-CR, 2006 WL 743431, at *2 (Tex. App.—Fort Worth Mar. 23, 2006, no pet.) (same)
- *Brooks v. State*, 08-15-00208-CR, 2017 WL 6350260, at *7 (Tex. App.—El Paso Dec. 13, 2017, pet. ref'd) (listing robbery by reckless causation of injury as a way to prove §30.02(a)(3)).
- *Battles v. State*, 13-12-00273-CR, 2013 WL 5520060, at *1 & n.1 (Tex. App.—Corpus Christi Oct. 3, 2013, pet. ref'd) (recognizing that the predicate felony—injury to an elderly individual under Texas Penal Code §22.04—could be committed with recklessness or with “criminal negligence.”

These cases eliminate the inference that Texas requires proof of “formation of specific intent” to convict under §30.02(a)(3). Under the reasoning of *Van Cannon*, and *Chazen* that makes §30.02(a)(3) non-generic. But the Fifth Circuit has held that it is generic. This Court should grant the petition to resolve that conflict.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 14th day of May, 2021.

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