No. _____

In the Supreme Court of the United States

ROSHAWN DEON JOINER, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does the "use of force" clause in the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e)(2)(B)(i) encompass crimes with a mens rea of mere recklessness?[1]

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[1] This same question is before the Court in *Borden v. United States*, No. 19-5410 (argued Nov. 3, 2020). *Borden* involves the Tennessee robbery statute which, like the Texas robbery statute, Tex. Penal Code Ann. § 29.02, includes a *mens rea* of recklessness. Thus, the Court's decision in *Borden* likely will be dispositive of Joiner's petition for writ of certiorari. Accordingly, Joiner's petition should be held pending the Court's resolution of *Borden*, and then disposed of as appropriate in light of the decision in that case.

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Petitioner Roshawn Deon Joiner asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on August 14, 2020.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

A copy of the unpublished opinion of the court of appeals, *United States v. Joiner*, No. 18-50136 (5th Cir. Nov. 6, 2020) (per curiam), is reproduced at Pet. App. 1a–4a.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on November 6, 2020. On March 19, 2020, this Court extended the deadline for filing a petition for writ of certiorari due after that date to 150 days from the date of the lower court's judgment. *See also* Sup. Ct. R. 13.1, 13.5. This petition is filed within that time. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

Title 18 U.S.C. § 924(e)(2)(B)(i) provides:

> [T]the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that … has as an element the use, attempted use, or threatened use of physical force against the person of another[.]

STATE STATUTE INVOLVED

The Texas robbery statute reads:

(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.
(b) An offense under this section is a felony of the second degree.

Tex. Penal Code Ann. § 29.02 (West 2019).

STATEMENT

1. *Introduction.* Joiner appeals the district court's denial of his 28 U.S.C. § 2255 motion challenging his 151-month prison sentence for being a felon in possession of a firearm. That sentence was authorized by the district court's finding that Joiner was subject to an enhanced sentence under the Armed Career Criminal Act, based in part on two prior Texas convictions for robbery. Joiner argues that under this Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015), he was not subject to the ACCA and his sentence exceeds the 120-month non-ACCA statutory maximum for a felon in possession. The question presented is the same as that in *Borden v. United States*, No. 19-5410 (argued Nov. 3, 2020): Does the "use of force" clause in the Armed Career ACCA, 18 U.S.C. § 924(e)(2)(B)(i) encompass crimes with a mens rea of mere recklessness?

2. *The original sentence*. In 2012, Roshawn Deon Joiner was charged in a one-count indictment with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He pleaded guilty. That offense is generally punishable by a maximum term of ten years' imprisonment and three years' supervised release. 18 U.S.C. §§ 922(g)(1), 924(a)(2). But if the defendant has at least three prior convictions for a "violent felony," a "serious drug offense," or both, the ACCA increases the penalty to 15 years' to life imprisonment and a maximum of five years' supervised release. 18 U.S.C. § 924(e)(1); § 3559(a)(1), (3); § 3583(b)(1), (2).

The presentence report stated that Joiner was subject to the ACCA's enhanced penalties because he had four prior Texas convictions that qualified as violent felonies: attempted murder, aggravated robbery, and two simple robberies. *See* 18 U.S.C. § 924(e); § 3583(b)(1). His sentencing Guidelines range was 180 to 188 months. The district court adopted the presentence report without change.

Joiner was sentenced on May 18, 2012. The district court granted a Government motion for a downward departure under guideline §5K1.1 and 18 U.S.C. § 3553(e), which allowed the court to impose a sentence below the 15-year mandatory minimum. The

court sentenced Joiner to 151 month's imprisonment, to be followed by five years' supervised release.

3. *The direct appeal.* Ten months later, in May 2013, Joiner filed a combined notice of appeal and motion for leave to file the notice out of time. The district court denied the motion, and the court of appeals dismissed Joiner's appeal as untimely.

4. *Joiner's first § 2255 motion.* In December 2013, Joiner filed a 28 U.S.C. § 2255 motion challenging his sentence, along with a supporting memorandum of law. He argued that his 151-month sentence was unconstitutional because it exceeded the otherwise-applicable 10-year statutory maximum based on facts—his prior convictions—not alleged in the indictment and not found by a jury beyond a reasonable doubt. The district court denied Joiner's § 2255 motion as untimely because it was filed more than one year after his conviction became final.

5. *This § 2255 motion*. On June 26, 2015, the Court held, in *Johnson v. United States*, 576 U.S. 591, 593, 606 (2015), that the residual clause in the Armed Career Criminal Act's (ACCA) "violent felony" definition is unconstitutionally vague, and that imposing an enhanced sentence on that basis violates a defendant's Fifth Amendment right to due process. On April 18, 2016, the Court held, in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), that

"*Johnson* announced a substantive rule that has retroactive effect in cases on collateral review."

The district court appointed the Federal Public Defender to represent defendants who might be eligible to pursue sentencing relief under *Johnson*. On September 1, 2016, Joiner, through counsel, filed a second motion challenging his sentence under 28 U.S.C. § 2255.[2] The motion raised a claim that Joiner's sentence was imposed in violation of the Constitution and laws of the United States, and exceeds the statutory maximum, because his prior convictions no longer qualify as violent felonies under the ACCA post-*Johnson*. Joiner also sought authorization from the Fifth Circuit to file this second § 2255 motion, which the court granted.

Joiner expanded on his claim in a memorandum in support of the § 2255 motion, arguing that none of his prior convictions qualify as ACCA predicates because the offenses lack an element of force. Texas attempted murder, Joiner argued, only requires acts that "cause" the death of a person, and the Fifth Circuit had held

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[2] "In that motion, [Joiner] noted that the government had agreed in writing to waive any statute of limitations defense" to the timeliness of the motion.

that causation of injury—even serious bodily injury—does not require the use of force.[3] For the same reason, Joiner argued, Texas robbery and aggravated robbery also do not have an element of force. Simple robbery is a theft in which the perpetrator either causes bodily injury to another or threatens another with imminent bodily injury or death. *See* Tex. Penal Code Ann. § 29.02(a). Aggravated robbery is a simple robbery plus one of three aggravating factors. Pointing to this Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), Joiner argued that those factors are not alternative elements of distinct offenses; they are alternative means of committing a single indivisible offense. And one of those means is causing serious bodily injury.

The Government disagreed. Relying in large part on this Court's decision in *United States v. Castleman*, 572 U.S. 157 (2014)—which involved a definition of "misdemeanor crime of domestic violence" that does not apply to the ACCA—the Government argued that causation of injury necessarily involves the use of violent physical force, so that all four of the prior convictions at issue qualified as ACCA predicates. The Government also argued

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[3] The Fifth Circuit has since overruled that case law. *See United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc).

that Joiner's divisibility argument on aggravated robbery was "time-barred" because *Mathis* was not a new rule of constitutional law. Finally, the Government argued that Joiner has a fifth qualifying ACCA predicate not treated as such at his original sentencing: an adjudication of juvenile delinquency for another attempted murder. The Government's response included *Shepard*[4] documents for all four convictions and the juvenile adjudication.

Joiner replied to the Government's arguments, pointing out that *Castleman* does not apply here because it did not involve the statutory definition of "violent felony" that applies to the ACCA. He also argued that the retroactivity of *Mathis* was beside the point because his claim rests on *Johnson*, and *Mathis* merely clarified how the categorical approach works for determining whether a prior conviction was for an ACCA violent felony.

The district court denied Joiner's § 2255 motion. It found that all four of the prior convictions qualify as ACCA violent felonies under the force-element clause.[5] As for the robberies, the court noted that the Fifth Circuit had not resolved whether the offense

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[4] *Shepard v. United States*, 544 U.S. 13 (2005).

[5] The court did not address the Government's argument on Joiner's juvenile attempted murder adjudication.

has a force element and that district courts had divided on the question. The court then concluded that both forms of Texas robbery—by causing injury or by threat—contain an element of force.[6] Turning to aggravated robbery, the court applied the Fifth Circuit's decision in *United States v. Lerma*, 877 F.3d 628 (5th Cir. 2017), which held that the Texas aggravated robbery statute is divisible and that the deadly-weapon aggravator has as element of force. Because the *Shepard* documents from Joiner's aggravated robbery conviction showed that it involved the deadly-weapon form of the offense, the court concluded that it, too, had a force element. Finally, relying on a factual allegation in Joiner's attempted murder indictment that he shot at the victim with a handgun, the court concluded that "[s]hooting a gun at another constitutes a use of force sufficient to qualify as a predicate offense" for the ACCA. On top of denying Joiner's § 2255 motion, the court denied him a certificate of appealability, without explanation.

6. *The certificate of appealability.* Joiner filed a notice of appeal and asked the Fifth Circuit to grant him a certificate of appealability. He argued that reasonable jurists could debate

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[6] The court did not address the Government's argument on the applicability of *Mathis*.

whether any of his four prior convictions remain ACCA predicates post-*Johnson*. At the court's direction, Joiner filed a supplemental brief addressing the effect of *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc), on his request for a certificate of appealability. *See* Order, *United States v. Joiner*, No. 18-50136 (5th Cir. Dec. 5, 2018). In that supplemental brief, Joiner conceded that *Reyes-Contreras* foreclosed his argument on attempted murder, but he maintained that the robbery and aggravated robbery questions remained debatable.

The Court granted Joiner a certificate on appealability on two issues:

1) "whether the original sentencing court relied upon the now-invalidated residual clause in determining that Joiner's prior convictions for robbery were 'violent felonies'"; and
2) whether Texas simple robbery still qualifies as an ACCA violent felony post-*Johnson*.

Order, *United States v. Joiner*, No. 18-50136 (5th Cir. Feb. 20, 2019). The Court denied a COA on the questions of whether Joiner's aggravated robbery and attempted murder convictions remain violent felonies. *Id.*

7. Anders *brief.* Counsel then filed a motion to withdraw and a brief under *Anders v. California*, 386 U.S. 738 (1967). Counsel's

brief did not address the first, jurisdictional question because case law developments after the COA grant foreclosed any argument on the second, merits question. *See United States v. Burris*, 920 F.3d 942 (5th Cir.), *petition for cert. filed*, No. 19-6186 (U.S. Oct. 3, 2019) (holding that Texas simple robbery remains an ACCA violent felony). This development, in counsel's view, left no nonfrivolous grounds on which to continue challenging Joiner's ACCA sentence. The panel agreed with counsel's assessment, granted the motion to withdraw, and dismissed Joiner's appeal.

8. *Panel rehearing*. Joiner then moved for panel rehearing because a subsequent grant of certiorari in a nearly identical case demonstrated that counsel's frivolousness assessment was wrong. Just a month before the panel dismissed Joiner's appeal, this Court granted certiorari in *Walker v. United States*, 140 S. Ct. 519 (2019), which presented the question "[w]hether a criminal offense that can be committed with a mens rea of recklessness can qualify as a 'violent felony' under the Armed Career Criminal Act, 18 U.S.C. 924(e)." The offense at issue was Texas simple robbery, and Walker, like Joiner, raised this challenge in a *Johnson*-based 28 U.S.C. § 2255 motion attacking his ACCA sentence.

Walker later died, so the Court dismissed his case. 140 S. Ct. 953 (2020). Thus, Joiner's argument remained foreclosed in the

Fifth Circuit under *Burris*. But Joiner argued that this Court was likely to grant certiorari in another case to resolve the *Walker* issue with robbery and the ACCA. And that is what happened in *Borden v. United States*, 140 S. Ct. 1262 (2020).

The Fifth Circuit panel granted Joiner's motion for rehearing, reappointed the Federal Public Defender to represent him, and directed the parties to address the jurisdictional question that counsel pretermitted in the *Anders* brief.

In his merits brief, Joiner argued that the district court had jurisdiction over his § 2255 motion because that court had relied on the residual clause when it sentenced him as an armed career criminal. He also argued that Texas simple robbery does not qualify as an ACCA predicate under the force clause of the violent felony definition because the offense can be committed by recklessly causing bodily injury and causing bodily injury recklessly does not involve the use, attempted use, or threatened use of physical force within the meaning of § 924(e)(2)(B)(i)—an argument the Fifth Circuit had rejected in *Burris*, 920 F.3d 942.

The Fifth Circuit held that the district court had jurisdiction over Joiner's § 2255 motion, for the reasons he argued. Pet. App. 3a. Because the merits issue was foreclosed by *Burris*, the court

affirmed the district court's denial of Joiner's § 2255 motion. Pet. App. 3a–4a.

REASONS FOR GRANTING THE WRIT

The Court should hold Joiner's petition pending a decision in *Borden v. United* States, No. 19-5410, and dispose of it in light of the decision in that case, as they present the same issue: whether the "use of force" clause in the Armed Career Criminal Act 18 U.S.C. § 924(e)(2)(B)(i) encompass crimes with a mens rea of mere recklessness.

Joiner argued below that Texas simple robbery, Tex. Penal Code Ann. § 29.02, does not qualify as an ACCA predicate under the force clause of the violent felony definition. That is because the offense can be committed by recklessly causing bodily injury, *see* Tex. Penal Code Ann. § 29.02(a)(1), and causing bodily injury recklessly does not involve the use, attempted use, or threatened use of physical force within the meaning of § 924(e)(2)(B)(i).

The Fifth Circuit rejected this argument in *United States v. Burris*, finding itself bound by this Court's decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016), which "confirms that the use of force under the ACCA includes reckless conduct." 920 F.3d 942 (5th Cir. 2019), *petition for writ of cert. filed*, (U.S. Oct. 3, 2019).

Burris is wrong. As this Court has recognized in interpreting a materially identical provision in another statute, the critical phrase in the force clause is "against the person of another." That phrase describes the subset of ways to "use force" that satisfy the clause: namely, to use force in a manner that is aimed at another

person. When a person uses force recklessly, however, he is indifferent as to whether it falls on another person or on no one at all. Such an offense does not qualify as a "violent felony" under the force clause.

Ordinary usage confirms this understanding. In everyday English, one does not describe a reckless action that results in harm to another person as an action being taken against that person. For example, a police officer who recklessly throws a can of tear gas to a colleague near a crowd of peaceful protesters has not used the tear gas against the crowd if the can falls and discharges. So too here: a thief who recklessly causes bodily injury to another person is not targeting the person with the use of force.

The statutory context and structure reinforce the plain-language interpretation. Under the ACCA, the ultimate inquiry is whether a particular predicate offense constitutes a "violent felony." In interpreting the now-invalidated residual clause, this Court explained that violent felonies are crimes that involve the intentional use of violence against another. Crimes that can be committed recklessly (such as reckless driving) do not comfortably fit in that category.

By defining violent felonies as it did, Congress sought to identify the type of offender who might, in the future, deliberately point

a gun at another person. While the commission of a crime of recklessness reflects a callousness toward risk, it does not suggest a likelihood of future violent behavior of the sort Congress was targeting. The Court has explained that Congress did not intend to impose a harsh 15-year mandatory minimum sentence where such a risk is absent.

Considering the statutory text and context, as well as this Court's precedents, the correct analysis here is straightforward. Indeed, until recently, the courts of appeals had uniformly interpreted the language at issue here to exclude offenses that can be committed recklessly from the range of eligible predicate offenses.

Burris's reliance on *Voisine v. United States*, 136 S. Ct. 2272 (2016), was mistaken. In *Voisine*, this Court interpreted the phrase "misdemeanor crime of domestic violence" in 18 U.S.C. § 922(g)(9), which is defined to include offenses that merely require the "use of physical force." The Court held that offenses that could be committed recklessly satisfied that definition. But it made clear that it was not resolving the question presented here, recognizing that courts (including itself) had treated that definition differently.

In its text and context, the provision at issue in *Voisine* differs in significant respects from the ACCA's force clause. Most importantly, that provision lacks the critical restriction that force be

used "against the person of another." *Voisine* explained that the word "use" required volitional action, but that it was "indifferent" as to the actor's mental state concerning the action's consequence. That indifference disappears with the addition of the limiting phrase "against the person of another," which requires the use of force to be directed in a particular way. A person who uses force but is indifferent as to whether the force falls onto another person has used force, but not against another.

What is more, the contexts of the two provisions are worlds apart. The provision at issue in *Voisine*, § 922(g)(9), operates as a prophylactic provision in the unique context of domestic violence. Enacted long after the ACCA, § 922(g)(9) does not seek to identify particularly blameworthy offenders; rather, it extends the prohibition on possessing firearms to domestic abusers whose prior conduct did not rise to the level of a felony. In that way, it disables any domestic abuser from accessing a gun that could make domestic violence lethal. And because the predicate domestic-violence offenses that Congress sought to capture in § 922(g)(9) could be committed recklessly in more than two-thirds of the States, excluding reckless domestic-violence offenses would have rendered § 922(g)(9) inoperative in much of the country. The Court recog-

nized that unique context when it gave the definition of "misdemeanor crime of domestic violence" an expansive interpretation in *Voisine*. But none of that context is relevant to the ACCA.

Also, including reckless offenses would distort the meaning of "violent felony" by bringing garden-variety offenses into the ACCA's harsh regime. In particular, various reckless driving offenses would become "violent felonies" under the ACCA (and, presumably, "crimes of violence" for purposes of other criminal and immigration statutes). The Court has made clear that the ACCA did not seek to capture those types of offenses. And including those offenses would render meaningless another provision that separately delineates reckless driving offenses from the offense at issue here. It would be similarly incongruous to treat Joiner's conviction for Texas robbery as a "violent felony," because the Texas robbery statute, unlike traditional robbery statutes, permits a conviction for what is effectively reckless shoplifting. *See* Tex. Penal Code Ann. § 29.02(a)(1). And a host of similar offenses would be swept within the scope of the ACCA as well.

Finally, at best, the ACCA is ambiguous as to whether offenses that can be committed recklessly can qualify as valid predicate offenses. Given the preexisting consensus among the circuits that such offenses are excluded and this Court's decisions before

Voisine, it certainly cannot be said that the ACCA clearly encompasses reckless offenses. Defendants have not been on notice that the commission of such offenses would expose them to the ACCA's 15-year mandatory minimum sentence. Under those circumstances, the rule of lenity demands the narrower interpretation. In all events, that interpretation is plainly the better one.

This same question is before the Court in *Borden v. United States*, No. 19-5410 (argued Nov. 3, 2020). *Borden* involves the Tennessee robbery statute which, like the Texas robbery statute, includes a *mens rea* of recklessness. *See* Tex. Penal Code Ann. § 29.02. Thus, the Court's decision in *Borden* likely will be dispositive of Joiner's petition.

CONCLUSION

FOR THESE REASONS, Joiner asks this Honorable Court to hold his petition pending the Court's resolution of *Borden*, and then dispose of it as appropriate in light of the decision in that case.

Respectfully submitted.

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