

ORIGINAL

No. 21-7520

Supreme Court, U.S.
FILED

MAR 16 2022

OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

ISAIAH WILSON
Petitioner,

VS.

UNITED STATES OF AMERICA
Respondent,

ON PETITIONER FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Should the court exercise its Power to resolve a split amongst the sister Circuits regarding New Jersey Third degree burglary designation as a crime of violence Pursuant to U.S.S.G § 4B1.2(a)(2).
2. Is Mr. Wilson's enhanced sentence under U.S.S.G § 4B1.2(a)(2) a violation of due Process.

LIST OF PARTIES

All Parties appear in the Caption of the case on the cover Page.

RELATED CASES

- United States v. Isaiah, NO. 14-4704, U.S. Court of Appeals for the Second Circuit. Judgement enter May. 24, 2016.
- Isaiah Wilson v. United States, NO. 13-cr-777-03, 16-cv-4994, U.S. District Court for the Southern district of New York. Judgement enter Mar. 1, 2021.
- Isaiah Wilson v. United States, NO. 21-846, United States Court of Appeals for the Second Circuit. Judgement enter Sept. 9, 2021.

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IN THE SUPREME COURT
OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of Certiorari issue to review the Judgment below.

OPINION BELOW

The Opinion of the United States Court of Appeals appear at Appendix A to the Petition and is unpublished.

The Opinion of the United States district Court appears at Appendix B to the Petition and is reported at

JURISDICTION

The date on which the United States Court of Appeals decided my Case September 9, 2021. At timely Petition for rehearing was denied by the United States Court of Appeals on the following date: December 15, 2021, and a copy of the order denying rehearing appears at Appendix C. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Sentencing Guidelines § 4B1.1

(A) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony conviction of either a crime of violence or a controlled substance offense.

New Jersey Statute Annotated § 2C:18-2(a)

Under New Jersey's burglary statute, a person is guilty of burglary if, with purpose to commit an offense therein or thereon he: (1) Enters a research facility, structure, or a separately secured or occupied portion thereof unless the structure was at the time open to the public or the actor is licensed or privileged to enter.

STATEMENT OF THE CASE

On September 4, 2013, Mr. Wilson and two co-defendants were arrested in New York City by United States Drug Enforcement Administration. October 8, 2013, Mr. Wilson was indicted on Conspiracy to distribute Cocaine and heroin (count one), Conspiracy to Commit Hobbs Act Robbery (Count two), and unlawful Possession of a Firearm in connection with a drug trafficking offense and Crime of Violence (Count three). See Dkt. No. 10. On March 24, 2014, Mr. Wilson Pled guilty to Count two and Count three, as well as to lesser included offense of conspiracy to distribute smaller amounts of Cocaine and heroin than originally charged in Count one of the indictment. See Dkt. No. 58 Plea Tr. 24: 18-24.

In the Plea agreement executed between Mr. Wilson and the Government, the Parties agreed Mr. Wilson qualified as a Career offender Under Section 4B1.1(a), because he had two Prior Conviction for a "Crime of Violence". The convictions were Burglary and aggravated assault in the third degree under New Jersey law. December 8, 2014, at the Sentencing hearing Mr. Wilson's Counsel conceded that New Jersey convictions constituted crimes of violence for the purpose of the Career offender enhancement. Dkt. No. 115, Sent Tr. 23: 24: 25. The Court conducted its own independent calculation, and agree with the Parties that the stipulated Guidelines range was correct. Id. at 6: 9-6. The Court sentenced Mr. Wilson to 216 months imprisonment.

December 19, 2014, Mr. Wilson appealed his sentence to the Courts of Appeals for the Second Circuit, arguing his prior conviction for burglary did not qualify as a "crime of violence" under Section 4B1.2 of the Guidelines. Dkt. NO. 110. May 24, 2016, the second circuit dismissed Mr. Wilson's appeal because he had not demonstrated that the waiver of appellate rights contained in the plea agreement was unenforceable. Dkt. NO. 121.

On June 24, 2016, Mr. Wilson filed, with assistance of counsel, a motion to vacate his sentence under 28 U.S.C. § 2255, arguing that in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015), his prior conviction for burglary and aggravated assault under New Jersey law did not qualify as a crime of violence under 4B1.2. August 8, 2019, the court denied Mr. Wilson's motion on the merits. Dkt. NO. 170. The court reasoned that § 4B1.2(a)(2) of the Guidelines was not void for vagueness in light of *Beckles v. United States*, 137 S.Ct. 886 (2017), and that Mr. Wilson's burglary conviction is a crime of violence for the purpose of that sentencing enhancement, citing *United States v. Brown*, 514 F.3d 256, 264-69, (2d Cir. 2008), where the second circuit held that an effectively identical burglary statute in New York constitutes a crime of violence under § 4B1.2(a)(2). *Id.*

On October 25, 2019, Mr. Wilson renewed his rule 59e motion. Dkt. NO. 184. Mr. Wilson argued first that the court erred in considering the arguments raised in his original 2255 motion and accompanying affidavit waived. Second, that the court erred in determining

that New Jersey burglary conviction was a "crime of violence" for the purpose of the career offender enhancement of the Guidelines § 4B1.2.

March 1, 2021, the court denied Mr. Wilson's motion on the Merit. The court reasoned that, the second circuit case cite in the Prior Opinion, which determined that an effectively identical New York Statute qualified. Citing Brown, 514 F.3d 256, 264-69 (2d Cir. 2008). The court held that New Jersey burglary statutes qualifies as a crime of violence under § 4B1.2 of the Guidelines. Dkt. NO. 201

April 1, 2021, Mr. Wilson filed a motion for a notice of Prisoner appeal with the district court. Dkt. NO. 202. July 23, 2021, Mr. Wilson filed a motion for certificate of appealability case No. 21-846. Dkt. NO. 42. September 9, 2021, Courts of Appeals for the second Circuit denied Mr. Wilson motion for certificate for appealability, in forma pauperis status, and to vacate, set aside, or modify sentence, construed as a motion for summary reversal. Dkt. NO. 50. November 8, 2021, Mr. Wilson filed a motion for reconsideration / reconsideration en banc. Dkt. NO. 56. December 15, 2021, The court denied Mr. Wilson's motion for Panel reconsideration or in alternative, for reconsideration en banc. Dkt. NO. 59.

Reason for Granting the Petition

Use of state burglary to enhance sentence was in error by the Second Circuit Court of Appeals. Defendants enjoy the right of the Penalties faced before a court. As it stands several sister circuits beyond the second circuit have found state burglary is not a suitable predicate.

Petitioner seeks this Court to resolve the split amongst the sister circuits.

I. It is the duty of the Court to resolve splits amongst the Sister Circuits.

It is duty of the Supreme Court to resolve splits amongst the Sister Circuits. There exists a split amongst the Sister Circuits regarding State burglary statutes that involve structures that are not "dwellings". The original Guidelines defined crime of violence by adopting the definition of that term as it appeared in 18 U.S.C. § 16. Guidelines § 4B1.2(i) (1987) (renumbered § 4B1.2(a) in 1997, Guidelines Appendix C, Vol. 1, Amendment 568, at 526 (eff. Nov. 1, 1997)); see 18 U.S.C. § 16 (defining Crime of Violence to encompass any "felony... that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course committing the offense"). The Commentary to the original § 4B1.2 stated that the Commission interpreted the crime-of-violence definition to mean that "[C]onviction for burglary of a dwelling would be covered". Guidelines § 4B1.2 Application Note 1 (1987) (emphasis added). However, this stated interpretation was short lived.

In 1989, the Commission amended § 4B1.2 "to clarify" the definition of crime of violence. Guidelines Appendix C, vol. 1, Amendment 268 (eff. Nov. 1, 1989) ("Amendment 268"), at 133. The reference to 18 U.S.C. § 16 was deleted; the Clarified Guidelines

definition Used the § 4B1.2(a) wording Quoted in the second Paragraph of this Part II. B. (wording that has remained the same through 2007), i.e., listing, inter alia, burglary of a dwelling and any felony that "otherwise involves conduct that Present a Serious Potential risk of Physical injury to another," Amendment 268, at 131-33. The original commentary was replaced by Commentary that continued to note that crime of violence include burglary of a dwelling; but the statement that "burglary of a Structure would not be covered" was omitted. Id at 132. No subsequent version of 4B1.2 or of its Commentary has stated that burglaries of non-dwellings are exclude from the Guide lines definition of crime of violence. The Sentencing Commission, for its Part has not since 1989 Clarified this matter.

Currently, the Sister Circuits dealing with state laws defining crimes of burglary have struggled to determine whether interpreting § 4B1.2(a)(2)'s residual "otherwise involves" clause to include burglary of a building that is not a dwelling is foreclosed by that definition's earlier specific mention of "burglary of a dwelling." Some Circuits have answered this question in the affirmative, concluding that only burglaries of dwellings are to be considered crimes of violence under § 4B1.2(a)(2). See e.g., United States v. Harrison, 58 F.3d 115, 119 (4th Cir. 1995); United States v. Spell, 44 F.3d 936, 938-39 (11th Cir. 1995); United States v. Smith, 10 F.3d 724, 733 (10th Cir. 1993). Others have conclude that burglary of a Commercial

building involves conduct that presents a serious potential risk of physical injury to another, and hence burglary of such a non-dwelling is also a crime of violence, falling within the scope of 4B1.2(a)(2)'s last clause. See e.g., *United States v. Hascall*, 76 F.3d 902, 906 (8th Cir.) ("Hascall"), cert. denied, 519 U.S. 948, 117 S.Ct. 358, 136 L.Ed. 2d 250 (1996); *United States v. Fiores*, 938 F.2d 1, 4-5 (1st Cir. 1992), cert. denied, 507 U.S. 1024, 113 S.Ct. 1830, 123 L.Ed. 2d 458 (1993). Still other circuits have ruled that whether burglary of a building other than dwelling be considered a crime of violence within the meaning of the residual clause of § 4B1.2(a)(2) depends on the circumstances of the crime. See, e.g., *United States v. Matthews*, 374 F.3d 872, 880 (9th Cir. 2004); *United States v. Howlts*, 240 F.3d 647, 651-52 (7th Cir. 2001); *United States v. Wilson*, 168 F.3d 916, 928-29 (6th Cir. 1999); *United States v. Jackson*, 22 F.3d 583, 585 (5th Cir. 1994).

Mr. Wilson suffers prejudice due to an enhanced sentence from a conviction for third degree burglary under New Jersey Statute Annotated § 2C:18-2(a). The Court should resolve the split amongst the sister circuits and give relief to Mr. Wilson from the enhance sentence.

II. Conviction for New Jersey third degree burglary cannot be used to enhance sentence.

The Second Circuit has held that Mr. Wilson's Prior third degree burglary conviction under New Jersey's law is identical to third degree burglary under New York's law, which qualifies as a Predicate offense for a sentencing enhancement under United States Sentencing Guidelines § 4B1.2(a)(2) residual clause. The court committed procedural error when it failed to comply with the rules or steps in the legal process, when there was clear Supreme Court and Second Circuit precedents detailing the analytical framework for determining whether a crime qualifies as a predicate offense under § 4B1.2(a). see *Taylor v. United States*, 495 U.S. 575, 602 110 S.Ct. 2143, 109 L.Ed. 2d 607 (1990); *United States v. Van Mead*, 773 F.3d 429, 432 (2d Cir. 2014).

The career offender sentencing enhancement at United States Sentencing Guidelines § 4B1.1(a) requires that, "the defendant has at least two Prior felony conviction of either a crime of violence ~~or a~~ controlled substance offense." At the time Mr. Wilson was sentenced December 2014, a crime of violence for the purpose of 4B1.1 was defined in § 4B1.2(a) as:

Any offense under Federal or State law, Punishable by imprisonment for a term exceeding one Year, that has as a element the use, attempted use, or threatened use of Physical Force against the Person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves

Conduct that Presents a Serious Potential Risk of Physical Injury to another. Section 4B1.2(a)(1) is referred to as the "Physical Force Clause". The first half of 4B1.2(a)(2) contains the "exemplar crimes", and the second half the "Residual Clause".

When determining whether a Prior Conviction Qualifies as a Crime of Violence Under the Guidelines, Courts apply a categorical approach, focusing on "the Fact of Conviction and the Statutory definition of Prior Offense" rather than conduct underlying the offense. Taylor, 495 U.S. at 600.

A. The New Jersey burglary Statute does not Satisfy the Force Clause of § 4B1.2(a)(1).

Under N.J.S.A § 2C:18-2, a Person is guilty of burglary if with Purpose to commit an offense therein or thereof he: (1) enters a research facility, structures, or a separately secured or occupied Portion thereof unless the structures was at the time Open to the Public or the actor is licensed or Privilege to enter; (2) Surreptitiously remains in a research facility, structures, or a separately secured or occupied Portion thereof knowing that he is not licensed or Privileged to do so; (3) Trespass in or Upon Utility Company Property where Public Notice Prohibiting trespass is given by conspicuous Posting, or fencing or other enclosure manifestly designed to exclude intruders N.J.S.A § 2C:18-2(a)(2014).

For the fact that the law lacks a "Physical Force element," it cannot be deemed a "crime of violence" under § 4B1.2(a)(1)'s "Physical Force clause." Van Mead, 773 F.3d at 432.

B. The New Jersey burglary statute does not fit within the enumerated Clause of § 4B1.2(a)(2).

The New Jersey burglary statute reaches beyond the generic definition of burglary in 4B1.2(a)(2). Unlike the generic definition of burglary which concern it self with dwellings only. In *Taylor*, the Sumereeme Court held that burglary under the enumerated Clause was a crime having the basic element of unlawful or unPrivileged entry into or remaining in a building or structures with intent to commit a crime, where Ships, vessels, Car, vechile and airplanes do not qualify as buildings or structures. *Taylor*, 495 U.S. at 599. *Taylor* went on to explain that some states define burglary more broadly, including entry into cars and vending machines as examples. *Id.* at 602. New Jersey's burglary statute is one such Statute as "structures" is defined as: "Any building, room, Ship, vessel, Car, vechile, or Airplane and also any Place adopted for overnight accommodation of Person or for carrying on business therein, whether or not a Person is actually Present." N.J.S.A § 2C:18-1 (west 1994).

The Second Circuit has followed this rationale as it found that Mr. Wilson's third degree burglary was a crime of violence under § 4B1.2(a)(2)

residual clause, citing *United States v. Brown*, 514 F.3d 256, 265 (2d Cir. 2008), and not as an enumerated offense.

C.I. New Jersey third degree burglary does not meet the remaining
Residual clause

When determining whether a Prior Conviction falls within the residual clause of U.S.S.C. § 4B1.2(a)(2), the court's inquiry remains a categorical one, "considering whether the elements of the offense are the type that would justify its inclusion within the residual provision, without inquiring into specific conduct of this particular offender. *James v. United States*, 550 U.S. 192, 202, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007).

Under this approach, "Every conceivable factual offense covered by a structure need not necessarily present a serious potential risk of injury before the offense can be deemed a violent," or, as it were, a crime of violence. *James*, 550 U.S. at 208. Instead, the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another. *Id.*

The Supreme Court has provided two tests to determine whether an offense qualifies as a crime of violence within the meaning of U.S.S.C. § 4B1.2(a)(2). Which test a court will apply depends on

the Mens rea requirement, demanding that a defendant act knowingly, intentionally, or the likes as to the core element or elements of the offense" need only "pose a risk 'similar in degree' to its 'closest analog' among the exemplar crimes to qualify as a 'violent felony' under the residual clause". Sykes v. United States, 131 S.Ct. 2267, 2275-76, 180 L.Ed. 2d 60 (2011). On the other hand, for "a strict liability, negligence, or reckless offense" to qualify as a violent felony, it must not only 'involve conduct presenting a serious potential risk of physical injury to another' but must also be roughly similar to the exemplar crimes by typically consisting of purposeful, violent, and aggressive conduct. Begay v. United States, 553 U.S. 137, 128 S.Ct. 1581, 170 L.Ed. 2d 490 (2008); see Sykes, 131 S.Ct. at 2275-76 (limiting Begay to strict liability, negligence, and recklessness offenses).

C.(i)

Degree of Risk

Mr. Wilson's third degree burglary conviction under New Jersey's law is not limited to the Sykes analysis. The Begay analysis governs Mr. Wilson's third degree burglary conviction under New Jersey's law, because it involves a crime akin to strict liability, negligence and recklessness crimes. As it is in James, the enumerated offense of burglary is the closest analog to third degree burglary conviction at issue in this case. Accordingly, the question is whether the risk of physical injury

Posed by third degree burglary offense is roughly similar to the risk posed by generic burglary.

Under New Jersey's 2C:18-1 statute, a structure is defined overly broad as mentioned above. see N.J.S.A. § 2C:18-1. New Jersey Highest court held, third degree burglary was "affirmed because the fenced in and locked lot was a structure within the meaning of N.J.S.A. § 2C:18-2." State v. Olivero, 221 N.J. 632, 115 A.3d 1270, 2015 N.J. LEXIS 648 (N.J. 2015). It is reasonable to believe that this "fenced in" and "locked lot" is not a "dwelling" or "building" like the generic definition Taylor describes, and for the fact that it is a "lot" and not a "dwelling", the chances of a face to face confrontation doesn't exist in this matter, when fails to create an immediate, serious and foreseeable physical risk that arise concurrently with the commission of the crime. Further, In State v. J. Jan, 264 N.J. Super. 405, 624 A.2d 1029, 1993 N.J. Super. LEXIS 187 (App. Div. 1993), Aff'd, 135 N.J. 471, 640 A.2d 1152, 1994 N.J. LEXIS 426 (N.J. 1994), the court held that, "defendant was properly convicted of burglary and Joyriding where Joyriding constituted an offense within the confines of N.J.S.A. § 2C:18-2".

Plainly third degree burglary under § 2C:18-2(a)(1) does not pose a similar risk of confrontation under the offense, because entering into someone car (structure) without their permission to take it

for a ride, but with intention on bringing it back, does not present serious potential risk of injury to another. Since New Jersey third degree burglary is not a generic burglary, there are too many ways under this statute to commit burglary and not have a face to face confrontation as in James. Therefore Mr. Wilson's third degree burglary conviction does not pose the risk of physical injury as generic burglary, and cannot qualify as a crime of violence under the residual clause.

Similar in kind

C(ii) Begay requires that the prior conviction must also be similar in kind to the enumerated crimes. See Begay, 553 U.S. at 143. Crimes that can be committed through negligence do not satisfy the Begay inquiry. (Applying Begay to conclude that statutory rape under New York law is not a crime of violence under the residual clause of 4B1.2(a)(2) because the crime can be committed through negligent conduct). Van Mead, 773 F.3d at 437; (Maryland burglary statute not purposeful, aggressive, and violent under Begay because the statute "explicitly criminalizes a broad swath of unintentional conduct") United States v. Martin, 753 F.3d 485, 491 (11th Cir. 2014). Comparing New Jersey's burglary statute to Maryland's burglary statute, it too can not be characterized as purposeful because the statute can be violated by negligent conduct.

New Jersey's Highest Court has made clear that the statute at issue in this case requires: "If the actor has the requisite intent to commit an offense, the act of burglary is complete upon entry." *State v. Jijon*, 264 N.J. Super. 405, 407 (App. Div. 1993), *aff'd* 135 N.J. 471 (1994). However, in addition to these two elements, a person may be "licensed" or "privileged" to enter a structure.

See e.g. 2C:18-2(a)(1). The element of intent to commit an offense can be satisfied with "any offense". *State v. Robinson*, 289 N.J. Super. 447, 453 (App. Div. 1996); A disorderly person or petty disorderly person offense satisfies the intent element of burglary. *State v. Jijon*, 264 N.J. Super. at 407; see also *State v. Marquez*, 227 N.J. Super. 162, 169 (App. Div. 1994) (Intent not shown by defendant's entry into apartment contrary to domestic violence restraining order), *certif. denied*, 141 N.J. (1995). Held in *State v. Zembreski*, 455 N.J. Super. 412, 138 A.3d 583, 2016 N.J. Super. LEXIS 72 (App. Div. 2016), the court explained, "defendant commits an act of burglary, N.J. Stat. Ann. 2C:18-2, if he gains access to his victim's residence by deception for purpose of committing a crime". A conviction for that offense may result either from a well planned scheme or merely rash, impetuous conduct of a defendant. Entering a structure involves no felonious or larcenous intent, it is a crime of general intent that includes within its scope a variety of acts, including some that are reckless or negligent.

Clearly, the statute's knowledge requirement "is designed primarily to excluded from criminal liability both the inadvertant trespasser and trespasser who believes that he has received an express or implied permission to enter or remain. (Quoting Model Penal Code § 221.2 (1985). Accordingly, it is an affirmative defense to a § 2C:18-2(a)(1) charge if the actor reasonably believed that the owner of the premises would have licensed him to enter. Because the defense requires a reasonable belief of permission to enter a structure, a defendant who unreasonably believed that he had permission to enter would be guilty under § 2C:18-2(a)(1). That is, a defendant who reasonably believed that he had permission to enter would not have the awareness that his entry was unwarranted, while a defendant who unreasonably believed he had permission would be deemed to be aware that his entry was unwarranted.

It is therefore clear that a conviction under § 2C:18-2(a)(1) may be based on negligent rather than intentional conduct, and because the statute may be violate by negligent conduct, a violation of § 2C:18-2(a)(1) is not purposeful and thus is not similar in kind to the Guidelines' enumerated crimes. Mr. Wilson's burglary conviction under § 2C:18-2(a)(1) therefore can not be treated as a crime of violence under the residual clause of U.S.C.G § 4B1.2(a)(2).

"Identical" as, "(1) being the same, (2) essentially alike."

Here, these two Statutes fails to be the same or alike, as mentioned above, Have the courts done its own independent analysis of the New Jersey statute, it would have notice the difference of the statutes. The court should not hold New Jersey's Statute to the standard of a Unidentical New York statute.

IV.

Conclusion

As several Sister Circuits have found, a conviction for New Jersey third degree burglary cannot support an enhanced sentence under 4B1.2. Mr. Wilson's current sentence has been illegally extended beyond the statutory maximum and is a due Process violation. For the reason above Mr. Wilson Prays this court Grant him the relief he seeks.

March, 16, 2022

Isaiah Wilson