No. 22-7258

In the

Supreme Court of the United States

Brian Marc Fraser,

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

I. After the decision below, the Sentencing Commission voted to adopt an Amendment to USSG §4B1.2. This proposed Amendment shows that the Commission understood the enumerated offense of "robbery" to require a causal connection between the defendant's assaultive conduct and his or her acquisition of property. As such, the Amendment shows that the Texas offenses of robbery and aggravated robbery likely do not qualify as "robbery" within the meaning of the Guidelines. Because the court below held to the contrary, it should have an opportunity to consider the significance of the proposed Amendment.

After the decision below, the Sentencing Commission approved a definition of "robbery" that requires the acquisition of property "**by means of** actual or threatened force, or violence, or fear of injury…." U.S. Sentencing Commission, *Amendments to the Sentencing Guidelines* (*Preliminary*), at pdf page 95 (April 4, 2023)(emphasis added)(hereafter "Amendments"), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230405_prelim-RF.pdf , *last visited June 21, 2023.* That definition plainly requires a causal connection between the defendant's acquisition of property and the defendant's assaultive conduct, a fact the government does not appear to contest. *See Commonwealth v. Jones*, 283 N.E.2d 840, 843 (Mass. 1986) (citing Anderson, *Wharton's Criminal Law & Procedure*, § 559; 46 Am. Jur., Robbery, § 19; *Commonwealth v. Novicki*, 87 N.E. 2d 1, 5 (Mass. 1941); Hale, P. C. (1847 ed.) 534; 77 *C. J. S., Robbery*, §§ 11-14)(common law robbery, which refers to theft "by" force or intimidation, required "a causal connection between the defendant's use of violence or intimidation and his acquisition of the victim's property."); *accord* La Fave,

Substantive Criminal Law, §20.3(d), p.187 ("There must be a causal connection between the defendant's threat of harm and his acquisition of the victim's property– that is the threat must induce the victim to part with his property."); *see also* BLACK'S LAW DICTIONARY (11th Ed. 2019)("Means: … 2. Something that helps to attain an end; an instrument; a cause.")

Just as plainly, the Commission's definition excludes Texas robbery offenses, which require only that the defendant inflict injury or place another in fear, "in the course of committing theft," which is to say, at the same time. *See* Tex. Penal Code §29.02(a). One may inflict injury in the course of a theft without acquiring property by means of that injury. This is true as a matter of logic, and is shown by Texas prosecutions – at least one Texas defendant has been convicted of robbery for causing injury to another after discarding stolen property. *See Smith v. State*, 2013 WL 476820, at *3 (Tex. App. Houston [14th Dist.] Feb. 7 2013)(unpublished). If the defendant no longer has the property when the injury occurs, he can hardly be said to have acquired it "by means of" causing that injury.

The critical fact here is that the definition was not intended to **change** the relationship between the defendant's acquisition of property and his or her use of violence. *See* Amendments, at pdf page 93-94. Rather, it was intended to address the degree of force necessary to accomplish robbery and the possible targets, *i.e.* whether the robber may accomplish the offense by threatening or injury to property. *See id*., at pdf page 93 ("At least two circuits—the Ninth and Tenth Circuits—have found ambiguity as to whether the guideline definition of extortion includes injury to

property…"; *id.* at pdf page 94 ("Part A of the proposed amendment would add a provision defining the phrase 'actual or threatened use of force,' for purposes of the 'robbery' definition, as "force that is sufficient to overcome a victim's resistance."). So insofar as the Amendment addresses the relationship between the defendant's assaultive conduct and his or her acquisition of property, it shows the Commission's pre-existing view of the term "robbery." Importantly, "[n]othing prohibits an amendment from being clarifying in part and substantive in part." *United States v. Jackson*, 901 F.3d 706, 709 (6th Cir. 2018).

Accordingly, the Commission's adoption of this Amendment, whether or not accepted by Congress, provides strong evidence that the courts below misunderstood the 2021 version of USSG §4B1.2. These courts thought that the generic, enumerated offense of robbery encompassed Texas robbery; the Amendment shows that the Commission thought otherwise.

The government nonetheless resists review for four reasons. First, it notes that the Amendment is ineffective until November 1, 2023, and might still be blocked by Congressional disapproval. *See* (Brief in Opposition, at 7)("BIO"). The critical fact, however, is not the formal legal effect of the Amendment, but its tendency to show the Commission's understanding of the term "robbery" at the time of sentencing. Even if Congress did overrule the new definition of robbery, the Commission's choice to enact still provides good evidence about its understanding of the relationship between assault and theft in generic robbery.

Second, the government points, *see* (BIO at 8), to USSG §1B1.10, which says that "if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes." §1B1.10(b)(2). Because the district applied the Manual in effect at the time of sentencing, reasons the government, it could not consider subsequent amendments. *See* (BIO, at 8). Of course, this is an inverse fallacy; the Guideline does not forbid consideration of subsequent clarifying amendments in cases where the district court applies the most recent Guideline, it merely authorizes such consideration when the court applies an earlier one.

But in truth the Guideline does not really address the instant situation at all – it speaks to the district court imposing sentence, not to reviewing courts evaluating information that has arisen thereafter. Notwithstanding §1B1.10, it is well-settled that clarifying Amendments may be considered to determine the meaning of Guidelines in effect at sentencing even if they were issued after sentencing. *See United States v. Crudup*, 375 F.3d 5, 8 (1st Cir. 2004); *United States v. Goines*, 357 F.3d 469, 474 (4th Cir. 2004); *United States v. Anderson*, 5 F.3d 795, 802 (5th Cir. 1993); *United States v. Descent*, 292 F.3d 703, 707 (11th Cir.2002).

Third, the government contends that Petitioner's offenses fall into the "force clause" of USSG §4B1.2 even if they do not constitute the enumerated offense of "robbery." *See* (BIO, at 8-9). That's clearly not true of Petitioner's simple robbery-by-injury conviction, which may be committed recklessly. *See* Tex. Penal Code §29.02(a)(1). The court below has repeatedly said as much in the ACCA context. *See*

United States v. Garrett, 24 F.4th 485, 488–89 (5th Cir. 2022)("If the statute is indivisible and thus only states one crime, Garrett's conviction does not qualify under *Borden* as an ACCA violent felony because robbery can be committed recklessly."); *United States v. Balderas*, No. 20-10992, 2022 WL 851768, at *1 (5th Cir. Mar. 22, 2022)(unpublished)("Robbery-by-injury no longer qualifies as a violent felony post-*Borden*."). And if the district court is wrong about even one of the two convictions, the result would be a change in the Guidelines from 120 months to 110-120 months imprisonment.

Fourth, the government points to the district court's Guideline disclaimer in an effort to show that any error would be harmless. This is a boilerplate recitation, routinely added to the record by this Judge to prevent appeal. *See* Anders Brief in *United States v. Perez*, 22-10580, 2022 WL 10067528,*14 (5th Cir. Filed October 11, 2022)(reflecting that the same Judge issued the following Guideline disclaimer: "I will say, if I had gotten the guidelines calculations wrong, I think that I still view the facts and circumstances warranting that 235 months sentence and five years of supervised release, given my desire to avoid unwanted sentencing disparities in this case."); Sentencing Transcript in *United States v. Williams*, No. 3:21-CR-77-1, at 39 (N.D. Tex. August 8, 2022)(reflecting that the same Judge issued the following Guideline disclaimer: "If I had gotten my guidelines range wrong, I think, based on the facts and circumstances, that is the right number in this case."); Appellee's Brief *in United States v. Gonzalez-Enriquez*, No. 2022 WL 5532396, at *8 (5th Cir. Filed September 29, 2022)(reflecting that the same Judge issued the following Guideline

disclaimer: "Finally, the court declared: "I will say that even if I had gotten the guidelines range wrong, I would have imposed that same 52-month ... sentence as evidenced by the fact that I threw out the guidelines and granted a variance."); Sentencing Transcript in *United States v. De La Rosa*, No. 3:20-cr-00195-X, at 91 (N.D. Tex. May 18, 2022)(ECF 71)(reflecting that the same Judge issued the following Guideline disclaimer: "And I will say even if I got the guideline range wrong, I think that the 11-month sentence is correct in light of the facts and circumstances of this case."); Anders Brief in *United States v. Woodson*, 21-110052022 WL 510681, at *13 (5th Cir. Filed Feb. 12, 2022)(reflecting that the same Judge issued the following Guideline disclaimer: "After imposing sentence, the district court stated '... I will say if I had gotten the guideline calculation wrong, I would have set the same sentence because I was really keying off of the 270 that I gave earlier to Vernon Stiff and relative culpability there.'").

As such, the Judge's statement regarding the impact of the Guideline is simply not owed much deference. If the Court is otherwise inclined to credit the disclaimer, it should grant certiorari in *Seekins v. United States*, No. 22-6853, or an appropriate case addressing the validity of Guideline disclaimers, and hold the instant case pending the outcome.

II. This Court should grant certiorari to resolve the tension between *Scarborough v. United States*, 431 U.S. 563 (1963), on the one hand, and *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and *Bond v. United States*, 572 U.S. 844 (2014), on the other.

Scarborough v. United States, 431 U.S. 563 (1963), stands in profound tension with *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and *Bond v. United*

States, 572 U.S. 844 (2014). The former permits conviction for possession of any firearm that has previously crossed state lines, whether or not the defendant was responsible for that travel, whether that travel took place as a result of an economic act, and irrespective of the time that elapsed between possession and travel. *See Scarborough*, 431 U.S. at 568-571. *Nat'l Fed'n of Indep. Bus*. and *Bond*, however, recognize limits on Congressional enactments utilizing the Commerce Power, the former through a direct recognition of constitutional limits, *see Nat'l Fed'n of Indep. Bus*., 567 U.S. at 557-558 (Roberts., C.J. concurring), the latter through the canon of constitutional avoidance, *see Bond*, 572 U.S. at 863. Given the staggering scope of Congressional power implied by *Scarborough*, these holdings defy easy reconciliation, and the tension between them ought to be addressed by this Court.

The government downplays the tension between *Scarborough* and *Nat'l Fed'n of Indep. Bus*., reading *Nat'l Fed'n of Indep. Bus*. as a narrow statement that Congress may not compel commercial activity. (BIO, at 12-13). But the holding of *Nat'l Fed'n of Indep. Bus.* is not a freestanding edict – it arises from the text of the Commerce Clause, not from a judicial understanding of good government. The individual mandate provision surely affected a pre-existing commercial act of some kind. It fell outside the Commerce Power because it did not actually **regulate** those commercial acts, and because a mere effect or connection to commerce did not suffice to bring it within the Commerce Power. *See Nat'l Fed'n of Indep. Bus*., 567 U.S. at 556 (Roberts., C.J. concurring).

And neither does 18 U.S.C. §922(g) actually regulate a commercial act, at least as *Scarborough* reads it. According to *Scarborough* (or to lower courts extrapolating its holding regarding a predecessor statute to the statute at issue here), §922(g) prohibits the non-commercial act of possession. Indeed, it does not even require that the interstate movement of a firearm have occurred in a commercial context. Further, it is difficult to square the limitless search of §922(g) for interstate movement of commodities with *Nat'l Fed'n of Indep. Bus.* demand for a **present** commercial act. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 556 (Roberts., C.J. concurring)(rejecting the government's argument that the uninsured were "active in the market for health care" because they were "not **currently** engaged in any commercial activity involving health care...") (emphasis added).

The government also tries to minimize the tension between *Scarborough* and *Bond*, *see* (BIO, at 13), but here the tension is even more palpable. As the government points out "*Bond*'s statutory holding obviated any need to address the Commerce Clause," (BIO, at 13), but a similar statutory interpretation may likewise minimize conflict between §922(g) and the limits of the Commerce Clause. Nothing about the phrase "possess in or affecting commerce," §922(g), necessarily or even naturally refers to a felon's simple possession of a firearm acquired through unknown means, that traveled across state lines at an unknown time, for unknown reasons. Further, *Scarborough* is difficult to square with *Bond*'s use of "the background principle that Congress does not normally intrude upon the police power of the States," and its statement that this principle "is critically important." *Bond*, 572 U.S. at 863.

Ultimately, both *Bond* and *Nat'l Fed'n of Indep. Bus.* recognize the need to leave some area of criminal punishment to the states alone. *See Bond*, 572 U.S. at 863; *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 536. But those words of caution mean very little as the lower courts have interpreted and applied *Scarborough*. The contemporary world – even the Founders' world – abounds in objects, or parts of objects, that once crossed state lines. If every such object endows the federal government with the power to make law, it quickly becomes difficult to understand what, if anything, remains outside its power. In the criminal sphere, the federal government could appropriate every mundane street crime, so long as the defendant does not take care to avoid bullets, guns, knives, or masks that once crossed state lines. It could usurp the domain of family law by setting the standards for any wills or marriage licenses printed on paper that once crossed state lines. Or it could nullify state property codes by determining the rules for devolving or holding any real property on which some item once crossed state lines.

This Court should soon address the vitality of *Scarborough*, both as a statutory holding and to whatever extent it sheds inferential light on the scope of the Commerce Power. The government argues that it should not do so in the instant case because Petitioner did not preserve error in district court, triggering plain error review. True enough, a party subject to plain error review may show error without receiving relief. *See United States v. Olano*, 507 U.S. 725, 732 (1993). The government has previously argued, however, that the "possibility that [petitioner] might ultimately be denied [relief] on another ground would not prevent the Court from addressing [the question

presented]. Indeed, the Court frequently considers cases that have been decided on one ground by a court of appeals, leaving other issues to be decided on remand, if necessary." Cert. Reply 11, *Astrue v. Capato*, 566 U.S. 541 (2012) (No. 11-159); *accord* Cert. Reply 10–11, *Salazar v. Patchak*, 567 U.S. 209 (2012)(No. 11-247). At a minimum, this Court should grant certiorari on the question presented here in some case, and hold the instant Petition pending resolution.

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 23rd day of June, 2023.

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