No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2021

VICTOR NAVA, JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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Question Presented

1. Does the Supreme Court's holding in *Borden v. United States,* 141 S. Ct. 1817 (2021) that a reckless aggravated assault cannot qualify as a "crime of violence" under the *elements clause* of the Armed Career Criminal Act mean that a reckless injury-causing robbery (under Texas law) likewise cannot qualify as a "crime of violence" under the *enumerated offense clause* of the Career Offender Guideline?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Victor Nava, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Nava's conviction and sentence is styled: *United States v. Nava*, ___ F. App'x ___, 2021 U.S. App. LEXIS 32589 (5th Cir. 2021).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the Nava's conviction and sentence was announced on November 2, 2021 and is attached hereto as Appendix A. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the date of the judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Career Offender Sentencing Guidelines

U.S.S.G. § 4B1.1(a):

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a *crime of violence* or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a *crime of violence* or a controlled substance offense.

U.S.S.G. § 4B1.2(a):

"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).

ACCA Statute:

18 U.S.C. § 924(c)(3):

> [T]he term "crime of violence" means an offense that is a felony and:
>
> (A) has an element the use, attempted use, or threatened us of physical force against the person or property of another[.]

Statement of the Case

Nava was sentenced as a career offender based in part[1] on an aggravated robbery conviction out of Midland County, Texas wherein he pled guilty to "intentionally, knowingly, *and recklessly caus[ing] bodily* injury to Eric Adkinson by striking Eric Adkinson with his hand and with the bottom of a knife" while exhibiting a deadly weapon.

> The Texas robbery statute provides:
>
> 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.

Tex. Penal Code Ann. § 29.02(a). The mens rea of "recklessly" applies only to robbery causing bodily injury. *Sidney v. State,* 560 S.W. 679, 682 n.2 (Tex. Crim. App. 1978). By definition under Texas law, "reckless" is a

[1] Nava's other career offender predicate was a 2009 federal importation of marijuana conviction. Nava argued that this conviction was not a proper career offender predicate because marihuana was defined more broadly in the Controlled Substances Act at the time of Nava's conviction (in that it included hemp) than it was at the time of his sentencing herein. The Fifth Circuit held that "the question remains an open one in the Fifth Circuit" and thus Nava failed to show plain error.

lesser culpable mental state than "intentional or knowing." See Tex. Penal Code Ann. § 6.02(d); *Rocha v. State*, 648 S.W.2d 298, 302 (Tex. Crim. App. 1982) (op. on reh'g). The Texas aggravated robbery statute provides:

> A person commits an offense if he commits robbery as defined in Section 29.02, and he:
>
> (1) causes serious bodily injury to another;
>
> (2) uses or exhibits a deadly weapon; or
>
> (3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:
>
> (A) 65 years of age or older; or
>
> (B) a disabled person.

Tex. Penal Code Ann. § 29.03(a).

Nava was convicted under Tex. Penal Code Ann. § 29.02(a)(1) (intentionally, knowingly, or recklessly causing bodily injury to another) and Tex. Penal Code Ann. § 29.03(a)(2) (uses or exhibits a deadly weapon). Nava's base offense level without the career offender enhancement was 24. With the enhancement, his base offense level jumped to 37. He objected in writing and at sentencing that his robbery conviction was not a crime of violence.

Nava argued on appeal that his aggravated robbery conviction did not qualify under U.S.S.G. § 4B1.2(a)'s enumerated offense clause (which includes robbery) because a *mens rea* of recklessness was incongruent with the generic definition of robbery in the Model Penal Code. More specifically, in 2016 § 4B1.2 was amended in several ways. See U.S.S.G. App. C, amend. 798. As to the enumerated offenses clause the Sentencing Commission stated:

> In applying this [enumerated offense] clause, courts compare the elements of the predicate offense of conviction with the elements of the enumerated offense in its "generic, contemporary definition."

U.S.S.G. App. C, amend. 798. Nava cited to the Model Penal Code (which Fifth Circuit case law had previously relied on in addressing whether Texas robbery was a "crime of violence"). The Model Penal Code defines robbery thusly:

> A person is guilty of robbery if, in the course of committing a theft, he:
>
> (a) inflicts serious bodily injury upon another; or
>
> (b) threatens another with or purposely puts him in fear of immediate serious bodily injury; or
>
> (c) commits or threatens immediately to commit any felony of the first or second degree.

American Law Institute, Model Penal Code § 222.1 (1980). Nava noted that while this definition includes inflicting serious bodily injury, it does not include merely causing bodily injury, let alone whether a *mens rea* of recklessness suffices.

Nava then argued that Nava's Texas robbery conviction likewise did not qualify as a crime of violence under the elements clause of the career offender guideline. He addressed two Fifth Circuit cases (*United States v. Lerma,* 877 F.3d 628 (5th Cir. 2017) and *United States v. Burris*, 920 F.3d 942 (5th Cir. 2019)), both of which had held that Texas robbery constitutes a violent crime for purposes of the ACCA elements clause. The defendant in *Lerma,* unlike Nava, did not plead guilty to reckless injury-causing robbery, but instead to *knowingly and intentionally* threatening the victim and placing he victim in fear of imminent bodily injury or death, while using and exhibiting a gun. Thus the issue of whether reckless injury-causing robbery constitutes a violent crime was simply not before the court.

Burris, on the other hand, did involve injury-causing robbery. The Fifth Circuit relied on *Voisine v. United States,* 136 S.Ct. 2272 (2016) for the proposition that that reckless conduct can constitute physical force

for purposes of a crime of violence. Nava argued that the *Burris* panel cited *Voisine* for a proposition for which it does not stand. The issue before the Court in *Voisine* was whether an assault committed only with a mens rea of recklessness could properly be a predicate for § 922(g)(9). The Court held that it could, noting that the statute was enacted to prohibit domestic abusers from possessing guns and that two-thirds of the states include recklessness as a mens rea in their misdemeanor assault and battery statutes. But the *Voisine* Court was careful to cabin its holding. The Court held that while reckless conduct *in the context of domestic assault* can be sufficient to constitute a crime of violence, such is not necessarily true in other contexts.

Nava filed his principal brief on May 13, 2021, at which time *Borden* was still pending before this Court. Nava did point out in his principal brief the issue that the Court would be addressing in *Borden*. On June 11, 2021, the day *Borden* was decided, Nava filed a Rule 28(j) letter with the Fifth Circuit, citing *Borden* for the proposition that reckless conduct that does not require the "use of physical force against the person of another" is not an ACCA predicate.

The Government argued in its brief that: (1) Nava's robbery sentencing enhancement was based on the enumerated offenses clause of the career offender guideline (not the elements clause of the ACCA addressed in *Borden*), (2) the enumerated offenses clause in the career offender guideline specifically references robbery, and (3) the Fifth Circuit has previously held that Texas robbery fits within the generic definition of robbery. The Fifth Circuit agreed with the Government:

> Relying on the Supreme Court's recent decision in *Borden v. United States*, . . . Nava argues that an offense must be purposeful to qualify as a crime of violence. Because the Texas statute criminalizes reckless conduct, he contends that his prior conviction cannot be considered a crime of violence. However, *Borden*, 141 S. Ct. at 1825, held that an offense with a mens rea of recklessness cannot qualify as a violent felony under the elements clause of the Armed Career Criminal Act [.] [I]t did not address recklessness in the context of enumerated offenses. Under *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 377-82 (5th Cir. 2006), . . . Nava's Texas conviction for aggravated robbery with a deadly weapon meets the definition of generic robbery. It therefore qualifies as a crime of violence under the enumerated offenses clause of U.S.S.G. § 4B1.2(a).

United States v. Nava, 2021 U.S. App. LEXIS 32589, at *2-3 (5th Cir. 2021).

<u>First Reason for Granting the Writ</u>: ***The difference between a "crime of violence" in the ACCA and robbery as a "crime of violence" in U.S.S.G. § 4B1.2 is minimal.***

Under the Armed Career Criminal Act of 1984, any felon found in possession of a firearm, who had three prior convictions for "robbery or burglary," was to receive a mandatory minimum sentence of 15 years imprisonment. *Taylor v. United States*, 495 U.S. 575, 581 (1990). The House Report accompanying the act stated that "robbery and burglary are the crimes most frequently committed by "these career criminals." *Id.* Robbery was defined in the statute, Congress intending that the enhancement apply to crimes having certain elements, not by labels. *Taylor*, 495 U.S. at 588-89. The Career Criminals Amendment Act of 1986 expanded the predicate offenses from "robbery or burglary" to "a violent felony or a serious drug offense." *Taylor,* 495 U.S. at 582. Congress, by eliminating "robbery" from the definition, was not suggesting that robbery should no longer be a predicate for the enhancement, but instead "extending the range of predicate offenses to all crimes having certain common characteristics." *Id.* at 589. Congress thus chose to frame the Armed Career Criminal Act (ACCA) in

qualitative[2] terms instead of compiling a list of covered offenses. *Sykes v. United States*, 564 U.S. 1, 15 (2011). The House Committee on the Judiciary explained the reason for expanding the predicate offenses beyond robbery and burglary thusly:

> At [the] hearing a consensus developed in support of an expansion of the predicate offenses to include serious drug trafficking offenses under both State and Federal law and violent felonies, generally. This concept was encompassed in [the bill] by deleting the specific predicate offenses for robbery and burglary and adding as predicate offenses [drug trafficking] . . . and violent felonies under Federal or State law if the offense has an element the use, attempted use or threatened use of physical force against a *person.* This latter provision would include such felonies involving physical force against a person such as murder, rape, assault, *robbery*, etc.

H.Rep. No. 849, 99th Cong., 2d Sess. 3 (1986); *United States v. Mathis*, 963 F.2d 399, 406-07 (D.C. Cir. 1992).

The Career Offender Guideline is the Sentencing Commission's attempt to implement the Congressional directive set forth in 28 U.S.C. § 994(h). U.S.S.G. App. C, amend. 798 (Reason for Amendment). Section 994(h) provides in relevant part:

[2] "Qualitative" means "having to do with qualities." Webster's New World Dictionary 1161 (2nd college ed. 1970).

> The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant . . . has been convicted of a felony that is . . . *a crime of violence*[.]

28 U.S.C. § 994(h). Thus the Career Offender Guideline was intended to carry forth into the Sentencing Guidelines what Congress had already statutorily mandated in the ACCA.

It is worth noting that a number of circuits treat "crime of violence" (ACCA) and "crime of violence" (U.S.S.G. § 4B1.2) interchangeably. *See United States v. Brown,* 765 F.3d 185, 189 n.2 (3d Cir. 2014) (applying ACCA case law to U.S.S.G. § 4B1.2 because of the substantial similarity of the two sections); *United States v. Morris*, 885 F.3d 405, 409 (6th Cir. 2018) ("We have interpreted and applied the definition of 'crime of violence' in § 4B1.2(a) in the same way as the definition of 'violent felony' under the Armed Career Criminal Act (ACCA) . . . because 'both laws share essentially the same definitions (if not the same titles).'"); *United States v. Brown*, 916 F.3d 706, 708 (8th Cir. 2019) ("The relevant definition of a violent felony under the ACCA and the definition of a crime of violence under the guidelines are so similar that we generally consider cases interpreting them interchangeably."); *United*

States v. Spencer, 724 F.3d 1133, 1138 (9th Cir. 2013) ("We make no distinction between the terms 'violent felony' [as defined in the ACCA] and 'crime of violence' [as defined in § 4B1.2(a)(2) of the Sentencing Guidelines][.]"); *In re Sealed Case,* 548 F.3d 1085, 1089 (D.C. Cir. 2008) ("[W]e apply the ACCA standard to determine whether an offense qualifies as a crime of violence under section 4B1.2.").

It is also worth noting that the Supreme Court has at least implicitly suggested that "crime of violence" (ACCA) and "crime of violence" (U.S.S.G. § 4B1.2) are in fact interchangeable. In *United States v. Hopkins,* the Third Circuit held that the defendant's prior Pennsylvania misdemeanor escape qualified as a crime of violence for purposes of the career offender guideline. 264 F. App'x 173, 175-76 (3d Cir. 2008). The Supreme Court remanded the case back to the Third Circuit for further consideration in light of *Chambers v. United States*, 555 U.S. 122 (2009). *Hopkins v. United States,* 555 U.S. 1132 (2009). But *Chambers* was not a career offender case, it was an ACCA case. *Chambers,* 555 U.S. at 123.

<u>Second Reason for Granting the Writ</u>: The Supreme Court's language in Borden would appear to apply to reckless crimes in general, not just reckless crimes under the ACCA's elements clause.

While *Borden* specifically addressed a Tennessee assault statute, the language of the opinion establishes at least the following: (1) recklessness, unlike intent, does not specifically target another individual, and (2), the opinion applies to reckless crimes in general, not just assault under Tennessee law:

> The question here is whether a criminal offense can count as a "violent felony" if it requires only a *mens rea* of recklessness—a less culpable mental state than purpose or knowledge. We hold that a reckless offense cannot so qualify.

Borden, 141 S. Ct. at 1821-22.

> The phrase "against another," when modifying the "use of force," demands that the perpetrator direct his action at, or target, another individual. Reckless conduct is not aimed in that prescribed manner.

Id. at 1825.

> [T]he "against" phrase reveals at whom the conduct is consciously directed[.]

Id. at 1826.

> [T]he Government's intent-less reading would leave the "against" phrase in §16(a) without any function[.]

Id. at 1827.

> The quintessential violent crimes [internal quotation marks omitted] . . . involve the intentional use of force.

Id. at 1830.

> Extending the elements clause to reckless offenses would thus do exactly what *Leocal* decried: "blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and [all] other crimes."

Id. at 1831.

> The treatment of reckless offenses as "violent felonies" would impose large sentencing enhancements on individuals (for example, reckless drivers) far afield from the "armed career criminals" ACCA addresses[.]

Id. at 1825.

> Offenses with a *mens rea* of recklessness do not qualify as violent felonies under ACCA. [this would appear to include the ACCA's enumerated clause]

Id. at 1834.

Third Reason for Granting the Writ: ***Texas injury-causing robbery does not come within the generic definition of robbery.***

The Armed Career Criminal Act of 1984 defined robbery as follows:

> any felony consisting of the taking of the property of another from the person or presence of another by force of violence, or by threatening or placing another person in fear that any person will imminently be subjected to bodily injury.

United States v. Mathis, 963 F.2d 399, 405 (1992) (citing the then relevant statute: 18 U.S.C. § 1202(c)(8)). "Congress clearly intended to invoke the common-law definition of 'robbery.'" *Mathis,* 963 F.2d at 405. As noted above, it has never been the intent of Congress to abandon this definition although robbery is no longer defined in the ACCA.

The Texas robbery statute at issue herein is different. It provides in relevant part:

> A person commits an offense if, in the course of committing theft . . . he . . . recklessly causes bodily injury to another.

Tex. Penal Code Ann. § 29.02(a)(1). This statute does not require a taking by force of violence – it only requires that at some point in process, the defendant recklessly causes bodily injury to another. See e.g. *Orlando v. State*, 2009 Tex. App. LEXIS 3948, at *17-18, 20 (Tex. App.—Fort Worth June 4, 2009, pet. ref'd) (unpublished) (Trial court entitled to find defendant charged with intentional or knowing robbery guilty of lesser

included offense of robbery with a reckless culpable mental state, given that his conduct involved only attempting to elbow past loss prevention officer).

<u>Fourth Reason for Granting the Writ</u>: Allowing recklessly caused injury robbery to be a career offender predicate will sweep defendants into career offender status that Congress never intended.

Congress has directed the Sentencing Commission to:

> assure that the guidelines specify a sentence to a term of imprisonment *at or near the maximum term authorized* for categories of defendants in which the defendant is eighteen years old or older and has been convicted of a felon that is . . . a crime of violence[.]

28 U.S.C. § 994(h)(1)(A). If recklessly caused bodily injury robbery in Texas constitutes a crime of violence, the individuals convicted in the following Texas robbery cases are potential career offenders: *Hernandez v. State*, 268 S.W.3d 176, 179 (Tex. App.—Corpus Christi 2008, no pet.) (Defendant pushed loss prevention officer as he walked out of J.C. Penny store with unpaid-for merchandise); *Craver* v. *State*, 2015 Tex. App. LEXIS 6569 (Tex. App.—Fort Worth, 2015, pet. ref'd)[3] (A shoplifter jumps

[3] Borden cited this case as an example of reckless conduct that should not come within the purview of the ACCA. *Borden,* 141 S.Ct. at 1831.

off a mall's second floor balcony while fleeing security only to land on a customer.); *Orlando v. State*, 2009 Tex. App. LEXIS 3948, at *17-18, 20 (Tex. App.—Fort Worth, 2009, pet. ref'd) (Trial court entitled to find defendant charged with intentional or knowing robbery guilty of lesser included offense of robbery with a reckless culpable mental state, given that his conduct involved only attempting to elbow past loss prevention officer); *Garcia v. State*, 2012 Tex. App. LEXIS 5224, at *1-3 (Tex. App.—Corpus Christi June 28, 2012, no pet.) (Defendant struck loss prevention officer as he fled from pharmacy after stealing a bag of peanuts); *Smith v. State*, 2013 Tex. App. LEXIS 1146, at *7-8 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (Defendant left store with stolen television, dropped the television when ordered to stop by loss-prevention employee and then punched employee when employee attempted to detain him); *Harris v. State*, 1999 Tex. App. LEXIS 8845, at *3-5 (Tex. App.—Dallas, 1999, no pet.) (Loss prevention officer suffered a bruise on his arm while detaining defendant who had stolen a box of hinges).

The conduct punished in these cases no doubt deserved to be punished but these individuals can hardly be the sort of folks Congress

had in mind in directing the Sentencing Commission to punish "at or near the maximum term authorized."

Fifth Reason for Granting the Writ: The Career Offender Guideline includes attempt; a person cannot recklessly attempt to use force.

The commentary to § 4B1.2 states that "crime of violence" includes the offense of *attempting* to commit such offenses. U.S.S.G. § 4B1.2, cmt. n. 1. Attempt requires "[a]n *intent* to commit a crime coupled with an act taken toward committing the offense." Black's Law Dictionary 127 (6th ed. 1990). "The mens rea requirement for the crime of attempt is, in its most basic formulation, [internal quotes omitted] an *intent* to commit some other crime. *United States v. Sanchez,* 667 F.3d 555, 561 (5th Cir. 2012). (Emphasis added.). Because attempt requires intent it is logically impossible for a person to recklessly "attempt" to use force. *See e.g., United States v. Resendiz-Ponce,* 549 U.S. 102, 106 (2007) (At common law, attempt required the perpetrator to *intend* to commit the completed offense.).

Conclusion

For the foregoing reasons, Petitioner Nava respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Certificate of Service

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 28th day of January 2022.

/s/ John A. Kuchera
John A. Kuchera,
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