

No. _____

In the
Supreme Court of the United States

Alford Danta Tarpley,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Texas offense of robbery by injury constitutes a “crime of violence” under USSG §4B1.2?

PARTIES TO THE PROCEEDING

Petitioner is Alford Danta Tarpley, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Alford Danta Tarpley seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reported at *United States v. Tarpley*, 813 Fed. Appx. 976 (5th Cir. July 30, 2020)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on July 30, 2020. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTORY AND GUIDELINE PROVISIONS

Section 29.02 of the Texas Penal Code reads in relevant part:

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

United States Sentencing Guideline 4B1.2 reads:

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful

possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

Petitioner Alford Danta Tarpley pleaded guilty to one count of possessing a firearm after having sustained a felony conviction, a violation of 18 U.S.C. §922(g). *See* (Record in the Court of Appeals, at 25-26). A Presentence Report (PSR) calculated a Guideline range of 46-57 months, the product of a final offense level of 19 and a criminal history of IV. *See* (Record in the Court of Appeals, at 143). The final offense level stemmed from a six-level adjustment to the base offense level for having previously sustained a prior “crime of violence,” namely a Texas conviction for robbery by injury. *See* (Record in the Court of Appeals, at 127).

The district court imposed a sentence of 100 months imprisonment. *See* (Record in the Court of Appeals, at 130). It did not say that the sentence would have been the same under different Guidelines. *See* (Record in the Court of Appeals, at 103-110).

B. Appellate Proceedings

Petitioner appealed, contending, *inter alia*, that the district court plainly erred in treating his prior robbery conviction as a “crime of violence” because it could be committed by reckless conduct. He conceded that Fifth Circuit precedent foreclosed the claim but raised it to preserve review before this Court.

The court below applied its circuit precedent and rejected the claim, citing one authority: *United States v. Burris*, 920 F.3d 942, 948-52 (5th Cir. 2019), petition for cert. filed (U.S. Oct. 3, 2019) (No. 19-6186). Its entire decision on this question is as follows:

We also review for plain error Tarpley's unpreserved argument that the district court miscalculated the guidelines range by holding that his conviction for robbery causing bodily injury under Texas Penal Code § 29.02(a)(1) constituted a crime of violence for purposes of U.S.S.G. §§ 2K2.1(a)(4)(A) and 4B1.2(a)(1). See *id.* Tarpley correctly concedes that his argument is foreclosed by *United States v. Burris*, 920 F.3d 942, 948-52 (5th Cir. 2019), petition for cert. filed (U.S. Oct. 3, 2019) (No. 19-6186), in which we held that a conviction under § 29.02(a)(1) categorically requires the use of physical force.

[Appx. A]; *United States v. Tarpley*, 813 F. App'x 976, 977 (5th Cir. 2020)

REASONS FOR GRANTING THE PETITION

This Court’s decision in *Borden v. United States*, No. 19-5410, 140 S.Ct. 1262 (March 2, 2020), and its disposition of the Petition pending in *Burris v. United States*, 19-6168 (Filed October 3, 2019), may destroy the precedential value of the sole authority cited below to resolve the question presented.

Federal Sentencing Guideline 2K1.2 provides an enhanced base offense level when the defendant has sustained a conviction for a “crime of violence.” *See* USSG §2K2.1(a). For the purposes of this enhancement, “crime of violence” has the meaning found in USSG §4B1.2. *See* USSG §2K2.1, comment. (n. 1). Under §4B1.2, an offense is a “crime of violence” when it either has “as an element the use, attempted use, or threatened use of physical force against the person of another,” or constitutes one of a list of enumerated offenses, among them “robbery.” USSG §4B1.2(a).

Petitioner received this enhancement due to his prior Texas conviction for “robbery” under Texas Penal Code §29.02. This offense may be committed by recklessly inflicting injury in the course of theft, or the immediate flight therefrom. Tex. Penal Code §29.02(a). Relying on *United States v. Burris*, 920 F.3d 942 (5th Cir. 2019), the opinion below held that this form of the offense possesses the use of force against the person of another as an element. *See* [Appx. A].

But *Burris* is currently before this Court on Petition for Certiorari, where it has been held more than a year. *See Burris v. United States*, 19-6168 (Filed October 3, 2019). Probably, it is awaiting a decision in *Borden v. United States*, 19-5410, __U.S.__ 140 S.Ct. 1262 (March 2, 2020), which will decide whether reckless offenses

possess the use of force of against the person of another as an element. In the event that *Burris* is vacated, the sole authority offered in support of the decision below will lack precedential force. See *Ridley v. McCall*, 496 F.2d 213, 214 (5th Cir. 1974) (stating that vacated opinions have no precedential value); accord *Cent. Pines Land Co. v. United States*, 274 F.3d 881, 894 (5th Cir. 2001). Accordingly, this Court should hold the instant case pending the disposition of *Borden* and *Burris*. In the event that *Borden* prevails and/or *Burris* is vacated, it should grant certiorari, vacate the judgment below, and remand in light of those developments. See 28 U.S.C. §2106.

CONCLUSION

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

Respectfully submitted this 22nd day of December, 2020.

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