SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2021-AP-765-CR

vs.

Trial No. 18-CF-1428

ANTONIO DARNELL MAYS,

Defendant-Appellant-Petitioner.

Seeking review of a court of appeals' decision of April 12, 2022
arising from an appeal of a judgment of conviction entered
December 24, 2018 and
an order denying postconviction relief entered April 15, 2021
in the Circuit Court of Milwaukee County,
Honorable David L. Borowski, Judge, presiding

PETITION FOR REVIEW

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STATEMENT OF THE ISSUE

During trial, doubt arose as to who fired the shot that killed Malik Smith. To remedy this, the state modified the charge from first degree reckless homicide while armed to felony murder, with an underlying felony of armed burglary. This armed burglary was premised on the allegation that upon entering the premises, Mr. Mays intended not to steal, but to commit the felony of second-degree recklessly endangering safety.

The issue is whether burglary based upon entry made with *intent* to commit a *reckless* crime is an offense under Wisconsin law.

The trial court did not expressly address the issue, but allowed the State to modify the charge after the defense withdrew its objection.

The postconviction court saw "no reason why a person cannot intend their own reckless conduct." Apx. 117; 127: 5. The court concluded that burglary committed "with the *intent* to endanger the safety of another human being by criminally reckless conduct" is "plainly a crime under Wisconsin law." Apx. 117-118; 127: 5-6 (emphasis by the court).

The Court of Appeals concluded "that Mays's conviction for the crime of felony murder, with the underlying crime of armed burglary predicated on his intent to commit second-degree recklessly endangering safety, is a valid crime under Wisconsin law." Apx. 111.

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STATEMENT OF CRITERIA FOR REVIEW

The decision of the Court of Appeals is in conflict with controlling opinions of the Wisconsin Supreme Court. Wis. Stat. §809.62(1r)(d). More than 50 years ago, this Court addressed whether a person may intend to commit a reckless crime. The issue arose in the context of a defendant charged with attempted first-degree murder who sought an instruction on a lesser-included offense of attempted homicide by reckless conduct. This Court concluded:

> An "attempt" by sec. 939.32 (2) requires that the actor have an intent to perform acts and attain a result which if accomplished would constitute the crime. Acts to constitute an attempt must unequivocally demonstrate that the actor had such intent and would have committed the crime excepting for the intervention of another person or some other extraneous factor. Homicide by reckless conduct does not require any intent to attain a result which if accomplished would constitute a crime; and consequently, one cannot attempt to commit a crime which only requires reckless conduct and not a specific intent.

State v. Melvin, 49 Wis.2d 246, 249-250, 181 N.W.2d 490, citing *State v. Carter*, 44 Wis.2d 151, 170 N.W.2d 681 (1969). Both the Postconviction Court (apx. 115-16; 212: 3-4) and the Court of Appeals (apx. 108) acknowledged *Melvin*, but declined to follow it. The Courts below failed to construe the statutes, as this Court did in Carter and Melvin, but instead conduct fact-based analyses.

STATEMENT OF THE CASE

Procedural history

A complaint dated March 27, 2018 charged Mr. Mays with two counts of first-degree reckless homicide while armed in violation of Wis. Stat. §940.02(1) and §939.63(1)(b) and two counts of felon in possession of a firearm in violation of Wis. Stat. §941.29(1m)(a).

During the jury trial held October 15-19, 2018 before the Honorable David Borowski, count 1 was amended from first-degree reckless homicide while armed to felony murder in violation of Wis. Stat. §940.03. The jury convicted Mr. Mays of one count of felony murder, one count of first-degree reckless homicide while armed and two counts of felon in possession of a firearm.

On December 20, 2018 Judge Borowski imposed sentences on the four counts of conviction aggregating 55 years imprisonment with 40 years initial confinement. Apx. 119-121; 178: 1-3.

On January 13, 2021 Mr. Mays filed a postconviction motion to vacate the conviction and sentence as to count 1. 203: 1-15. Pursuant to a briefing schedule (204: 1; 209: 1) the State filed a response (210: 1-6) and Mr. Mays filed a reply (211: 1-6). On April 15, 2021 Judge Borowski entered a decision and order denying postconviction motion to vacate conviction on court one. Apx. 113-118; 212: 1-6.

The offenses

On March 15, 2018 police who were dispatched to a shooting at 4260 North 27th Street, apartment 1, discovered the bodies of two shooting victims: Malik Smith was in the hallway, and Romale Richardson was inside the apartment. 226: 7, 10, 19. The medical examiner determined that both victims died from gunshot wounds. 230: 17-18, 22-23.

In the days preceding the shooting, Brandon Jones had been present at the apartment participating in a series of dice games. 226: 29, 39, 49, 68, 73. Mr. Jones was losing. 226: 71. An argument arose, during which Mr. Jones accused others of cheating. 226: 39, 54. After the last dice game, Mr. Jones paced around, claiming to be searching for his dope, then left the apartment. 226: 74-76; 227: 7-9.

Shortly after Mr. Jones left, someone knocked at the door. 226: 76. Someone answered the door; the shooter then burst in and the shooting started. 226: 77-78; 227: 9. Romale Richardson returned fire. 226: 80-81.

Testimony conflicted over who opened the door before the shooter entered. Christopher Wright testified he thought Romale Richardson opened the door. 226: 76. However, Mr. Wright had told police that Malik Smith had opened the door. 230: 54. Jervita Tisdale testified that Romale Richardson answered the door. 227: 9. However,

after the shooter rushed in, Ms. Tisdale fled into the hall, heard shots, turned around and saw Malik Smith fall in the hallway. 227: 10. (As noted above, police found Mr. Smith's body in the hallway.)

None of the three surviving witnesses at the apartment at the time of the shooting could identify the shooter at a line-up which included Antonio Mays. 226: 60-62. 78-79; 227: 11-12; 230: 42. The evidence suggesting that Antonio Mays was the shooter was circumstantial. A series of texts between Mr. Mays and Brandon Jones in the minutes before the shooting suggested Mr. Mays and Mr. Jones were acting in concert. 227: 89-90. DNA testing determined that blood found in the hallway was Mr. Mays' blood. 227: 55-56; 228: 11-12. Police recovered 3 .45 caliber casings and 7 9mm casings in the apartment. 227: 36, 44. Police searched 3623 West Marian Street, an address where Mr. Mays had resided in early 2018, and found a number of firearms. 228: 59-60, 72; 229: 67-74. Firearm testing showed that three guns matched casings found on the scene. 229: 121-124, 129. Mr. Mays' DNA was found on two of these three guns, a Hi Point and a Taurus. 228: 12-13, 17-18. The third of the three guns which matched casings, a Smith & Wesson 9mm, was used by Romale Richardson; Jervita Tisdale had hidden this gun after the shooting, but police eventually found it. 227: 9, 12-13; 228: 35.

At the outset of the trial, as shown in the opening statement, the

prosecution's theory was that Antonio Jones entered the apartment and shot both victims. 225: 44-48. In response, the defense opening statement suggested that Malik Smith answered the door, and since he was shot in the back, he may have been shot by Romale Richardson. 225: 56; 230: 20.

Amending court 1

On October 17, 2018, the third day of the jury trial, the prosecutor filed an amended information which changed the charge in count 1 from first-degree reckless homicide while armed to felony murder, with the underlying felony alleged to be armed burglary.

The following morning, Judge Borowski inquired about the amended information, which led to a lengthy discussion. 230: 26-40. The prosecutor noted that this amended charge could apply without regard to whether the jury found that Mr. Mays or someone else fired the fatal shot. 230: 27. Defense counsel objected to the amendment and moved to dismiss count 1. 230: 28-30. The prosecutor further explained her theory, asserting that Mr. Mays entered the premises without consent and with intent, not to steal, but to commit a felony, specifically second-degree recklessly endangering safety. 230: 32, 34. The prosecutor suggested that numerous felonies might have been intended upon entry, including injury and battery. 230: 35. The defense objected that no one testified about non-consent to the entry. 230: 36. The

prosecutor responded that non-consent can be shown circumstantially. 230: 38. This discussion ended without any decision.

Before the noon recess, the court indicated an inclination not to allow the amended charge, but to have felony murder as a lesser included offense. 230: 59. The defense then withdrew its objection to the amended information. 230: 60-61. Just before the jury received final instructions (231: 14-34), the prosecutor clarified that the jury instructions she had prepared included "felony murder not as a lesser included but as the Count 1 in the amended information . . . because the defense had withdrawn its objection to the State proceeding on that amended information." 231: 10. The amended information containing felony murder as count 1 was filed. 52: 1-2. (The Court of Appeals stated that the State withdrew the amended information. Apx. 105, ¶15. This is incorrect.)

Thus, the jury was instructed on count 1 on felony murder. Apx. 122-127; 231: 16-21. Per the jury instructions, the underlying felony of felony murder was armed burglary as party to a crime. Apx. 123-125; 231: 17-19. The fourth element of armed burglary was defined as entry with intent to commit second-degree recklessly endangering safety. Apx. 125; 231: 19. The court provided the jury with the elements of second-degree recklessly endangering safety. Apx. 125-126; 231: 19-20. The court concluded instruction on count 1 by addressing intent:

> When Must Intent Exist? The intent to commit a felony must be formed before entry is made. The intent to commit second-degree recklessly endangering safety which is an essential element of burglary is no more or less than the mental purpose to commit second-degree recklessly endangering safety formed at any time before the entry, which continued to exist at the time of the entry.

Apx. 126; 231: 20.

ARGUMENT

Burglary based on entry made with *intent* to commit a *reckless* crime is not an offense under Wisconsin law, and therefore such a burglary may not support a felony murder charge

Mr. May's initially objected to the State's request to amend the charge in count 1 from first-degree reckless homicide while armed to felony murder with an underlying felony of armed burglary. 230: 28-30. However, after the Court voiced an inclination to instruct on felony murder as a lesser-included offense, the defense withdrew its objection to amending the charge. 230: 59-61. Nonetheless, while not objecting to instructing on felony murder, Mr. Mays' counsel offered a comment on this instruction; after noting that armed burglary is the underlying offense, and this offense must be defined, he observed:

> And so that when you're reading the instructions to the jury, it doesn't have a lightbulb go on where you're thinking, well, this can't be right because on Page 5, element 4 of armed burglary the language is "the defendant entered the building with intent to commit second-degree recklessly endangering safety." And just right away when I saw the word "intent" in the same sentence with reckless, that's just not something that you normally see.

231: 7. Counsel concluded the while using intent and reckless in the same sentence is confusing, the proposed instruction is consistent with the pattern instruction, which counsel believed allows State to allege burglary based on entry with intent to commit any felony.

Counsel's instinct suggested that something might be wrong with an instruction requiring a jury to determine whether Mr. Mays had "the mental purpose to commit second-degree recklessly endangering safety." Apx. 126; 231: 20. His concern was well-founded, for this Court's precedent has recognized the inconsistency of intending to commit a reckless crime.

This Court has long held that one cannot attempt to commit a crime which requires only recklessness rather than intent. *State v. Melvin*, 49 Wis.2d 246, 250, 181 N.W.2d 490 (1970) (citing *State v. Carter*, 44 Wis.2d 151, 170 N.W.2d 681 (1969)). Convicted of attempted first-degree murder, Mr. Melvin appealed the trial court's refusal to give jury instruction on several lesser charges which Mr. Melvin asserted were included offenses. One of the requested instructions was for attempted homicide by reckless conduct. The *Melvin* court affirmed the trial court's refusal to instruct on this charge:

> The trial court did not err in refusing to give the requested instruction on attempted homicide by reckless conduct (secs. 940.06 and 939.32, Stats.) because there is no such crime. An "attempt" by sec. 939.32 (2) requires that the actor have an intent to perform acts and attain a result which if accomplished would constitute the crime. Acts to constitute an attempt must unequivocally demonstrate that the actor had such intent and would have committed the crime excepting for the intervention of another person or some other extraneous factor. Homicide by reckless conduct does not require any intent to attain a result which if accomplished would constitute a crime; and consequently, one cannot attempt to commit a

> crime which only requires reckless conduct and not a specific intent.

Melvin, 49 Wis.2d at 249-250 (citation omitted).

In *Carter*, as in *Melvin*, a defendant charged with attempted first-degree murder sought instructions on attempts to commit several lesser degrees of homicide, including:

- attempted second degree murder (i.e., attempting to cause death "by conduct imminently dangerous to another and evincing a depraved mind, regardless of human life");

- attempted third-degree murder (i.e., attempting to cause death "in the course of committing or attempting to commit a felony . . . being as a natural and probable consequence of the commission of or attempt to commit the felony"); and,

- attempted manslaughter (i.e., attempting to cause death "without intent to kill and while in the heat of passion").

Carter, 44 Wis.2d at 155 (text and footnotes 1-3). The Court in *Carter* determined that because intent as defined in Wis. Stat. §939.23 is not an element of any of these crimes, the language of these three degrees of homicide "is not reconcilable with the concept of attempt." *Carter*, 44 Wis.2d at 155; *but see State v. Oliver*, 108 Wis.2d 25, 321 N.W.2d 119 (1982) holding that attempted manslaughter *is* an offense because of the unique concept of heat of passion:

> [T]he literal language of sec. 940.05(1), Stats., requiring

> that a defendant act without intent to kill, is a legal fiction. Heat of passion negates the distinct intent required for first-degree murder, but a defendant acting in the heat of passion may still intend to actually kill a person. It necessarily follows from this result that a defendant may be guilty of attempted manslaughter. A person may have the actual intent to kill someone and attempt to do so, but still be acting in the heat of passion as that phrase has been interpreted.

Oliver, 108 Wis.2d at 28. The Court of Appeals later noted that the holding in *Oliver* is "peculiar to the crime of manslaughter." *State v. Briggs*, 218 Wis.2d 61, 68, 579 N.W.2d 783 (Ct. App. 1998).

When a person is convicted of a non-existent crime, the court lacks subject matter jurisdiction, and the error cannot be waived; "'the waiver doctrine does not permit conviction for a nonexistent crime,' even when a defendant has specifically requested that the jury be instructed on the non-offense." *Briggs*, 218 Wis.2d at 68, quoting *State v. Cvorovic*, 158 Wis.2d 630, 631, 462 N.W.2d 897 (Ct. App. 1990). Mr. Briggs, charged with attempted first-degree intentional homicide, plead guilty to the amended charged of attempted felony murder pursuant to a plea agreement; since attempted felony murder is not a crime under *Carter*, the conviction had to be vacated.

Burglary is committed by one who "intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony in such place." Wis. Stat. §943.10(1m). The statute lists six categories of places, such

as "building or dwelling" and "enclosed railroad car." Wis. Stat. §943.10(1m)(a)-(f). These alternative places are not essential elements about which the jury must be unanimous; the six options simply present alternate means of committing the offense. *United States v. Franklin*, 2019 WI 64, ¶4, ¶20, 387 Wis.2d 259, 928 N.W.2d 545. However, the statute defines alternate intents: "to steal" or "to commit a felony." These alternatives set forth separate crimes which may not be joined in a single charge. *Champlain v. State*, 53 Wis.2d 751, 756, 193 N.W.2d 868 (1972). Moreover, when a burglary charge is based on intent to commit a felony, the information, jury instruction and verdict all should specify what felony was intended. *Champlain*, 53 Wis.2d at 756. A jury may be given multiple intended felony options, and the jury need not be unanimous as to which felony a defendant intended, as long as all jurors agree the defendant intended to commit one of the felony options. *State v. Hammer*, 216 Wis.2d 214, 675 N.W.2d 285 (Ct. App. 1997). Finding that a person intended to commit a felony when entering a place means finding that the person intended *every element* of the felony:

> It was not alleged that the defendant intended to steal anything once he had entered the Shawano Paper Mill. Rather, it was alleged that defendant intended to commit the felony of criminal damage to property in excess of $1,000. Thus, it was necessary to show beyond a reasonable doubt that defendant entered the premises not only to commit criminal damage to property therein but intending that such damage would exceed $1,000.

Gilbertson v. State, 69 Wis.2d 587, 592, 230 N.W.2d 874 (1975) (footnote omitted).

For a burglary charge based on intent to commit a felony, the burglary statute does not expressly limit which felonies might apply. *State v. O'Neill*, 121 Wis.2d 300, 305, 359 N.W.2d 906 (1984). Thus, one might assume that any felony might apply which meets the definition of felony: "A crime punishable by imprisonment in the Wisconsin state prisons is a felony. Every other crime is a misdemeanor." Wis. Stat. §939.60. However, the Court in *O'Neill* found that the range of possible felonies is not unlimited: "We conclude that the legislature intended to include only offenses against persons and property within the felonies which could form the basis of a burglary charge. . .." *O'Neill*, 121 Wis.2d at 307. Mr. O'Neill's burglary conviction, based on intent to commit misconduct in office, could not stand, as this underlying offense was not against persons or property.

Felony murder is committed by one who "causes the death of another human being while committing or attempting to commit a crime specified. . .." Wis. Stat. §940.03. The crimes specified in this statute include burglary while armed with a dangerous weapon in violation of Wis. Stat. §943.10(2)(a).

Under amended count one, Mr. Mays was charged with causing the death of Malik Smith while committing an armed burglary. The

armed burglary was based on the allegation, set forth in the jury instruction, that Defendant Mays "entered the building with the *intent* to commit second-degree *recklessly* endangering safety that is, the defendant intended to commit second-degree recklessly endangering safety at the time the defendant entered the building." Apx. 113; 231: 19 (emphasis added).

As stated in *Melvin*, "one cannot attempt to commit a crime which only requires reckless conduct and not a specific intent." *Melvin,* 49 Wis.2d at 250. The *Melvin* Court reached this conclusion immediately after noting that the attempt statute "requires that the actor have an intent to perform acts and attain a result which if accomplished would constitute the crime." *Melvin,* 49 Wis.2d at 249-250. Thus, the *Melvin* Court essentially concluded that one may not *attempt* a reckless crime because one may not logically *intend* to commit a *reckless* crime. *See, State v. Henning*, 2013 WI App 13, ¶9, 346 Wis.2d 246, 828 N.W.2d 235: "*Melvin* . . . held that the crime of attempted reckless homicide does not exist because one cannot intentionally act recklessly." Yet Mr. Mays' conviction for felony murder is based on the premise that Mr. Mays *intended* to commit *recklessly* endangering safety.

Acting with a specific intent is defined by statute:

> "With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result specified, or is

> aware that his or her conduct is practically certain to cause that result.

Wis. Stat. §939.23(4). This definition incorporates two alternates: *purpose* to do an act or cause a specified result and *knowledge* (i.e., awareness) that conduct will bring about a particular result. *State v. Smith*, 170 Wis.2d 701, 706-712, 490 N.W.2d 40 (Ct. App. 1992) (rebuffing a claim that the purpose and knowledge prongs of intent are so conceptually different as to constitute separate offenses). In Mr. Mays' case, the jury was instructed with respect to the purpose prong of the intent definition:

> The intent to commit second-degree recklessly endangering safety which is an essential element of burglary is no more or less than the mental purpose to commit second-degree recklessly endangering safety formed at any time before the entry, which continued to exist at the time of the entry.

Apx. 126; 231: 20. However, as with the offenses involving attempts to commit reckless crimes, the notion of having the purpose to commit recklessly endangering safety is irreconcilable with the definition of intent. The armed burglary, being based on intent to commit a reckless crime, is not a valid offense under Wisconsin law. As such, it could not be a constituent part of the charge of felony murder.

When a person is charged with burglary based on intent to commit a felony, the only express limits on what that felony may be is that it must be a crime against persons or property. *State v. O'Neill*, 121

Wis.2d 300, 307, 359 N.W.2d 906 (1984). However, the undersigned counsel can find no Wisconsin case addressing a burglary charge based on intent to commit a felony where such felony did not itself require specific intent. The law and logic which prohibits charges of attempt to commit a reckless crime also prohibits reckless felonies from being the basis for burglary with intent to commit a felony.

The Postconviction Court took a narrow view of the logic and rationale of *Melvin*:

> The problem the *Melvin* court identified in instructing the jury on first degree reckless homicide as an attempt was not so much that it would require the jury to find that the defendant intended to act recklessly but rather that it required the jury to find that he intended to "attain the result" of death, which would be inconsistent with a finding of recklessness. Thus, the holding in *Melvin* is not that one can never intend to act recklessly – of course one can – it is only that one cannot *attempt* to commit a reckless homicide. This case does not involve an attempt to commit a reckless homicide.

Apx. 115-116; 212: 3-4 (emphasis in original). The Postconviction Court found *Melvin* is premised on the rationale that attempt, which requires a finding that the defendant "intended to 'attain the result' of death," is inconsistent with a finding of recklessness. However, the distinction does not hold, for *all* reckless crimes have result elements. Second-degree reckless homicide requires the result of "death of another human being." Wis. Stat. §940.06(1). Second-degree reckless injury requires the result of "great bodily harm to another human

being." Wis. Stat. §940.23(2)(a). Second-degree recklessly endangering safety requires the result that "another's safety" is "endanger[ed]" Wis. Stat. §941.30(2). Each of these reckless crime examples requires causing a result recklessly. *Melvin* would prohibit charging *any* of these offenses as an attempt, because to do so would require intending the result of a reckless crime. Contrary to the Postconviction Court's analysis, the holding of *Melvin* is not confined to reckless homicides.

The Court of Appeals deemed reliance on *Melvin* and *Carter* "misguided" and proceeded to explain how, under the facts of the case, "the State sought to prove that Mays intended to endanger the safety of Richardson—as well as the other people in Smith's apartment—by his criminally reckless conduct. . .." Apx. 109, ¶24.

Instead of applying *Melvin*, both the Postconviction Court and the Court of appeals relied on an analogy to solicitation, noting that the Court of Appeals has held that one person may solicit another to commit a reckless crime. Apx. 109-110, ¶¶25-28; apx. 116-117; 212: 4-5, citing *State v. Kloss*, 2019 WI App 13, 386 Wis.2d 314, 925 N.W.2d 563, *review dismissed* 2020 WI 26, 390 Wis.2d 685, 939 N.W.2d 564. In *Kloss*, the defendant made a series of recorded calls from jail to his wife in which he urged his wife, should the police come to her door, to shoot them through the door, and in the event that the

police flee, to pursue them and to continue shooting them. *Kloss*, ¶3. Based on these calls, Mr. Kloss was charged with and convicted of solicitation of first-degree reckless injury.

Without mention of either *Melvin* or *Carter*, the Court in *Kloss* rejected Mr. Kloss' assertion that one cannot intentionally solicit another person to engage in a reckless act:

> We see no reason why a *solicitor* cannot intend, at the time he or she solicits reckless conduct from another, that great bodily harm result from the *solicitee's* reckless conduct. It may be true that a solicitor cannot know with certainty at the time of the solicitation whether an injury will in fact result from the solicitee's conduct—such uncertainty is inescapable in an inchoate crime such as solicitation. But no level of certainty is required to form a purpose to cause a particular result —that is, an intent that a result take place.

Kloss, ¶10 (emphasis by the Court).

This rationale in *Kloss* makes clear why solicitation affords a poor analogy to Mr. Mays' charge: the crime of solicitation requires two persons, a solicitor and a solicitee. A solicitor such as Mr. Kloss, sitting in jail and powerless to act directly, may nonetheless intend that his wife, the solicitee, cause harm to others, without caring whether the result is brought about by reckless conduct or intentional conduct. In a solicitation, the actor who, "with intent that a felony be committed, advises another to commit that crime," completes the crime. Wis. Stat. §939.30. The crime is completed by one who, with requisite intent,

merely advises another to commit a crime.

In contrast, in Mr. Mays' situation, as with an attempt, only one actor is involved. In an attempt, the actor must have an intent to perform acts and attain a result which if accomplished would constitute the crime. *Melvin*, 40 Wis.2d at 249-250. A burglar must enter premises with intent either to steal or to commit a felony. The acts and intent are both by the same actor. Thus, the logic of *Melvin* that one may not attempt a reckless crime because one cannot intend a reckless crime likewise applies to Mr. Mays: one may not enter premises with *intent* to commit a *reckless* crime. The crime of felony murder based on a burglary, which in turn is based on entry with *intent* to commit a *reckless* crime, does not exist.

The heart of Mr. Mays' claim is that the offense of burglary based on entry made with intent to commit a reckless crime is not an offense. Whether an offense exists as a crime in Wisconsin raises a question of statutory interpretation which an appellate reviews *de novo*. *State v. Briggs*, 218 Wis.2d 61, 65, 579 N.W.2d 783 (Ct. App. 1998); *State v. Cvorovic*, 158 Wis.2d 63, 632-633, 462 N.W.2d 897 (Ct. App. 1990). The proper focus in assessing whether an offense exists at law in on the statutes. Thus, when this Court in *Carter* assessed whether attempted second-degree murder, attempted third-degree murder and attempted manslaughter existed as offense in Wisconsin law, this Court compared

the requirements of the attempt statute (§939.32(2)), the statute defining intent (§939.23) and the statutes defining the offenses (§940.02, §940.03 and §940.05) and concluded the language in these offense statutes "is not reconcilable with the concept of attempt." *Carter*, 44 Wis.2d at 155. When this Court in *Melvin* determined whether attempted reckless homicide was an offense, this Court compared the intent requirement in the attempt statute with the offense statute and concluded: "Homicide by reckless conduct does not require any intent to attain a result which if accomplished would constitute a crime; and consequently, one cannot attempt to commit a crime which only requires reckless conduct and not a specific intent." *State v. Melvin*, 49 Wis.2d at 250 (citing *Carter*). The underlying facts in *Carter* and *Melvin* were of no consequence to the analyses.

In Mr. Mays' case, neither the Postconviction Court nor the Court of Appeals performed any such analysis of the relevant statutes. The Postconviction Court based its analysis on the facts:

> It is without dispute that when the defendant burst into the apartment firing his weapon he was recklessly endangering the safety of everyone in that space. There is no material dispute that the defendant intended to do what he did in committing that crime. So, the defendant intended to do what he did, and what he did was to recklessly endanger the safety of others; ergo, he intended to commit the crime of second degree recklessly endangering safety. It's just that simple.

Apx. 166; 127: 4.

The Court of Appeals recognized that the issue presented a question of statutory interpretation. Apx. 107, ¶20. However, rather that address statutory provisions, the Court of Appeals' analysis focused on the underlying conduct and the factual basis for the prosecutor's theory of proof.

> [T]he State sought to prove that Mays intended to endanger the safety of Richardson—as well as the other people in Smith's apartment—by his criminally reckless conduct of forcing his way into the apartment and firing two guns. *See* WIS. STAT. § 941.30(2). His intent to commit this felony upon entering Smith's apartment without consent proved the requisite elements of burglary, and it was during the commission of that burglary that he committed felony murder by causing Smith's death. *See* WIS. STAT. §§ 940.03, 943.10(1m).

Apx. 109, ¶24; *see also* apx. 110, ¶27 (quoting the prosecutor at length as to her factual theory of felony murder).

The relevant statutory requirement of burglary is that a person must enter a premises "with *intent* . . . to commit a felony in such place." Wis. Stat. §943.10(1m) (emphasis added). The alleged underlying intended felony requires that a person "*recklessly* endangers another's safety." Wis. Stat. §941.30(2) (emphasis added). Whether a burglary premised on entry made with intent to commit a reckless crime is an offense under Wisconsin law is a question of statutory construction. This issue may not be resolved by resort to applying the particular facts in the case, for such a mode of analysis may lead to different

conclusions based on different facts. For this reason, the analyses of the issue in the courts below are flawed. Mr. Mays prays that this Court accepts review to perform a proper analysis based upon construing the statutes.

CONCLUSION

Defendant-appellant-petitioner Antonio Darnell Mays prays that the Supreme Court of Wisconsin accepts his case for review.

Respectfully Submitted:

Electronically signed by
John T. Wasielewski

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John T. Wasielewski
Attorney for
Antonio Darnell Mays

FORM AND LENGTH CERTIFICATION

I hereby certify that this petition for review complies with Wis. Stat. §809.62(4) with respect to form and length. This petition contains 5458 words.

Electronically signed by
John T. Wasielewski

_____

John T. Wasielewski

APPENDIX CONTENTS