No. _____

In the

Supreme Court of the United States

_____

Michael David McCall,

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

_____

Kevin Joel Page
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
Joel_Page@fd.org

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 Michael David McCall, 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 Michael David McCall 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. McCall*, 840 Fed. Appx. 791 (5th Cir. March 23, 2021) (unpublished). It is reprinted in Appendix A to this Petition. The Court of Appeals order to vacate and remand, *United States v. McCall*, 5th Cir. No. 19-10030 (Dec. 18, 2019) is attached as Appendix B. The district court's judgement and sentence is attached as Appendix C. The district court's amended judgement and sentence is attached as Appendix D.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on March 21, 2021. 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

Petitioner Michael David McCall pleaded guilty to possessing a firearm in spite of a prior conviction. *See* (Record in the Court of Appeals, at 43). The district court imposed a 37-month sentence of imprisonment, (Record in the Court of Appeals, at 164), finding that his three prior burglaries of a habitation under Texas law did not constitute "violent felonies," *see* (Record in the Court of Appeals, at 146-147). It thus declined to apply the provisions of 18 U.S.C. §924(e), the Armed Career Criminal Act (ACCA), which would have required a 15-year mandatory minimum. *See* (Record in the Court of Appeals, at 146-147).

The government appealed, and secured summary reversal based on *United States v. Herrold*, 941 F.3d 173, 177 (5th Cir. 2019)(en banc). *See* (Record in the Court of Appeals, at 105). On remand, the government introduced judicial records showing three prior convictions for burglary of a habitation under Texas law, and one showing a prior conviction for burglary of a building. *See* (Record in the Court of Appeals, at 233-274). The defendant objected to the suggestion that these convictions could be treated as "violent felonies" under ACCA, contending that *Herrold* might be overruled. *See* (Record in the Court of Appeals, at 366-367). The district court overruled the objection and imposed a sentence of 180 months imprisonment. See (Record in the Court of Appeals, at 175, 179, 186); [Appendix A].

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. *See* Appellant's Initial Brief in *United States v. McCall*, 20-10959, 2020 WL

7401570, at *4-11 (December 15, 2020). 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. *See id.* This, he contended, is not generic burglary under ACCA. *See id.* The government moved for summary affirmance, which motion the court below granted. *See* [Appendix B]; *United States v. McCall*, 840 Fed. Appx. 791 (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 20th day of August, 2021.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Kevin Joel Page
Kevin Joel Page
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: joel_page@fd.org

Attorney for Petitioner