

APPENDIX

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UNITED STATES DISTRICT COURT

Northern District of Iowa

UNITED STATES OF AMERICA

v.

CARLOS DEJUAN HUTCHINSON

) **JUDGMENT IN A CRIMINAL CASE**
)
) Case Number: **0862 1:19CR00129-001**
)
) USM Number: **18294-029**
)

Samuel Owen Cross

Defendant's Attorney

 ORIGINAL JUDGMENT **AMENDED JUDGMENT**

Date of Most Recent Judgment:

THE DEFENDANT: pleaded guilty to count(s) 1 of the Indictment filed on December 18, 2019 pleaded nolo contendere to count(s) _____ which was accepted by the court. was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 922(g)(1), 922(g)(3), and 924(e)(1)	Possession of a Firearm by a Prohibited Person as an Armed Career Criminal	10/12/2019	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. The defendant has been found not guilty on count(s) _____ Count(s) _____ is/are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

C.J. Williams
United States District Court Judge

Name and Title of Judge

September 28, 2020

Date of Imposition of Judgment



Signature of Judge

September 29, 2020

Date

DEFENDANT: **CARLOS DEJUAN HUTCHINSON**
CASE NUMBER: **0862 1:19CR00129-001**

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PROBATION

The defendant is hereby sentenced to probation for a term of:

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
180 months on Count 1 of the Indictment.

The court makes the following recommendations to the Federal Bureau of Prisons:
It is recommended that the defendant be designated to a Bureau of Prisons facility as close to the defendant's family as possible, commensurate with the defendant's security and custody classification needs.

It is recommended that the defendant participate in the Bureau of Prisons' 500-Hour Comprehensive Residential Drug Abuse Treatment Program or an alternate substance abuse treatment program.

The defendant is remanded to the custody of the United States Marshal.

The defendant must surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____ .

as notified by the United States Marshal.

The defendant must surrender for service of sentence at the institution designated by the Federal Bureau of Prisons:

before 2 p.m. on _____ .

as notified by the United States Marshal.

as notified by the United States Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
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OPPO UNITED STATES MARSHAL

DEFENDANT: **CARLOS DEJUAN HUTCHINSON**
CASE NUMBER: **0862 1:19CR00129-001**

SUPERVISED RELEASE

■ Upon release from imprisonment, the defendant will be on supervised release for a term of:
3 years on Count 1 of the Indictment.

MANDATORY CONDITIONS OF SUPERVISION

- 1) The defendant must not commit another federal, state, or local crime.
- 2) The defendant must not unlawfully possess a controlled substance.
- 3) The defendant must refrain from any unlawful use of a controlled substance.
The defendant must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future controlled substance abuse. (*Check, if applicable.*)
- 4) ■ The defendant must cooperate in the collection of DNA as directed by the probation officer. (*Check, if applicable.*)
- 5) The defendant must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where the defendant resides, works, and/or is a student, and/or was convicted of a qualifying offense. (*Check, if applicable.*)
- 6) The defendant must participate in an approved program for domestic violence. (*Check, if applicable.*)

The defendant must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: **CARLOS DEJUAN HUTCHINSON**
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STANDARD CONDITIONS OF SUPERVISION

As part of the defendant's supervision, the defendant must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for the defendant's behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in the defendant's conduct and condition.

- 1) The defendant must report to the probation office in the federal judicial district where the defendant is authorized to reside within 72 hours of the time the defendant was sentenced and/or released from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
- 2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed. The defendant must also appear in court as required.
- 3) The defendant must not knowingly leave the federal judicial district where the defendant is authorized to reside without first getting permission from the court or the probation officer.
- 4) The defendant must answer truthfully the questions asked by the defendant's probation officer.
- 5) The defendant must live at a place approved by the probation officer. If the defendant plans to change where the defendant lives or anything about the defendant's living arrangements (such as the people the defendant lives with), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 6) The defendant must allow the probation officer to visit the defendant at any time at the defendant's home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.
- 7) The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, the defendant must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about the defendant's work (such as the defendant's position or the defendant's job responsibilities), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 8) The defendant must not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- 9) If the defendant is arrested or questioned by a law enforcement officer, the defendant must notify the probation officer within 72 hours.
- 10) The defendant must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- 11) The defendant must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- 12) As directed by the probation officer, the defendant must notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and must permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 13) The defendant must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **CARLOS DEJUAN HUTCHINSON**
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SPECIAL CONDITIONS OF SUPERVISION

The defendant must comply with the following special conditions as ordered by the Court and implemented by the United States Probation Office:

1. The defendant must submit the defendant's person, property, house, residence, vehicle, papers, computers [as defined in 18 U.S.C. § 1030(e)(1)], other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant must warn any other occupants that the premises may be subject to searches pursuant to this condition. The United States Probation Office may conduct a search under this condition only when reasonable suspicion exists that the defendant has violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
2. The defendant must participate in a mental health evaluation. The defendant must complete any recommended treatment program, and follow the rules and regulations of the treatment program. The defendant must take all medications prescribed to the defendant by a licensed medical provider.
3. The defendant must participate in a substance abuse evaluation. The defendant must complete any recommended treatment program, which may include a cognitive behavioral group, and follow the rules and regulations of the treatment program. The defendant must participate in a program of testing for substance abuse. The defendant must not attempt to obstruct or tamper with the testing methods.
4. The defendant must not use or possess alcohol. The defendant is prohibited from entering any establishment that holds itself out to the public to be a bar or tavern without the prior permission of the United States Probation Office.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them. Upon a finding of a violation of supervision, I understand the Court may: (1) revoke supervision; (2) extend the term of supervision; and/or (3) modify the condition of supervision.

Defendant

Date

United States Probation Officer/Designated Witness

Date

DEFENDANT: **CARLOS DEJUAN HUTCHINSON**
 CASE NUMBER: **0862 1:19CR00129-001**

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>AVAA Assessment¹</u>	<u>JVTA Assessment²</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100	\$ 0	\$ 0	\$ 0	\$ 0

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss³</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	-------------------------------	----------------------------	-------------------------------

TOTALS	\$ _____	\$ _____	
---------------	----------	----------	--

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

- the interest requirement is waived for the fine restitution.
- the interest requirement for the fine restitution is modified as follows:

¹Amy, Vicky, and Any Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

²Justice for Victims of Trafficking Act of 2015, 18 U.S.C. § 3014.

³Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ 100 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant must pay the cost of prosecution.
 The defendant must pay the following court cost(s):
 The defendant must forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

1 IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

3 UNITED STATES OF AMERICA,)
4 Plaintiff,)
5 VS.) 19-CR-129
6 CARLOS HUTCHINSON,)
7 Defendant.)

9 APPEARANCES:

10 ATTORNEY DILLAN EDWARDS, U.S. Attorney's Office,
11 111 Seventh Avenue S.E., Box 1, Cedar Rapids, Iowa 52401,
11 appeared on behalf of the United States.

12 ATTORNEY SAMUEL OWEN CROSS, Federal Public Defender's
13 Office, 222 Third Avenue S.E., Suite 290, Cedar Rapids,
Iowa 52401, appeared on behalf of the Defendant.

14

21 Transcript Ordered: 10/9/20
Transcript Completed: 10/30/20

1 further, I certainly would request a brief period of time
2 to do that.

3 THE COURT: No, let me take a look here. I've
4 got the statute. And I think you are right. I got
5 confused here a minute.

6 Yeah, all right, yeah, that is irrelevant to it.

7 All right. Thank you. This was well briefed and I
8 did review the *Herrold* decision, and the *Herrold* decision
9 is not binding on this Court but I do find it to be
10 persuasive. The *Herrold* analysis is that subsection (3)
11 of Texas Code 30.02(a) incorporates or has inherent
12 within it an intent requirement. It's consistent with
13 the interpretation adopted by the Texas courts
14 apparently. It makes sense to me as a logical matter as
15 well, because if you were to read it otherwise, then
16 if -- then a defendant could be found to be an armed
17 career criminal if they enter a building with the intent
18 to commit a felony offense under subsection (1), but not
19 be an armed career criminal if they enter a building and
20 actually commit the offense or attempt to commit the
21 offense, and that would end up with an absurd result
22 here. The *Herrold* court analyzed this statute and
23 concluded that the intent is inherent because you cannot
24 commit or attempt to commit another felony theft or
25 assault without intending to do so.

1 I understand that the underlying offense that may
2 have been committed or that would be attempted to be
3 committed could be an offense that did not require
4 specific intent and it could be performed recklessly, but
5 that's not the intent that's being addressed by the
6 statute. The intent is the intent to commit the crime.
7 Now, the crime itself may not require specific intent,
8 but that's not what is being addressed by burglary here
9 in the statute.

10 And so I find that the *Herrold* reasoning is
11 persuasive to me. I couldn't find any authority to the
12 contrary. And so while it is not binding on me, I am
13 going to adopt that reasoning. It has a dramatic effect
14 for this offender, and I recognize that. And perhaps the
15 Eighth Circuit Court of Appeals will disagree with me.
16 But as a legal matter, in my interpretation of this
17 statute and the case law, I find that to be the outcome
18 that is dictated by the law. Whether I agree with it or
19 not, I think that's the way the law reads.

20 And so I am going to overrule the defendant's
21 objection to paragraph 17. I do find the defendant does
22 qualify as an armed career criminal. And so the total
23 offense level will be 30, criminal history category IV,
24 with an advisory guideline range of 180 months.

25 Mr. Edwards, do you wish to be heard regarding the

1 been under treatment and prescribed medication for these
2 conditions as well.

3 He has a long-term use of controlled substances,
4 going back to the age of 18 with marijuana. He's used
5 marijuana, methamphetamine, cocaine, and heroin, and I
6 did note that his increase in the use of drugs seems to
7 have occurred most recently.

8 The defendant indicated that he had a good
9 upbringing, and appears to have had loving parents,
10 although it looks like they were perhaps separated or
11 divorced at some point. He does have children, as I
12 mentioned before.

13 The defendant did earn his GED while he was with the
14 Department of Corrections in Texas. His employment
15 history in recent years is limited, but that's not
16 surprising because he has been found to be disabled by
17 the Social Security Administration, has been receiving
18 benefits for being disabled.

19 Taking into account then all the factors at Title 18
20 United States Code Section 3553(a), I do find a sentence
21 at the guideline range and not above it is called for.
22 To be clear, if I was not bound by a mandatory minimum
23 sentence of 180 months, I would find a sentence below
24 that, and perhaps significantly below that, would be
25 sufficient but not greater than necessary to achieve the

1 goals of sentencing. But I am bound by what I believe to
2 be an appropriate and accurate conclusion that the
3 defendant is an armed career criminal, although perhaps
4 the Eighth Circuit will disagree with me, but that's my
5 conclusion.

6 I recognize, Mr. Hutchinson, that in making that
7 finding, you are being held accountable for your past
8 wrongs that you did serve time for. That's the way the
9 statute is written by Congress that I find I'm bound to
10 apply in this case. So given that, I'm not in a position
11 to give you any more leniency. I'm bound to sentence you
12 at the mandatory minimum sentence.

13 So it is the judgment of this Court, Mr. Hutchinson,
14 that you are hereby committed to the custody of the
15 Bureau of Prisons to be imprisoned for a term of
16 180 months. It is recommended that you be designated to
17 a Bureau of Prisons facility in close proximity to your
18 family which is commensurate with your security and
19 custody classification needs. It is recommended that you
20 participate in the Bureau of Prisons 500-hour
21 Comprehensive Residential Drug Abuse Treatment Program or
22 an alternate substance abuse treatment program.

23 Upon release from imprisonment, you will be placed
24 on supervised release for a term of 3 years. While on
25 supervised release, you must comply with the following

United States Court of Appeals
For the Eighth Circuit

No. 20-3116

United States of America

Plaintiff - Appellee

v.

Carlos Dejuan Hutchinson

Defendant - Appellant

Appeal from United States District Court
for the Northern District of Iowa - Cedar Rapids

Submitted: September 22, 2021

Filed: March 3, 2022

Before KELLY, ERICKSON, and GRASZ, Circuit Judges.

ERICKSON, Circuit Judge.

Carlos Dejuan Hutchinson (“Hutchinson”) pled guilty to possession of a firearm by a prohibited person, in violation of 18 U.S.C. §§ 922(g)(1) and (g)(3). The district court¹ found that Hutchinson had three prior qualifying felony

¹The Honorable C. J. Williams, United States District Judge for the Northern District of Iowa.

convictions and imposed an enhanced sentence under the Armed Career Criminal Act (the “ACCA”), 18 U.S.C. § 924(e). Specifically, the district court found that Hutchinson’s three burglary convictions under Texas Penal Code Ann. § 30.02(c)(2)² qualified as “violent felony” predicate offenses. Hutchinson appeals, contending the court erred because the definition of “burglary” in Texas Penal Code Ann. § 30.02(a) is broader than the generic definition of “burglary” in Taylor v. United States, 495 U.S. 575, 599 (1990). We disagree and affirm the district court.

I. BACKGROUND

Following a traffic stop on October 12, 2019, in Cedar Rapids, Iowa, Hutchinson was subjected to a lawful search during which officers found a pistol and ammunition in his jeans’ pockets. Hutchinson was charged with one count of possession of a firearm by a prohibited person, in violation of 18 U.S.C. §§ 922(g)(1) and (g)(3). He entered into a plea agreement with the government and consented to preparation of a pre-plea presentence investigation report (the “PSIR”).

Noting Hutchinson’s three prior Texas burglary convictions, the PSIR recommended that Hutchinson be sentenced as an armed career criminal pursuant to 18 U.S.C. § 924(e)(1). The indictments underlying two of the three convictions alleged Hutchinson not only intended to unlawfully enter the habitations, but he also had the intent to commit theft therein.

Hutchinson objected to the PSIR’s recommendation, contending his Texas convictions did not qualify as predicate offenses because Texas’s burglary statute is indivisible and Texas Penal Code Ann. § 30.02(a) does not contain the requisite “specific intent” element required under Taylor, 495 U.S. at 599. See Texas Penal

²A burglary conviction under Texas Penal Code Ann. § 30.02(a) is a second-degree felony if committed in a habitation. Tex. Penal Code Ann. § 30.02(c)(2) (West 2017). Hutchinson’s 1997 and 2008 burglary convictions were under prior versions of Texas Penal Code Ann. § 30.02(a), but the statute’s minor amendments following his convictions do not affect our analysis.

Code Ann. § 30.02(a)(3) (defining “burglary” to include the elements of “enter[ing] a building or habitation [without the effective consent of the owner] and commit[ting] or attempt[ing] to commit a felony, theft, or an assault”).

The district court rejected Hutchinson’s argument, concluding Hutchinson’s convictions were qualifying predicate offenses because Texas Penal Code Ann. § 30.02(a)(3) has an inherent specific intent requirement. The district court relied on the Fifth Circuit’s reasoning in United States v. Herrold, 941 F.3d 173 (5th Cir. 2019) (en banc), cert. denied, 141 S. Ct. 273 (2020), which determined that Texas Penal Code Ann. § 30.02(a)(3)’s elements of “burglary” are generic and that convictions thereunder may be “qualifying predicates for a sentence enhancement under the ACCA.” Herrold, 941 F.3d at 182.

On September 28, 2020, the district court sentenced Hutchinson to the mandatory minimum term of fifteen years’ imprisonment set forth in 18 U.S.C. § 924(e)(1). Hutchinson appeals.

II. ANALYSIS

The issue before us is whether the district court erred when it determined Texas Penal Code Ann. § 30.02(a)(3) requires the government to prove that the defendant “inten[ded] to commit a crime” after his or her unlawful entry. Taylor, 495 U.S. at 599 (defining the elements of generic burglary). We review the district court’s legal findings on this issue *de novo*. See United States v. Vanoy, 957 F.3d 865, 867 (8th Cir. 2020).

Burglary qualifies as an enumerated predicate offense for purposes of the ACCA when the state law requires the following generic elements: “unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” Taylor, 495 U.S. at 599; see Descamps v. United States, 570 U.S. 254, 260–61 (2013) (stating that Taylor set forth the rule for determining whether a prior conviction qualifies as an enumerated predicate offense under the ACCA). We

begin the analysis by applying a categorical approach to determine whether the statute meets the “generic” definition of “burglary.” In so doing, we consider the language of the statute and not the particular facts underlying the defendant’s prior offenses. Descamps, 570 U.S. at 261.

Texas Penal Code Ann. § 30.02(a) provides:

A person commits an offense [of burglary] 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.

Texas Penal Code Ann. § 30.02(a) (West 2017).

Because § 30.02(a) lists alternative ways that burglary may be committed, we also analyze the divisibility of the statute. The question we consider in this analysis is whether the statute “list[s] elements in the alternative” and criminalizes multiple actions, which would render the statute divisible; or, whether the statute “sets out a single (or ‘indivisible’) set of elements to define a single crime.” Mathis v. United States, 136 S. Ct. 2243, 2248–49 (2016). If the statute is indivisible, then we utilize the “categorical approach” and “line[] up that crime’s elements alongside those of the generic offense and see[] if they match.” Id. at 2248. If, on the other hand, the statute defines multiple crimes as a divisible statute, then we apply the “modified categorical approach,” which would allow us to review the record from the Texas court that convicted Hutchinson in order to determine which subsection of § 30.02(a)

served as the basis for Hutchinson’s conviction and whether his conviction met the generic elements. Id. at 2249.

While the district court did not make an express finding on the divisibility of § 30.02(a), it adopted the reasoning of the Court of Appeals for the Fifth Circuit in Herrold, which found that the statute was indivisible. 941 F.3d at 177. Neither party has raised any meaningful arguments to contest this finding. By its plain language, the statute is set forth in the disjunctive, and, as found by the Texas Court of Appeals, it identifies three alternative ways by which a person may commit the single crime of burglary. See Martinez v. State, 269 S.W.3d 777, 783 (Tex. Ct. App. 2008) (holding that the Texas Legislature did not intend to create “distinct criminal offenses” under Texas Penal Code Ann. § 30.02(a)(1) and § 30.02(a)(3)).

Next, when determining whether § 30.02(a)(3) requires the government to prove the defendant had the intent to cause a specific unlawful result after a non-consensual entry, we note that the Fourth and Fifth Circuits have held it does. See United States v. Pena, 952 F.3d 503, 510–11 (4th Cir. 2020) (“[W]e conclude that Texas burglary qualifies as generic burglary as defined in *Taylor*”); United States v. Bonilla, 687 F.3d 188, 193 (4th Cir. 2012) (noting that § 30.02(a)(3)’s element of an attempted or completed crime inherently requires an intent to commit that crime), cert. denied, 571 U.S. 829 (2013); see also Herrold, 941 F.3d at 179 (“Texas law rejects Herrold’s no-intent interpretation”).

This Court briefly analyzed a similar question in an unpublished decision and concluded that Texas Penal Code Ann. § 30.02(a)’s definition of “burglary” met the generic definition even though the definition of “habitation” included a “vehicle that is adapted for the overnight accommodation of persons.” United States v. Wallis, 100 F.3d 960 (8th Cir. 1996) (per curiam) (quoting Texas Penal Code Ann. § 30.01(1)) (internal quotation marks omitted). Consistent with our previous decision and finding persuasive the Fourth and Fifth Circuits’ decisions, we conclude that Texas Penal Code Ann. § 30.02(a)(3) contains the generic specific

intent requirement necessary for a conviction under this statute to qualify as a predicate offense for purposes of the ACCA.

Hutchinson has not demonstrated a “realistic probability” that Texas Penal Code Ann. § 30.02(a)(3) encompasses “conduct that falls outside the generic definition” of burglary. Gonzalez v. Wilkinson, 990 F.3d 654, 659 (8th Cir. 2021) (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)) (internal quotation marks omitted) (discussing the application of the “realistic probability” analysis set forth by the United States Supreme Court in Duenas-Alvarez, 549 U.S. at 193, and Moncrieffe v. Holder, 569 U.S. 184, 191 (2013)). The cases relied on by Hutchinson do not meet this standard.

The case of Lopez v. State, No. PD-0245-13, 2013 WL 6123577 (Tex. Crim. App. Nov. 20, 2013), is an unpublished decision in which the defendant plainly had the specific intent to commit assault after he unlawfully broke into his uncle’s house and beat his uncle in his bed. 2013 WL 6123577, at *3. The second cited case, Rangel v. State, 179 S.W.3d 64 (Tex. Ct. App. 2005), is equally unavailing. In Rangel, the defendant was convicted under Texas Penal Code Ann. § 30.02(a)(3) for breaking into his on-and-off girlfriend’s home and slashing his girlfriend’s other on-and-off boyfriend with a knife. Id. at 67, 69. In that case, the court noted the nature of the aggravated assault inherently demonstrated the defendant’s intention to commit the assault. Id. at 72–73. Hutchinson’s third case is also unpersuasive as the court in that case did not obviate an inherent intent requirement under § 30.02(a)(3), but instead noted that this subsection of Texas’s burglary statute did not require the state to prove intent prior to entry into the residence. Daniel v. State, No. 07-17-00216-CR, 2018 WL 6581507, at *3 (Tex. Ct. App. Dec. 13, 2018) (unpublished).

In summary, the Texas Court of Criminal Appeals has made plain that the Texas burglary statute requires a specific intent to commit the crime. See Jacob v. State, 892 S.W.2d 905, 909 (Tex. Crim. App. 1995) (en banc) (discussing how the government’s proof of an attempted or completed crime after an unlawful entry

under Texas Penal Code Ann. § 30.02(a)(3) may inherently prove the specific intent to commit the crime); DeVaughn v. State, 749 S.W.2d 62, 65 (Tex. Crim. App. 1988) (en banc) (finding the proof of an “attempted or completed” crime under Texas Penal Code Ann. § 30.02(a)(3) “merely supplants the specific intent” requirement in §§ 30.02(a)(1) and (2)). We have not been pointed to any case to the contrary.

Hutchinson has neither briefed nor argued the question of whether Texas Penal Code Ann. § 30.02(a)(3) does not satisfy the elements of generic burglary because generic burglary may require that specific intent exists at the moment of entry.³ We agree with the Fourth Circuit’s statement in Pena, 952 F.3d at 511, that this is an interesting inquiry, but we will not address an issue the parties have not argued or one the Supreme Court has not clearly mandated we answer. See Shanklin v. Fitzgerald, 397 F.3d 596, 601 (8th Cir. 2005) (“Absent exceptional circumstances, we cannot consider issues not raised in the district court.”).

III. CONCLUSION

We affirm the judgment and sentence of the district court.

KELLY, Circuit Judge, dissenting.

Under the ACCA, the violent felony predicate offense of generic burglary requires the elements of an unlawful entry into, or remaining in, a building or other structure, with intent to commit a crime. Taylor v. United States, 495 U.S. 575, 598 (1990). The type of “intent to commit a crime” for generic burglary is specific intent. See, e.g., United States v. Bugh, 459 F. Supp. 3d 1184, 1199 (D. Minn. 2020) (citing Taylor, 495 U.S. at 599); see also id. at 1199 nn.25–26.

³The Supreme Court, in dicta, stated that generic burglary requires the specific intent to be formed at the moment of entry. See Quarles v. United States, 139 S. Ct. 1872, 1878 (2019) (“Put simply, for burglary predicated on unlawful *entry*, the defendant must have the intent to commit a crime at the time of entry.”).

Texas Penal Code § 30.02(a)(3) provides, “A person commits an offense if, without the effective consent of the owner, the person . . . enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.” Unlike §§ 30.02(a)(1) and (2), this provision does not contain an element of “intent to commit a felony, theft, or an assault,” but rather requires only that a felony, theft, or assault was committed or attempted. In other words, § 32.02(a)(3) “dispenses with the need to prove intent . . . when the actor is caught in the act” of committing or attempting a crime. DeVaughn v. State, 749 S.W.2d 62, 65 (Tex. Crim. App. 1988).

Relying on the commission of a felony, theft, or assault under § 32.02(a)(3) in place of proof of intent conflicts with the generic definition of burglary under the ACCA. This is because a conviction under the Texas burglary statute can be supported by commission of a crime that merely requires a mens rea of recklessness, such as assault, see Tex. Penal Code § 22.01(a)(1), manslaughter, id. § 19.04(a), or criminally negligent homicide, id. § 19.05(a). Commission of a crime of recklessness cannot replace the specific intent to commit a crime necessary for a categorical match; there can be no specific intent to commit a reckless crime. Put differently, just as one cannot attempt to commit a reckless crime because an attempt requires specific intent, one cannot have specific intent to commit a crime with a mens rea of recklessness. See United States v. Matthews, No. 20-1345, 2022 WL 413997, at *2 (8th Cir. Feb. 11, 2022) (“All attempts, regardless of the mental state of the underlying crime, are themselves specific-intent crimes. . . . ‘[O]ne *cannot* attempt to commit a crime which only requires reckless conduct.’” (quoting State v. Zupetz, 322 N.W.2d 730, 735 (Minn. 1982))). Because a conviction under § 32.02(a)(3) requires only *commission* of a crime of recklessness without separate proof of intent, the statute is broader on its face than generic burglary, which requires proof of specific intent to commit a crime. The inquiry should end here.

The court faults Hutchinson for not demonstrating a realistic probability that Texas Penal Code § 30.02(a)(3) encompasses conduct that falls outside the generic definition of burglary. But the court did not find § 32.02(a)(3) to be ambiguous, and, indeed, no party has argued that it is. Under these circumstances, a realistic

probability showing is not required. Gonzalez v. Wilkinson, 990 F.3d 654, 660–61 (8th Cir. 2021) (rejecting a requirement that petitioners “must prove through specific convictions that unambiguous laws really mean what they say” and adopting a rule that “in applying the categorical approach, state law crimes should be given their plain meaning.” (cleaned up) (quotation omitted)).

Decisions by the Fifth Circuit Court of Appeals and the Texas Court of Criminal Appeals do not change my view of the categorical analysis. The Fifth Circuit, in United States v. Herrold, rejected the defendant’s argument that § 32.02(a)(3) is not a categorical match to generic burglary because it “lacks a requirement that an offender form a specific intent to commit another crime,” finding this “argument fail[ed] for lack of supportive Texas cases.” 941 F.3d 173, 178 (5th Cir. 2019). In other words, the Fifth Circuit rejected the defendant’s argument—the same argument presented by Hutchinson in this case—because the Fifth Circuit requires a showing of a realistic probability “that the State would apply its statute to conduct that falls outside the generic definition of the crime.” Id. at 179. But in the Eighth Circuit, when a state statute is unambiguous, we do not require such a showing.⁴ Gonzalez, 990 F.3d at 660–61.

Nonetheless, the Fifth Circuit also proceeded, in dicta, to reject “Herrold’s no-intent interpretation” based on the construction of the statute articulated in

⁴Even if this court should look to how the Texas burglary statute has been applied in burglary prosecutions, Hutchinson may have shown a realistic probability that Texas would apply its burglary statute to conduct that falls outside the generic definition. For example, in Daniel v. State, the defendant was charged with burglary under § 30.02(a)(3), and the court concluded that, “[a]ll the State was required to prove was that he entered the residence without consent or permission and while inside, assaulted or attempted to assault [the victims],” No. 07-17-00216-CR, 2018 WL 6581507, at *3 (Tex. App. Dec. 13, 2018), yet assault may be committed with a mens rea of recklessness, Tex. Penal Code § 22.01(a)(1). Likewise in Rangel v. State, when analyzing whether assault was a lesser included offense of burglary under § 30.02(a)(3), the court found that the elements of burglary did not include intent to commit a crime. 179 S.W.3d 64, 69–71 (Tex. App. 2005).

DeVaughn v. State, 749 S.W.2d 62 (Tex. Crim. App. 1988). See Herrold, 941 F.3d at 179. In DeVaughn, however, the Texas Court of Criminal Appeals did not examine whether the Texas burglary statute is a categorical match to generic burglary, but merely described the “three distinct ways in which one may commit the offense of burglary under the present version of the Penal Code.” DeVaughn, 749 S.W.2d at 64. The court observed, “[p]roof of the intent to commit either theft or a felony was, and is, a necessary element in the State’s case” in §§ 30.02(a)(1) and (2), but for § 30.02(a)(3), “the attempted or completed theft or felony . . . merely supplants the specific intent which accompanies entry in §§ 30.02(a)(1) and (2).” Id. at 65. The court concluded, “the gravamen of the offense of burglary clearly remains entry of a building or habitation without the effective consent of the owner, accompanied by *either* the required mental state, under §§ 30.02(a)(1) and (2), [] *or* the further requisite acts or omissions, under § 30.02(a)(3).” Id. (emphasis added). As relevant here, the Texas court did not reject the notion that § 30.02(a)(3) includes the commission of crimes of recklessness or criminal negligence. DeVaughn notes that the unlawful entry into a building must be knowing or voluntary under § 30.02(a)(3), but says nothing about whether the “requisite acts” in § 30.02(a)(3) must be a specific-intent crime. See DeVaughn, 749 S.W.2d at 64–65; id. at 64 n.3, 65 n.4.

Thus, the plain language of the Texas burglary statute and DeVaughn both support the conclusion that § 30.02(a)(3) does not require proof of a specific-intent crime as would be necessary to make a categorical match. The Seventh Circuit’s interpretation of the similar Minnesota burglary statute is in accord. See Van Cannon v. United States, 890 F.3d 656 (7th Cir. 2018). The Minnesota burglary statute provides: “Whoever enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building, either directly or as an accomplice, commits burglary[.]” Minn. Stat. § 609.582(2)(a). The Seventh Circuit found that the statute is broader than generic burglary, rejecting the government’s position that “intent to commit a crime is implicit because the statute requires proof of a completed crime within the trespassed building,” since “not all crimes are intentional; some require only recklessness or

criminal negligence.”⁵ Van Cannon, 890 F.3d at 664. Specific intent to commit a crime is likewise not implicit in the Texas burglary statute.

In my view, the plain language of the Texas burglary statute shows that it is categorically broader than generic burglary under the ACCA. Because the statute is unambiguous, there is no role for the realistic probability analysis to play. I would therefore vacate Hutchinson’s sentence and remand for resentencing.

⁵The Seventh Circuit also found that “Taylor’s elements-based approach does not countenance imposing an enhanced sentence[] based on *implicit* features in the crime of conviction.” Van Cannon, 890 F.3d at 664.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3116

SENT TO CLIENT
Mar 03 2022
by: kelly_jensen

United States of America

Plaintiff - Appellee

v.

Carlos Dejuan Hutchinson

Defendant - Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:19-cr-00129-CJW-1)

JUDGMENT

Before KELLY, ERICKSON and GRASZ, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment and sentence of the district court in this cause is affirmed in accordance with the opinion of this Court.

March 03, 2022

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Adopted April 15, 2015
Effective August 1, 2015

Revision of Part V of the Eighth Circuit Plan to Implement the Criminal Justice Act of 1964.

V. Duty of Counsel as to Panel Rehearing, Rehearing En Banc, and Certiorari

Where the decision of the court of appeals is adverse to the defendant in whole or in part, the duty of counsel on appeal extends to (1) advising the defendant of the right to file a petition for panel rehearing and a petition for rehearing en banc in the court of appeals and a petition for writ of certiorari in the Supreme Court of the United States, and (2) informing the defendant of counsel's opinion as to the merit and likelihood of the success of those petitions. If the defendant requests that counsel file any of those petitions, counsel must file the petition if counsel determines that there are reasonable grounds to believe that the petition would satisfy the standards of Federal Rule of Appellate Procedure 40, Federal Rule of Appellate Procedure 35(a) or Supreme Court Rule 10, as applicable. *See Austin v. United States*, 513 U.S. 5 (1994) (per curiam); 8th Cir. R. 35A.

If counsel declines to file a petition for panel rehearing or rehearing en banc requested by the defendant based upon counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion to withdraw must be filed on or before the due date for a petition for rehearing, must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for rehearing, and must request an extension of time of 28 days within which to file *pro se* a petition for rehearing. The motion also must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

If counsel declines to file a petition for writ of certiorari requested by the defendant based on counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

A motion to withdraw must be accompanied by counsel's certification that a copy of the motion was furnished to the defendant and to the United States.

Where counsel is granted leave to withdraw pursuant to the procedures of *Anders v. California*, 386 U.S. 738 (1967), and *Penson v. Ohio*, 488 U.S. 75 (1988), counsel's duty of representation is completed, and the clerk's letter transmitting the decision of the court will notify the defendant of the procedures for filing *pro se* a timely petition for panel rehearing, a timely petition for rehearing en banc, and a timely petition for writ of certiorari.

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

No: 20-3116

United States of America

SENT TO CLIENT
Apr 08 2022
by: kelly_jensen

Appellee

v.

Carlos Dejuan Hutchinson

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:19-cr-00129-CJW-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 08, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA

v.

MICHAEL CHRISTIAN TINLIN

) JUDGMENT IN A CRIMINAL CASE

) Case Number: 4:19-cr-00224-001

) USM Number: 19447-030

) Melanie S. Keiper

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) One and Three of the Indictment filed on December 17, 2019.

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section ?	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846	Conspiracy to Distribute 500 Grams or More of a Mixture and Substance Containing Methamphetamine	11/08/2019	One
18 U.S.C. § 924(c)(1)(A)(i)	Possession of a Firearm in Furtherance of a Drug Trafficking Crime	11/08/2019	Three

See additional count(s) on page 2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

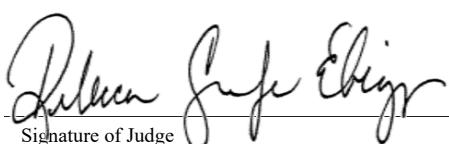
The defendant has been found not guilty on count(s) _____

Count(s) Two and Four is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 21, 2020

Date of Imposition of Judgment



Signature of Judge

Rebecca Goodgame Ebinger, U.S. District Judge

Name of Judge

Title of Judge

DEFENDANT: MICHAEL CHRISTIAN TINLIN
CASE NUMBER: 4:19-cr-00224-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

300 months, consisting of 240 months as to Count One and 60 months as to Count Three of the Indictment filed on December 17, 2019, to be served consecutively.

The court makes the following recommendations to the Bureau of Prisons:

The Court recommends the defendant be designated to FCI Oxford or Sandstone. The Court further recommends the defendant be afforded the opportunity to participate in the Residential Drug Abuse Treatment Program (RDAP) and the defendant be provided the opportunity to pursue course work for his GED and vocational training in carpentry and/or metal fabrication.

The defendant is remanded to the custody of the United States Marshal.

The defendant is remanded to the custody of the United States Marshal for surrender to the ICE detainer.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before on _____

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MICHAEL CHRISTIAN TINLIN
CASE NUMBER: 4:19-cr-00224-001

Judgment Page: 3 of 7

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Five years as to Counts One and Three of the Indictment filed on December 17, 2019, to be served concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: MICHAEL CHRISTIAN TINLIN
CASE NUMBER: 4:19-cr-00224-001

Judgment Page: 4 of 7

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: MICHAEL CHRISTIAN TINLIN
CASE NUMBER: 4:19-cr-00224-001

Judgment Page: 5 of 7

SPECIAL CONDITIONS OF SUPERVISION

You must participate in an approved treatment program for anger control. Participation may include inpatient/outpatient treatment. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

You must participate in a cognitive behavioral treatment program, which may include journaling and other curriculum requirements, as directed by the U.S. Probation Officer.

You will submit to a search of your person, property, residence, adjacent structures, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), and other electronic communications or data storage devices or media, conducted by a U.S. Probation Officer. Failure to submit to a search may be grounds for revocation. You must warn any other residents or occupants that the premises and/or vehicle may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your release and/or that the area(s) or item(s) to be searched contain evidence of this violation or contain contraband. Any search must be conducted at a reasonable time and in a reasonable manner. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

You must participate in a program of testing and/or treatment for substance abuse, as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Office. At the direction of the probation office, you must receive a substance abuse evaluation and participate in inpatient and/or outpatient treatment, as recommended. Participation may also include compliance with a medication regimen. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. You must not use alcohol and/or other intoxicants during the course of supervision.

You must not patronize business establishments where more than fifty percent of the revenue is derived from the sale of alcoholic beverages.

You must comply with the terms and conditions ordered by the Iowa Department of Human Service, for the State of Iowa, in Case Number 850756, requiring payments for the support and maintenance of D.H.

DEFENDANT: MICHAEL CHRISTIAN TINLIN
CASE NUMBER: 4:19-cr-00224-001

Judgment Page: 6 of 7

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

Pursuant to 18 U.S.C. § 3573, upon the motion of the government, the Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS \$ 200.00	\$0.00	\$ 0.00	\$ 0.00	\$ 0.00

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$0.00	\$0.00	

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

*Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: MICHAEL CHRISTIAN TINLIN
CASE NUMBER: 4:19-cr-00224-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ 200.00 due immediately, balance due
 not later than _____, or
 in accordance C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, IA. 50306-9344.

While on supervised release, you shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Case Number

Defendant and Co-Defendant Names
(including defendant number)

Total Amount

Joint and Several
Amount

Corresponding Payee,
if appropriate

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

A Walther, 9-millimeter handgun (SN: AL6909) and the ammunition that was in it when seized as outlined in the Preliminary Order of Forfeiture entered on May 4, 2020.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

United States Court of Appeals
For the Eighth Circuit

No. 20-2862

United States of America,

Plaintiff - Appellee,

v.

Michael Christian Tinlin,

Defendant - Appellant.

Appeal from United States District Court
for the Southern District of Iowa - Central

Submitted: September 21, 2021

Filed: December 15, 2021

Before LOKEN, COLLTON, and BENTON, Circuit Judges.

COLLTON, Circuit Judge.

Michael Tinlin pleaded guilty to conspiracy to distribute 500 grams or more of methamphetamine, *see* 21 U.S.C. § 846, and to possession of a firearm in furtherance of a drug trafficking offense, 18 U.S.C. § 924(c). In determining an advisory

sentencing range under the sentencing guidelines, the district court¹ concluded that Tinlin qualified as a career offender based on two prior convictions for a crime of violence. *See USSG § 4B1.1(a)*. The court thus determined an advisory range of 322 to 387 months' imprisonment and then varied downward from the range to impose a sentence of 300 months. Tinlin argues that the court miscalculated the advisory guideline range because one of his prior convictions does not qualify as a crime of violence, and that he should not have been treated as a career offender. We conclude that there was no error, and therefore affirm.

The dispute concerns the offense of domestic abuse assault, in violation of Iowa Code §§ 708.1(1) and 708.2A(2)(c). Under the so-called "force clause" of the career-offender guideline, a conviction qualifies as a "crime of violence" if it is an "offense under federal or state law, punishable by imprisonment for a term exceeding one year," that "has as an element the use, attempted use, or threatened use of physical force against the person of another." USSG §§ 4B1.1(a), 4B1.2(a). The Iowa offense is punishable by more than a year in prison, and the elements require proof that an offender (1) committed an assault against a person with an enumerated domestic relationship to the offender, Iowa Code § 708.2A(1), and (2) did so with intent to inflict serious injury upon another, or used or displayed a dangerous weapon in connection with the assault. *Id.* § 708.2A(2)(c). The alternatives specified in the second element appear to be different means of committing a single offense. *State v. Michael*, Nos. 0-602, 99-1578, 2000 WL 1675715, at *2 (Iowa Ct. App. Nov. 8, 2000). Tinlin does not dispute that the Iowa offense would qualify as a crime of violence if the offender displayed a dangerous weapon in connection with the assault, *see United States v. McGee*, 890 F.3d 730, 735-37 (8th Cir. 2018), but he argues that domestic abuse assault with intent to inflict serious injury does not necessarily require

¹The Honorable Rebecca Goodgame Ebinger, United States District Judge for the Southern District of Iowa.

the use, attempted use, or threatened use of physical force against the person of another.

The logic of our circuit precedent dictates that Iowa domestic abuse assault with intent to inflict serious injury is a crime of violence. In *United States v. Quigley*, 943 F.3d 390 (8th Cir. 2019), this court held that the Iowa offense of assault with intent to inflict serious injury under Iowa Code § 708.2(1) is a crime of violence under the force clause of the guideline. The offense at issue in *Quigley* required proof that the offender committed an assault, as defined in Iowa Code § 708.1, with the intent to inflict on another person a serious injury, as defined in Iowa Code § 702.18. We concluded that there is no realistic probability that an offender could be convicted of that offense, including the element of intent to inflict serious injury, without at least threatening to use physical force against another. 943 F.3d at 395.

Tinlin's offense, domestic abuse assault with intent to inflict serious injury, likewise required an assault committed with intent to inflict serious injury. Iowa Code § 708.2A(1), (2)(c); R. Doc. 41-1, 41-2. The "domestic abuse" element of the offense requires proof that the victim had an enumerated domestic relationship to the offender, *see* Iowa Code § 236.2(2)(a)-(d), but it does not change the elements of assault or intent to inflict serious injury. Given the conclusion in *Quigley* that an assault with intent to inflict serious injury against *any* person necessarily requires at least a threatened use of physical force, it follows that the same assault offense committed against a person with a domestic relationship likewise requires at least a threatened use of physical force. Accordingly, we conclude that Tinlin's offense is a crime of violence under the force clause, and the district court made no procedural error in calculating Tinlin's guideline range.

The judgment of the district court is affirmed.

Sent to Client on 12/15/21

By: Melissa Dullea

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

No: 20-2862

United States of America

Plaintiff - Appellee

v.

Michael Christian Tinlin

Defendant - Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:19-cr-00224-RGE-1)

JUDGMENT

Before LOKEN, COLLTON, and BENTON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

December 15, 2021

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Adopted April 15, 2015
Effective August 1, 2015

Revision of Part V of the Eighth Circuit Plan to Implement the Criminal Justice Act of 1964.

V. Duty of Counsel as to Panel Rehearing, Rehearing En Banc, and Certiorari

Where the decision of the court of appeals is adverse to the defendant in whole or in part, the duty of counsel on appeal extends to (1) advising the defendant of the right to file a petition for panel rehearing and a petition for rehearing en banc in the court of appeals and a petition for writ of certiorari in the Supreme Court of the United States, and (2) informing the defendant of counsel's opinion as to the merit and likelihood of the success of those petitions. If the defendant requests that counsel file any of those petitions, counsel must file the petition if counsel determines that there are reasonable grounds to believe that the petition would satisfy the standards of Federal Rule of Appellate Procedure 40, Federal Rule of Appellate Procedure 35(a) or Supreme Court Rule 10, as applicable. *See Austin v. United States*, 513 U.S. 5 (1994) (per curiam); 8th Cir. R. 35A.

If counsel declines to file a petition for panel rehearing or rehearing en banc requested by the defendant based upon counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion to withdraw must be filed on or before the due date for a petition for rehearing, must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for rehearing, and must request an extension of time of 28 days within which to file *pro se* a petition for rehearing. The motion also must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

If counsel declines to file a petition for writ of certiorari requested by the defendant based on counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

A motion to withdraw must be accompanied by counsel's certification that a copy of the motion was furnished to the defendant and to the United States.

Where counsel is granted leave to withdraw pursuant to the procedures of *Anders v. California*, 386 U.S. 738 (1967), and *Penson v. Ohio*, 488 U.S. 75 (1988), counsel's duty of representation is completed, and the clerk's letter transmitting the decision of the court will notify the defendant of the procedures for filing *pro se* a timely petition for panel rehearing, a timely petition for rehearing en banc, and a timely petition for writ of certiorari.

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

No: 20-2862

United States of America

SENT TO CLIENT
Jan 18 2022
by: kelly_jensen

Appellee

v.

Michael Christian Tinlin

Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:19-cr-00224-RGE-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 18, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT

Northern District of Iowa

UNITED STATES OF AMERICA

v.

KWANE DEMARCHEL WHEAT

JUDGMENT IN A CRIMINAL CASE

)

) Case Number: 0862 3:20CR03031-001

)

) USM Number: 18528-029

)

Timothy Herschberger

Defendant's Attorney

 ORIGINAL JUDGMENT **AMENDED JUDGMENT**

Date of Most Recent Judgment:

THE DEFENDANT: pleaded guilty to count(s) 1 and 2 of the Indictment filed on September 16, 2020 pleaded nolo contendere to count(s) _____ which was accepted by the court. was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 922(g)(3), 922(g)(8), and 924(a)(2)	Possession of a Firearm by a Prohibited Person	05/30/2020	1
18 U.S.C. §§ 922(g)(3) and 924(a)(2)	Possession of a Firearm by a Drug User	04/27/2019	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. The defendant has been found not guilty on count(s) _____ Count(s) _____ is/are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

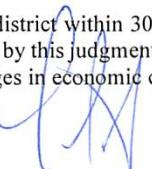
Leonard T. Strand
Chief United States District Court Judge

Name and Title of Judge

June 24, 2021

Date of Imposition of Judgment

Signature of Judge


6/25/21

Date

DEFENDANT: **KWANE DEMARCHEL WHEAT**
CASE NUMBER: **0862 3:20CR03031-001**

Judgment — Page 2 of 7

PROBATION

The defendant is hereby sentenced to probation for a term of:

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **52 months. This term of imprisonment consists of a 52-month term imposed on Count 1 and a 52-month term imposed on Count 2 of the Indictment, to be served concurrently.**

The court makes the following recommendations to the Federal Bureau of Prisons:

It is recommended that the defendant be designated to a Bureau of Prisons facility (FMC Rochester in Rochester, Minnesota; FCI Sandstone in Sandstone, Minnesota; or USP Leavenworth in Leavenworth, Kansas) as close to the defendant's family as possible, commensurate with the defendant's security and custody classification needs.

It is recommended that the defendant participate in the Bureau of Prisons' 500-Hour Comprehensive Residential Drug Abuse Treatment Program or an alternate substance abuse treatment program.

The defendant is remanded to the custody of the United States Marshal.

The defendant must surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____.

as notified by the United States Marshal.

The defendant must surrender for service of sentence at the institution designated by the Federal Bureau of Prisons:

before 2 p.m. on _____.

as notified by the United States Marshal.

as notified by the United States Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **KWANE DEMARCHEL WHEAT**
CASE NUMBER: **0862 3:20CR03031-001**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant will be on supervised release for a term of:
2 years. This term of supervised release consists of a 2-year term imposed on Count 1 and a 2-year term imposed on Count 2 of the Indictment, to be served concurrently.

MANDATORY CONDITIONS OF SUPERVISION

- 1) The defendant must not commit another federal, state, or local crime.
- 2) The defendant must not unlawfully possess a controlled substance.
- 3) The defendant must refrain from any unlawful use of a controlled substance.
The defendant must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future controlled substance abuse. (*Check, if applicable.*)
- 4) The defendant must cooperate in the collection of DNA as directed by the probation officer. (*Check, if applicable.*)
- 5) The defendant must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where the defendant resides, works, and/or is a student, and/or was convicted of a qualifying offense. (*Check, if applicable.*)
- 6) The defendant must participate in an approved program for domestic violence. (*Check, if applicable.*)

The defendant must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: **KWANE DEMARCHEL WHEAT**
CASE NUMBER: **0862 3:20CR03031-001**

STANDARD CONDITIONS OF SUPERVISION

As part of the defendant's supervision, the defendant must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for the defendant's behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in the defendant's conduct and condition.

- 1) The defendant must report to the probation office in the federal judicial district where the defendant is authorized to reside within 72 hours of the time the defendant was sentenced and/or released from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
- 2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed. The defendant must also appear in court as required.
- 3) The defendant must not knowingly leave the federal judicial district where the defendant is authorized to reside without first getting permission from the court or the probation officer.
- 4) The defendant must answer truthfully the questions asked by the defendant's probation officer.
- 5) The defendant must live at a place approved by the probation officer. If the defendant plans to change where the defendant lives or anything about the defendant's living arrangements (such as the people the defendant lives with), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 6) The defendant must allow the probation officer to visit the defendant at any time at the defendant's home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.
- 7) The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, the defendant must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about the defendant's work (such as the defendant's position or the defendant's job responsibilities), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 8) The defendant must not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- 9) If the defendant is arrested or questioned by a law enforcement officer, the defendant must notify the probation officer within 72 hours.
- 10) The defendant must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- 11) The defendant must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- 12) As directed by the probation officer, the defendant must notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and must permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 13) The defendant must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **KWANE DEMARCHEL WHEAT**
CASE NUMBER: **0862 3:20CR03031-001**

Judgment—Page 5 of 7

SPECIAL CONDITIONS OF SUPERVISION

The defendant must comply with the following special conditions as ordered by the Court and implemented by the United States Probation Office:

1. If not employed at a lawful type of employment as deemed appropriate by the United States Probation Office, the defendant must participate in employment workshops and report, as directed, to the United States Probation Office to provide verification of daily job search results or other employment related activities. In the event the defendant fails to secure employment, participate in the employment workshops, or provide verification of daily job search results, the defendant may be required to perform up to 20 hours of community service per week until employed.
2. The defendant must not have contact during the defendant's term of supervision with the individual set forth in paragraph 83 of the presentence report, in person or by a third party. This includes no direct or indirect contact by telephone, mail, email, or by any other means. The United States Probation Office may contact the aforementioned individual(s) to ensure the defendant's compliance with this condition.
3. The defendant must participate in an evaluation for anger management and/or domestic violence. The defendant must complete any recommended treatment program, and follow the rules and regulations of the treatment program.
4. The defendant must submit the defendant's person, property, house, residence, vehicle, papers, computers [as defined in 18 U.S.C. § 1030(e)(1)], other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant must warn any other occupants that the premises may be subject to searches pursuant to this condition. The United States Probation Office may conduct a search under this condition only when reasonable suspicion exists that the defendant has violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
5. The defendant must participate in a substance abuse evaluation. The defendant must complete any recommended treatment program, which may include a cognitive behavioral group, and follow the rules and regulations of the treatment program. The defendant must participate in a program of testing for substance abuse. The defendant must not attempt to obstruct or tamper with the testing methods.
6. The defendant must not use or possess alcohol. The defendant is prohibited from entering any establishment that holds itself out to the public to be a bar or tavern without the prior permission of the United States Probation Office.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them. Upon a finding of a violation of supervision, I understand the Court may: (1) revoke supervision; (2) extend the term of supervision; and/or (3) modify the condition of supervision.

Defendant

Date

United States Probation Officer/Designated Witness

Date

DEFENDANT: **KWANE DEMARCHEL WHEAT**
 CASE NUMBER: **0862 3:20CR03031-001**

Judgment 6 of 7

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

<u>TOTALS</u>	<u>Assessment</u> \$ 200	<u>AVAA Assessment¹</u> \$ 0	<u>JVTA Assessment²</u> \$ 0	<u>Fine</u> \$ 0	<u>Restitution</u> \$ 0
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The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss³</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	-------------------------------	----------------------------	-------------------------------

TOTALS \$ _____ \$ _____

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

- the interest requirement is waived for the fine restitution.
- the interest requirement for the fine restitution is modified as follows:

¹Amy, Vicky, and Any Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

²Justice for Victims of Trafficking Act of 2015, 18 U.S.C. § 3014.

³Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **KWANE DEMARCHEL WHEAT**
CASE NUMBER: **0862 3:20CR03031-001**

SCHEDEULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A **\$ 200** due immediately;

not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of
(*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or

D Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of
_____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to a
term of supervision; or

E Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from
imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant must pay the cost of prosecution.

The defendant must pay the following court cost(s):

The defendant must forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. CR20-3031-LTS

KWANE DEMARCHEL WHEAT,

TRANSCRIPT OF
SENTENCING

Defendant.

/

The Sentencing held before the Honorable
Leonard T. Strand, Chief Judge of the United States
District Court for the Northern District of Iowa, at the
Federal Courthouse, 320 Sixth Street, Sioux City, Iowa,
June 24, 2021, commencing at 1:30 p.m.

APPEARANCES

For the Plaintiff: MIKALA STEENHOLDT, ESQ.
Assistant United States Attorney
Ho-Chunk Centre - Suite 670
600 Fourth Street
Sioux City, IA 51101

For the Defendant: TIMOTHY HERSCHEBERGER, ESQ.
Assistant Federal Defender
Suite 400
701 Pierce Street
Sioux City, IA 51101

Also present: Jessica Clark, U.S. Probation

Reported by: Shelly Semmler, RDR, CRR
320 Sixth Street
Sioux City, IA 51101
(712) 233-3846

1 THE COURT: And so isn't it -- I mean, I agree
2 with Miss Steenholdt. I think Gonzalez gives a new set
3 of arguments to defendants about this statute and
4 possibly other statutes. But aren't I still bound by
5 Quigley then and really it's an issue for the circuit to
6 decide?

7 MR. HERSCHEBERGER: Maybe. This is potentially
8 more preserving an issue I think.

9 THE COURT: Sure.

10 MR. HERSCHEBERGER: Gonzalez does interject new
11 analysis that the Court can consider.

12 THE COURT: Sure. No, and I agree --

13 MR. HERSCHEBERGER: Or not necessarily new
14 analysis but clarifies when analysis becomes proper.

15 THE COURT: Sure.

16 MR. HERSCHEBERGER: And provides much more
17 guidance than Quigley or prior cases.

18 THE COURT: Yeah. And I completely agree. I
19 certainly want you to preserve error on it, and you have
20 obviously done that here. I do find that I'm still bound
21 by Quigley. Number one, I don't know exactly what the
22 circuit will do when it's presented with another chance
23 to look at this statute. Now with the layer of Gonzalez
24 and that layer of arguments being out there, it could
25 ultimately result in a different outcome. But it hasn't

1 yet.

2 I am faced with binding published circuit precedent
3 in Quigley plus two other Eighth Circuit cases that are
4 unpublished in Chapman and Thiel, all of which point the
5 same direction which is 708.2-1 or 708.1 dash -- start
6 over. 708.1, subparagraph -- where am I? I'm sorry. I
7 was looking at the wrong paragraph. Let me start over.

8 My point is I guess between Quigley -- it is 708.2,
9 subparagraph 1. Quigley along with Chapman and Thiel
10 have all said that a violation of that statute is
11 categorically a crime of violence. And I don't have any
12 other Eighth Circuit law at this point overruling Quigley
13 or applying the analysis of Gonzalez to reach a different
14 outcome.

15 So I do find that I am bound by Quigley and that I
16 do have to find that the conviction in paragraph 26 is a
17 crime of violence for purposes of establishing the base
18 offense level.

19 So again, I think it's a good argument and one that
20 the circuit will have to take up when it's presented with
21 it. But given the current state of the law in the
22 circuit, I do overrule the defense objection to paragraph
23 12. I find that the base offense level should be 20
24 because Mr. Wheat does have one prior conviction that
25 constitutes a crime of violence under the guidelines.

1 And so I will be starting then at a base offense level of
2 20.

3 Then the agreement between the parties that I
4 referred to a bit earlier, there was a dispute about
5 paragraph 13 and which of the other felony offenses
6 listed in paragraph 13 might be in play here. It's my
7 understanding that the parties now agree or the defendant
8 is acknowledging that he possessed a firearm in
9 connection with the Iowa felony offenses of possession of
10 methamphetamine and cocaine with intent to deliver. Is
11 that correct, Mr. Herschberger?

12 MR. HERSCHEBERGER: Yes.

13 THE COURT: Okay.

14 MS. STEENHOLDT: Your Honor, I think it's
15 actually marijuana instead of methamphetamine.

16 THE COURT: It is. Again, my notes. I don't
17 know why I can't read my notes today. But it is
18 possession of marijuana or cocaine with intent to
19 deliver. And because that is another felony offense and
20 it's not the felony offense of carrying weapons which
21 sometimes I will grant a downward variance because of,
22 but because the defense is acknowledging that he
23 committed the Iowa felony offense of possession of
24 marijuana and cocaine with intent to deliver, that
25 4-level increase in paragraph 13 applies. That gets us

United States Court of Appeals
For the Eighth Circuit

No. 21-2531

United States of America

Plaintiff - Appellee

v.

Kwane Demarchel Wheat

Defendant - Appellant

Appeal from United States District Court
for the Northern District of Iowa - Central

Submitted: March 7, 2022

Filed: March 10, 2022

[Unpublished]

Before LOKEN, BENTON, and SHEPHERD, Circuit Judges.

PER CURIAM.

Kwane Wheat appeals the sentence the district court¹ imposed after he pleaded guilty to firearm offenses. On appeal, Wheat argues that the district court erred in determining that one of his prior convictions constituted a crime of violence.

¹The Honorable Leonard T. Strand, Chief Judge, United States District Court for the Northern District of Iowa.

Upon careful review, we find that the district court did not err in finding that Wheat's conviction under Iowa Code § 708.2(1) was a crime of violence. See United States v. Craig, 630 F.3d 717, 723 (8th Cir. 2011) (district court's finding that a prior conviction constitutes a crime of violence under the Sentencing Guidelines is reviewed de novo); see also United States v. Quigley, 943 F.3d 390, 395 (8th Cir. 2019) (conviction under § 708.2(1) qualifies as a crime of violence under the Guidelines; mere speculation that § 702.2(1) could be applied to conduct not involving physical force does not take the offense outside the scope of the force clause; “we can think of no non-fanciful, non-theoretical manner in which to commit such crime without at least threatening use of physical force”).

Accordingly, we affirm.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2531

SENT TO CLIENT
Mar 11 2022
by: kelly_jensen

United States of America

Plaintiff - Appellee

v.

Kwane Demarchel Wheat

Defendant - Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Central
(3:20-cr-03031-LTS-1)

JUDGMENT

Before LOKEN, BENTON, and SHEPHERD, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

March 10, 2022

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Adopted April 15, 2015
Effective August 1, 2015

Revision of Part V of the Eighth Circuit Plan to Implement the Criminal Justice Act of 1964.

V. Duty of Counsel as to Panel Rehearing, Rehearing En Banc, and Certiorari

Where the decision of the court of appeals is adverse to the defendant in whole or in part, the duty of counsel on appeal extends to (1) advising the defendant of the right to file a petition for panel rehearing and a petition for rehearing en banc in the court of appeals and a petition for writ of certiorari in the Supreme Court of the United States, and (2) informing the defendant of counsel's opinion as to the merit and likelihood of the success of those petitions. If the defendant requests that counsel file any of those petitions, counsel must file the petition if counsel determines that there are reasonable grounds to believe that the petition would satisfy the standards of Federal Rule of Appellate Procedure 40, Federal Rule of Appellate Procedure 35(a) or Supreme Court Rule 10, as applicable. *See Austin v. United States*, 513 U.S. 5 (1994) (per curiam); 8th Cir. R. 35A.

If counsel declines to file a petition for panel rehearing or rehearing en banc requested by the defendant based upon counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion to withdraw must be filed on or before the due date for a petition for rehearing, must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for rehearing, and must request an extension of time of 28 days within which to file *pro se* a petition for rehearing. The motion also must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

If counsel declines to file a petition for writ of certiorari requested by the defendant based on counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

A motion to withdraw must be accompanied by counsel's certification that a copy of the motion was furnished to the defendant and to the United States.

Where counsel is granted leave to withdraw pursuant to the procedures of *Anders v. California*, 386 U.S. 738 (1967), and *Penson v. Ohio*, 488 U.S. 75 (1988), counsel's duty of representation is completed, and the clerk's letter transmitting the decision of the court will notify the defendant of the procedures for filing *pro se* a timely petition for panel rehearing, a timely petition for rehearing en banc, and a timely petition for writ of certiorari.