

No. \_\_\_\_\_

IN THE

SUPREME COURT OF THE UNITED STATES

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ROBERTO TORNER

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

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ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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## **QUESTION PRESENTED**

**Whether a New Jersey conviction for Aggravated Assault, pursuant to N.J.S.A. 2C:12-1(b)(1), is a crime of violence for sentencing guideline purposes.**

## LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

**Roberto Torner**, Petitioner herein and Appellant Below.

**United States of America**, Respondent herein and Appellee Below.

**Liza Robles**, Appellant below.

## LIST OF ALL DIRECTLY RELATED PROCEEDINGS

*United States vs. Roberto Torner and Liza Robles, Defendants.* Middle District of Pennsylvania, D.C. Criminal Nos. 3-17-cr-00343-001 & 3-17-cr-00343-002, Judgments entered February 13, 2020, and July 24, 2019, respectively.

*Liza Robles, Appellant v. United States*, United States Court of Appeals Third Circuit, docket number 19-2804. Judgment entered April 8, 2021.

*Roberto Torner, Appellant v. United States*, United States Court of Appeals Third Circuit, docket number 20-1371. Judgment entered April 8, 2021.

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

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS AND ORDERS BELOW**

The judgment and opinion of the United States Court of Appeals appears at Appendix pp. 1, 3 to the petition.

The oral order and ruling of the United States District Court, as transcribed, appears at Appendix pp. 16 - 34, to the petition.

**JURISDICTION**

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The judgment to be reviewed was entered by the United States Court of Appeals on April 8, 2021.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

(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 an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnaping, 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).

U.S.S.G. § 4B1.2(a) (2018).

## **STATEMENT OF THE CASE**

Petitioner, hereinafter referred to as Torner, was indicted for violations of the laws of the United States. The district court had jurisdiction pursuant to Title 18, U.S.C. § 3231. The Court of Appeals had appellate jurisdiction pursuant to Title 28, U.S.C. § 1291.

On January 30, 2018, Torner was charged in a First Superseding Indictment

as follows; Count One, Conspiracy to Distribute Heroin in violation of Title 21, U.S.C. § 846; Count Two, Distribution of Heroin in violation of Title 21, U.S.C. § 841, Count Three, Firearms Conspiracy in violation of Title 18, U.S.C. § 371, Count Five, Possession of a Firearm and Ammunition by a Felon in violation of Title 18, U.S.C. § 922(g)(1), Count Seven, Possession of Stolen Explosives in violation of Title 18, U.S.C. §§ 842(h), and 3147(1), Count Eight, Possession of Explosives by a Felon in violation of Title 18, U.S.C. §§ 842(j) and 3147(1).

Torner was arraigned on the above-mentioned charges on February 6, 2018, and entered a plea of not guilty. Torner's trial commenced on October 15, 2018, and concluded on October 31, 2018, with a Verdict of Guilty on all counts.

Torner stood for sentencing on February 11, 2020. Prior to sentencing Torner had filed objections to the Presentence Report challenging the reports' determination that Torner's New Jersey convictions for aggravated assault and pointing were crimes of violence predicates for enhancements under U.S.S.G. Section 2K2.1 and Career Offender 4B1.1. The district court denied Torner's objections at sentencing and sentenced Torner to 270 months imprisonment.

Torner appealed his conviction and on April 8, 2021, the Court of Appeals for the Third Circuit affirmed his conviction. (App. 2)

## REASONS FOR GRANTING THE PETITION

### 1. Torner's New Jersey conviction for Aggravated Assault in not a crime of violence.

The term “crime of violence” is defined by the United States Sentencing Guidelines as follows:

(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 an element the use, attempted use, or threatened use of physical force against the person of another, or  
(2) is murder, voluntary manslaughter, kidnaping, 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).

U.S.S.G. § 4B1.2(a) (2018).

The conviction at dispute in this appeal is Torner’s 1997 New Jersey conviction for aggravated assault pursuant to N.J.S.A. 2C:12-1(b)(1).

New Jersey defines Aggravated Assault in this case as follows:

b. Aggravated Assault. A person is guilty of aggravated assault if he:

(1) Attempts to cause serious bodily injury to another, or causes such injury purposely or knowingly or under circumstances manifesting extreme indifference to the

value of human life recklessly causes such injury.

N.J.S.A 2C:12-1(b)(1)

The issue of whether a prior conviction is a crime of violence, pursuant to U.S.S.G § 4B1.1(2)(a), is determined by using the categorical approach to examine the elements of the statute of conviction, but not the particular facts of the conviction. Taylor v. United States, 495 U.S. 575 (1990). If the statute's elements are the same or narrower than the generic offense, the prior conviction can serve as a predicate because anyone convicted under that law would be guilty of all of the generic crime's elements. Deschamps v. United States, 570 U.S. 254, 261 (2013). In contrast, if the statute relating to the prior conviction is broader than the generic crime, the conviction may not serve as a predicate offense even if the actual offense committed by the defendant mirrored the offense in its generic form. Id.

In certain circumstances, where the relevant statute has a divisible structure which list the elements in the alternative, a modified categorical approach may be employed. The modified categorical approach allows the sentencing court to look to certain relevant documents, “Shepard materials”<sup>1</sup>, to determine which of the

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<sup>1</sup> Shepard materials include: “the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.: Shepard v. United States, 544 U.S. 13, 16 (2005).

alternative elements was the basis of the defendant's conviction and if that version is categorically a crime of violence. Mathis v. United States, 136 S.Ct. 2243 (2016).

Torner submits that New Jersey's Aggravated Assault statute is divisible. A statute is divisible if it "sets out one or more element of the offense in the alternative." Deschamps v. United States, 570 U.S. 254, 257, 133 S.Ct. 2276, 186 (2013). The New Jersey aggravated assault statute is divisible because it clearly proscribes different degrees of conduct, each subject to different maximum sentences, and alternate elements of each degree, "each subsection...criminalizes different conduct and sets forth different (albeit overlapping) elements that must be proven beyond a reasonable doubt." United States v. Abdullah, 905 F.3d. 739, 746 (3<sup>rd</sup> Cir 2018).

Pursuant to modified categorical approach resort can be made to certain extra-statutory materials, *Shepard's* documents, to identify the specific subsection of 2C:12-1(b) that provided the basis for Torner's conviction. United States v. Ramos, 892 F.3d 599, 610 (3<sup>rd</sup> Cir. 2018). Here, prior to sentencing, the Government submitted various documents as *Shepard's* documents, to wit, the amended disposition, Attachment 1 (App. 36), the Indictment, Attachment 2 (App. 41), and the Plea Form, Attachment 3 (App. 47). Torner submits that a review of

these documents merely establishes that Torner’s aggravated assault conviction was pursuant to subsection (b)(1) of 2C:12-1, and nothing more.<sup>2</sup> Notably absent from the government’s *Shepard*’s submission was the actual plea agreement, a transcript of the plea colloquy between the judge and the defendant, or any express factual findings of the court as to the mens rea admitted to by the defendant.

Torner submits that, because subsection (b)(1) of N.J.S.A. 2C:12-1, contains an element of recklessness, the government has failed to prove that Torner’s aggravated assault conviction is categorically a crime of violence. United States v. Garcia-Jimenez, 807 F.3d 1079(9th Cir. 2015). In contrast, the Third Circuit Court of Appeals has held, in Baptiste v. Attorney Gen. 841 F.3d 601, 615 (3<sup>rd</sup> Cir. 2016), “Because we conclude that reckless second-degree aggravated assault does, in the ordinary case, present a substantial risk of the intentional use of force, reckless second-degree aggravated assault in New Jersey is categorically a crime of violence.” Thus, a conflict exists between the Third and Ninth Circuit Courts of Appeals on the same important matter which presents a compelling reason for this Court to exercise its’ judicial discretion and grant Torner’s Petition for Writ of

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<sup>2</sup> The government bears the burden at sentencing of proving by a preponderance of the evidence that the defendant was convicted of a prior felony. United States v. Horton, 461 Fed. Appx. 179, 182 (3<sup>rd</sup> Cir. 2012).

Certiorari. See, Rule 10(a) Supreme Court Rules.

Under the Elements Clause analysis of U.S.S.G. 4B1.2, upon the identification of the offense of conviction the court is required to examine the elements of that offense to determine whether it categorically qualifies as a predicate crime of violence. A crime of violence under the elements clause is any offense that has as an element the use, attempted use, or threatened use of physical force against the person of another. This Honorable Court has held that the phrase “physical force” refers to force exerted by and through concrete bodies that is capable of causing physical pain or injury to another person. Johnson v. United States, 559 U.S. 133, 138-140, 130 S.Ct. 1265 (2010). Accordingly, “a crime is a violent one under the elements clause so long as it has an element that can be satisfied only through the use, threatened use, or attempted use of force against another person that is capable of causing that person physical pain or injury”. United States v. Heng Khim, 748 Fed. Appx. 440, 444 (3<sup>rd</sup> Cir. 2018).

Torner submits that under the New Jersey Aggravated Assault statute, the minimum conduct sufficient to convict a defendant is conduct that “under circumstances manifesting extreme indifference to the value of human life **reckless** causes such injury.” N.J.S.A. 2C:12-1(b)(1). Categorically, the court is required to compare the elements of the statute of conviction to the guidelines

definition of crime of violence. A conviction under 2C:12-1(b)(1) can be a crime of violence only if the least of the acts criminalized is sufficient to meet the guidelines definition of crime of violence. The least of the acts criminalized by 2C:12-1(b)(1) is reckless conduct thus it is, by its terms, broader than the “purposeful or knowingly” type of misconduct described by the elements clause contained at U.S.S.G. § 4B1.2(a)(1) and should not serve as a predicate crime of violence.

Similarly, Torner’s New Jersey conviction for Aggravated Assault under 2C:12-1(b)(1) should not serve as a predicate crime of violence pursuant to the enumerated clause of U.S.S.G § 4B1.2. Aggravated assault is listed in the enumerated clause of 4B1.2, nevertheless, the sentencing court is still required to employ a categorical approach to determine whether the elements of the prior offense are the same or narrower than those of the generic offense. United States v. Graves, 877 F.3d 494 (3<sup>rd</sup> Cir. 2017). “The prior conviction qualifies as a crime of violence only if the elements of the state offense are same as, or narrower than, those of the generic offense. If, on the other hand, the state offense allows for conviction on a broader basis than the generic offense, it may not be considered for purposes of sentencing enhancement.” Id at 501.

Torner submits that the generic federal crime of aggravated assault is

narrower than the aggravated assault offense set forth at 2C:12-1(b)(1). In United States v. Garcia-Jimenez, 807 F.3d 1079 (9<sup>th</sup> Cir. 2015) the Ninth Circuit Court of Appeals compared the elements of N.J.S.A. 2C:12-1(b)(1) to how the majority of states define the federal generic definition of the crime of aggravated assault<sup>3</sup> and held that the mens rea of extreme indifference recklessness recognized by 2C:12-1(b)(1) is broader than the generic offense of aggravated assault and is therefore not a crime of violence. Id. at 1085. In contrast, the Third Circuit Court of Appeals has held, in Baptiste v. Attorney Gen. 841 F.3d 601, 615 (3<sup>rd</sup> Cir. 2016), “Because we conclude that reckless second-degree aggravated assault does, in the ordinary case, present a substantial risk of the intentional use of force, reckless second-degree aggravated assault in New Jersey is categorically a crime of violence.” Thus, a conflict exists between the Third and Ninth Circuit Courts of Appeals on the same important matter which presents a compelling reason for this Court to exercise its’ judicial discretion and grant Torner’s Petition for Writ of Certiorari. See, Rule 10(a) Supreme Court Rules.

Finally, Torner respectfully submits that this Honorable Court’s ruling in Voisine v. United States, 136 S.Ct. 2272 (2016), does not warrant the finding that

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<sup>3</sup> Thirty-three states and the District of Columbia do not punish as aggravated assaults offenses committed with only extreme indifference recklessness. United States v. Garcia-Jimenez, 807 F.3d 1079, 1085 (9<sup>th</sup> Cir. 2015).

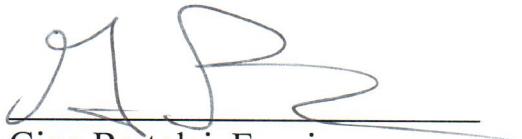
Torner's New Jersey aggravated assault conviction is a crime of violence. (App. 34). Torner submits that this Court expressly limited its holding in Voisine to the question of whether reckless domestic assault qualifies as a misdemeanor crime of domestic violence under the statutory firearms ban. Voisine, 136 S.Ct. at 2280 n.4.

## CONCLUSION

Based upon the foregoing, the Petitioner, Roberto Torner, respectfully requests that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 5-5-21



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