

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANGELO JOSEPH FERNANDEZ — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Does the petitioner's prior conviction for corporal injury to a spouse or cohabitant under California Penal Code § 273.5(a) qualify as a crime of violence under United States Sentencing Guidelines § 2K2.1(a)(4)(A) where the United States Supreme Court in *Borden v. United States*, 141 S. Ct. 1817 (2021) determined that an offense requiring a *mens rea* of mere recklessness does not qualify as a crime of violence?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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:

RELATED CASES

United States v. Fernandez, No. 1:21-cr-00142, U.S. District Court for the Eastern District of California. Judgment entered May 31, 2022.

United States v. Fernandez, No. 22-10140, U.S. Court of Appeals for the Ninth Circuit. Judgment entered May 16, 2023.

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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 BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 16, 2023.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A _____.

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

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Sentencing Commission, Guidelines Manual (Nov. 2021) ("Guidelines" or "U.S.S.G.") § 2K2.1(a)(4)(A), subjects a defendant to a base offense level of twenty where the defendant has been convicted of a prior crime of violence, as follows:

(a) Base Offense Level (Apply the Greatest):

...

(4) 20, if—

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense[.]

U.S.S.G. § 2K2.1(a)(4)(A). To define "crime of violence," § 2K2.1(a)(4)(A)

incorporates the meaning in § 4B1.2(a), which states in relevant part 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 as an element the use, attempted use, or threatened use of physical force against the person of another[.]

U.S.S.G. §§ 2K2.1(a)(4)(A) (Commentary, Application Notes, n.1), 4B1.2(a)(1).

STATEMENT OF THE CASE

On May 16, 2023, the United States Court of Appeals for the Ninth Circuit issued a non-published Memorandum Opinion affirming the judgment and sentence in the case of the petitioner ANGELO JOSEPH FERNANDEZ ("Mr. Fernandez"). Pet. App. 5a. The Memorandum Opinion fairly sets forth the relevant facts and proceedings as follows:

Angelo Joseph Fernandez pleaded guilty to one count of being a felon in possession of ammunition in violation of 18 U.S.C. § 922(g)(1). At sentencing, the district court concluded that Fernandez's prior conviction for corporal injury to a spouse or cohabitant under California Penal Code § 273.5(a) qualified as a crime of violence under the United States Sentencing Guidelines ("Guidelines" or "U.S.S.G.") that subjected Fernandez to a base offense level of twenty under the Guidelines. The district court adjusted the base offense level because of other factors and then imposed a 78-month sentence, which Fernandez appeals.

Pet. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

The United States Supreme Court (“Court”) should grant certiorari to decide whether the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) erred by affirming that a prior conviction for corporal injury to a spouse or cohabitant under California Penal Code § 273.5(a) qualifies as a crime of violence for purposes of the United States Sentencing Commission, *Guidelines Manual* (Nov. 2021) (“Guidelines” or “U.S.S.G.”). The matter presents a question of national importance. Supreme Court Rules, Rule 10(c). Certiorari would enable the Court to settle the question whether the willfulness element for a general intent crime can be satisfied by conduct constituting mere recklessness, thereby taking the crime outside the definition of “crime of violence” under the Guidelines.

The Ninth Circuit previously held that California Penal Code § 273.5(a) did qualify as a crime of violence for purposes of calculating an advisory sentencing range under the Guidelines. *United States v. Walker*, 953 F.3d 577, 580 (9th Cir. 2020); *United States v. Ayala-Nicanor*, 659 F.3d 744, 752 (9th Cir. 2011); *United States v. Laurico-Yeno*, 590 F.3d 818, 822–23 (9th Cir. 2010); *Banuelos-Ayon v. Holder*, 611 F.3d 1080, 1083-84 (9th Cir. 2010). In the present case, the Ninth Court affirmed those holdings, despite the subsequent United States Supreme Court opinion in *Borden v. United States*, 141 S. Ct. 1817 (2021). Pet. App. 2a-5a. The Ninth Circuit demonstrated by the opinion in the present case that it will continue to find that *Borden* does not change the import of the previous holdings about whether § 273.5(a) qualifies as a crime of violence. Accordingly, it is necessary that

the Court intervene and grant certiorari here.

In *Borden*, a plurality of four justices and a concurring fifth justice held that an offense does not qualify as a crime of violence where the essential elements could be satisfied by a mens rea of recklessness. *Borden*, 141 S. Ct. at 1822 (plurality), 1835 (Thomas, J., concurring). Accordingly, California Penal Code § 273.5(a) does not qualify as a crime of violence where the offense only requires a *mens rea* of recklessness. The statute in § 273.5(a) provides that the crime applies to “[a]ny person who willfully inflicts corporal injury resulting in a traumatic condition” Cal. Penal Code, § 273.5(a). While the statute does require that the defendant’s act must be willful, California case law authorities have affirmed that the willfulness element for general intent crimes can be satisfied by conduct constituting only recklessness. *People v. Thurston*, 71 Cal. App. 4th 1050, 1055 (1999); *People v. Campbell*, 76 Cal. App. 4th 305, 307-09 (1999) (disapproved on other grounds in *People v. Farwell*, 5 Cal. 5th 295, 304, fn. 6 (2018)); *People v. Lara* (1996) 44 Cal. App. 4th 102, 107-08.

Under California law, corporal injury to a spouse or cohabitant under California Penal Code § 273.5(a) is a general intent crime. *Thurston*, 71 Cal. App. 4th at 1055; *Campbell*, 76 Cal. App. 4th at 307-09. In *Lara*, the California appellate court recognized that for a general intent crime, the element of willfulness may be satisfied by the defendant acting “with conscious disregard of human life and safety[.]” *Lara*, 44 Cal. App. 4th at 107 (quoting *People v. Colantuono*, 7 Cal. 4th 206, 220 (1994) (superseded by statute on other grounds as noted in *People v.*

Conley, 63 Cal. 4th 646, 660, fn. 4 (2016)) and *People v. Lathus*, 35 Cal. App. 3d 466, 469-70 (1973). As *Lara* explained, "the required mental state entails only an intent to do the act that causes the harm . . ." *Id.* (quoting *People v. Davis*, 10 Cal. 4th 463, 510, fn. 15 (1995)). While the act must be willful, the resulting injury does not have to be willfully or even knowingly inflicted. *Id.*

In accord with *Lara*, the California appellate courts in *Thurston* and *Campbell* both affirmed that the crime under California Penal Code § 273.5(a) does not require any intent to cause injury. *Thurston*, 71 Cal. App. 4th at 1055; *Campbell*, 76 Cal. App. 4th at 308. In *Thurston*, the court rejected the defendant's argument that the crime "requires an instruction that the perpetrator had a separate intent to bring about the injury." *Thurston*, 71 Cal. App. 4th at 1055. Based on *Thurston*, the court in *Campbell* affirmed that "[a] defendant may be found guilty of section 273.5, subdivision (a), if he willfully used force against his spouse, even if he did not specifically intend to cause the traumatic injury." *Campbell*, 76 Cal. App. 4th at 308.

As the California authorities cited herein demonstrate, the crime of corporal injury under California Penal Code § 273.5(a) can be committed by mere recklessness. The crime requires the application of force, but does not require that the defendant intentionally direct the use of force against another person. Accordingly, the offense does not require proof that the defendant intended to cause any harm. Based on *Borden*, such an offense does not qualify as a crime of violence under the Guidelines, including under U.S.S.G. § 2K2.1(a)(4)(A) and 4B1.2(a), as

applied in the present case. Pet. App. 2a.

Despite the California legal authorities, the Ninth Circuit has determined on four different occasions that corporal injury to a spouse or cohabitant under California Penal Code § 273.5(a) does qualify as a crime of violence. *Banuelos-Ayon*, 611 F.3d at 1083-84; *Laurico-Yeno*, 590 F.3d at 822-23; *Ayala-Nicanor*, 659 F.3d at 752; *Walker*, 953 F.3d at 580. Those opinions all fail to recognize the analysis here, which is that under § 273.5(a), the defendant does not have to intend the injury that results from his conduct. The Court here should grant certiorari to decide the implications of *Borden* in the present case of a general intent crime involving a *mens rea* of mere reckless under § 273.5(a).

CONCLUSION

For the reasons stated, the United States Supreme Court should grant the petition for a writ of certiorari.

Date: August 11, 2023

Respectfully submitted,
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