

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)

APPENDIX

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Angelo Joseph Fernandez  
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**NOT FOR PUBLICATION****FILED****UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT****MAY 16 2023**MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 22-10140

Plaintiff-Appellee,

D.C. No.  
1:21-cr-00142-DAD-BAM-1

v.

ANGELO JOSEPH FERNANDEZ,

MEMORANDUM\*

Defendant-Appellant.

Appeal from the United States District Court  
for the Eastern District of California  
Dale A. Drozd, District Judge, Presiding

Submitted May 12, 2023\*\*  
San Francisco, California

Before: FRIEDLAND and BENNETT, Circuit Judges, and BENNETT,\*\*\* District Judge.

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

\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

\*\*\* The Honorable Richard D. Bennett, United States District Judge for the District of Maryland, sitting by designation.

Appendix A  
1a

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.

“We review *de novo* a district court’s decision that a prior conviction is a crime of violence under the Sentencing Guidelines.” *United States v. Velasquez-Reyes*, 427 F.3d 1227, 1229 (9th Cir. 2005) (citation omitted).

The Guidelines provide for a base offense level of twenty when a defendant has been convicted of a “crime of violence.” U.S.S.G. § 2K2.1(a)(4)(A). As relevant here, we have held that a crime of violence encompasses only offenses that require “the intentional use of force” as an element and that section 273.5(a) so qualifies because “a person cannot be convicted [of violating section 273.5(a)] without the intentional use of physical force.” *United States v. Laurico-Yeno*, 590 F.3d 818, 821 (9th Cir. 2010). The intentional-force requirement of section 273.5(a) is clear from its text, which makes “[a]ny person who *willfully* *inflicts* upon a person [as defined in the statute] *corporal injury* resulting in a traumatic condition . . . guilty of a felony.” *Id.* (quoting Cal. Penal Code

§ 273.5(a) (2010)) (emphases added).<sup>1</sup> We have reaffirmed that precedent since, including in the face of arguments that section 273.5(a) is not a crime of violence because of “California cases speaking to how convictions may be obtained under various assault-and-battery statutes without showing an intent to harm the victim.” *United States v. Walker*, 953 F.3d 577, 579 (9th Cir. 2020). We explained that the intentional direct application of force onto the victim that section 273.5(a) requires makes it satisfy the intentional-force requirement of a crime of violence. *Id.*

Fernandez does not dispute that we have previously held that section 273.5(a) qualifies as a crime of violence under the Guidelines. Fernandez instead argues that our precedent did not survive the Supreme Court’s recent decision in *Borden v. United States*, 141 S. Ct. 1817 (2021). According to Fernandez, *Borden* “held that an offense [does] not qualify as a crime of violence where the essential elements [can] be satisfied by a *mens rea* of recklessness”—in other words, Fernandez contends that if any essential element of an offense can be satisfied with a mens rea of recklessness, that offense cannot qualify as a crime of violence under *Borden*.<sup>2</sup> Because California law recognizes that section 273.5(a)

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<sup>1</sup> Section 273.5(a) was amended after *Laurico-Yeno* was decided, but those changes are not relevant here because Fernandez was convicted under the pre-amendment version.

<sup>2</sup> *Borden* involved the meaning of a “violent felony” in the Armed Career Criminal Act, not the meaning of a “crime of violence” in the Guidelines. But the language defining a “violent felony” in that Act is relevantly identical to the language

requires only that “*the act* must be willful,” not “*the resulting injury* [from the act],” Fernandez continues, an essential element of section 273.5(a)—that the act “result[] in a traumatic condition,” Cal. Penal Code § 273.5(a)—can be satisfied with a mens rea of recklessness and section 273.5(a) therefore cannot be a crime of violence after *Borden*. *Borden*, Fernandez argues, therefore requires us to abandon our prior precedent holding that section 273.5(a) is a crime of violence and to vacate Fernandez’s sentence.

We reject Fernandez’s argument. We are bound by prior precedent unless it is “clearly irreconcilable” with intervening higher authority, *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc), and our precedent and *Borden* are fully consistent. *Borden* confirmed that a person who “consciously deploy[s]” force “at another person” satisfies the use-of-force element that a crime of violence requires, and emphasized that it is irrelevant whether the person consciously deploying the force towards another intended the force to make contact with a person or simply knew that the force would make contact with a person. *Borden*, 141 S. Ct. 1817, 1826-27 (2021) (reasoning that both a person who “drives his car straight at a reviled neighbor, desiring to hit him” and a getaway driver who “prefers a clear

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defining a “crime of violence” in the Guidelines, so the reasoning from *Borden* applies with equal force here. *See United States v. Crews*, 621 F.3d 849, 852 n.4, 856 (9th Cir. 2010) (explaining that precedent interpreting one definition applies to the other because the definitions are nearly identical). We therefore treat *Borden* as addressing the meaning of a “crime of violence” under the Guidelines.

road” but “plows ahead anyway” when he “sees a pedestrian in his path . . . , knowing the car will run him over” satisfies the use-of-force element).

Moreover, nothing in *Borden* mandates, as Fernandez argues, that an offense can qualify as a crime of violence only when *every* element of that offense requires a mens rea of purpose or knowledge. The use-of-force element in the Guidelines is concerned with whether an offense “has as *an* element” force that is consciously deployed towards a person—not with whether an offense also requires that a defendant intend the harm resulting from the consciously deployed force, or intend every other element that makes up the offense. *See id.* at 1822 (emphasis added) (quotation marks omitted). This is precisely what we previously explained in *Walker*. Indeed, Fernandez agrees that section 273.5(a) requires as one element that a defendant consciously deploy force towards the victim. Our precedent holding that section 273.5(a) is a crime of violence is thus entirely consistent with *Borden*.

Because nothing in *Borden* upsets our prior precedent holding that section 273.5(a) is a crime of violence, the district court committed no error in the sentence it imposed.

**AFFIRMED.**

**UNITED STATES DISTRICT COURT**  
**Eastern District of California**

UNITED STATES OF AMERICA

v.

**ANGELO JOSEPH FERNANDEZ**

AKA: Angeio Joseph Fernandez, Angel Joseph Fernandez, Robert Hernandez, Angelo Fernandez, "Gangster Dawg"

**THE DEFENDANT:**

pleaded guilty to Count 1 of the Indictment.  
 pleaded nolo contendere to count(s)       , which was accepted by the court.  
 was found guilty on count(s)        after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1)	Felon in Possession of Ammunition (Class C Felony)	2/25/2021	1

The defendant is sentenced as provided in pages 2 through        of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s)       .  
 Count(s)        dismissed on the motion of the United States.  
 Indictment is to be dismissed by District Court on motion of the United States.  
 Appeal rights given.  Appeal rights waived.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution or fine, the defendant must notify the court and United States attorney of material changes in economic circumstances.

5/31/2022

Date of Imposition of Judgment

Signature of Judicial Officer

**Dale A. Drozd, United States District Judge**

Name & Title of Judicial Officer

6/3/2022

Date

**IMPRISONMENT**

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:  
78 months to run concurrent with any term of imprisonment imposed in Fresno County Superior Court Docket Number F21901766.

No TSR: Defendant shall cooperate in the collection of DNA.

The court makes the following recommendations to the Bureau of Prisons:  
The court recommends that the defendant be incarcerated in Otisville, New York, based on gang drop out status but only insofar as this accords with security classification and space availability. The court recommends the defendant participate in the 500-Hour Bureau of Prisons Substance Abuse Treatment Program.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district  
 at \_\_\_\_ on \_\_\_\_.  
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:  
 before \_\_\_\_ on \_\_\_\_.  
 as notified by the United States Marshal.  
 as notified by the Probation or Pretrial Services Officer.  
If no such institution has been designated, to the United States Marshal for this district.

Other, Please Specify:

**RETURN**

I have executed this judgment as follows:

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Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

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United States Marshal

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By Deputy United States Marshal

**SUPERVISED RELEASE**

Upon release from imprisonment, you will be on supervised release for a term of:  
36 months.

**MANDATORY CONDITIONS**

You must not commit another federal, state or local crime.

You must not unlawfully possess a controlled substance.

You must refrain from any unlawful use of controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two (2) periodic drug tests thereafter, not to exceed four (4) drug tests per month.

- The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse.
- You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution.
- You must cooperate in the collection of DNA as directed by the probation officer.
- You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense.
- You must participate in an approved program for domestic violence.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

## STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by the probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

### U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: [www.uscourts.gov](http://www.uscourts.gov).

Defendant's Signature \_\_\_\_\_

Date \_\_\_\_\_

### SPECIAL CONDITIONS OF SUPERVISION

1. As directed by the probation officer, the defendant shall participate in an outpatient correctional treatment program to obtain assistance for drug or alcohol abuse.
2. As directed by the probation officer, the defendant shall participate in a program of testing (i.e., breath, urine, sweat patch, etc.) to determine if he has reverted to the use of drugs or alcohol.
3. As directed by the probation officer, the defendant shall participate in a co-payment plan for treatment or testing and shall make payment directly to the vendor under contract with the United States Probation Office of up to \$25 per month.
4. The defendant shall submit to the search of his person, property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects at any time, with or without a warrant, by any law enforcement or probation officer in the lawful discharge of the officer's supervision functions with reasonable suspicion concerning unlawful conduct or a violation of a condition of probation or supervised release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
5. As directed by the probation officer, the defendant shall complete up to 20 hours of unpaid community service per week until employed for at least 30 hours per week or participating in a previously approved educational or vocational program.
6. The defendant shall not associate with any known gang member of the Bulldog street gang or any other known member of a criminal street gang, as directed by the probation officer.

## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

### TOTALS

<u>Processing Fee</u>	<u>Assessment</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>	<u>Fine</u>	<u>Restitution</u>
	\$100.00	\$0.00	\$0.00	0.00	0.00

The determination of restitution is deferred until \_\_\_\_\_. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Restitution amount ordered pursuant to plea agreement \$ \_\_\_\_

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

The interest requirement is waived for the  fine  restitution

The interest requirement for the  fine  restitution is modified as follows:

If incarcerated, payment of any unpaid criminal monetary penalties in this case is due during imprisonment at the rate of 10% of the defendant's gross income per month or \$25 per quarter, whichever is greater. Payment shall be made through the Bureau of Prisons Inmate Financial Responsibility Program.

Other:

\* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299

\*\* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

\*\*\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A.  Lump sum payment of \$ \_\_\_\_ due immediately, balance due
  - Not later than \_\_\_\_, or
  - in accordance  C,  D,  E, or  F below; or
- B.  Payment to begin immediately (may be combined with  C,  D, or  F below); or
- C.  Payment in equal \_\_\_\_ (e.g. weekly, monthly, quarterly) installments of \$ \_\_\_\_ over a period of \_\_\_\_ (e.g. months or years), to commence \_\_\_\_ (e.g. 30 or 60 days) after the date of this judgment; or
- D.  Payment in equal \_\_\_\_ (e.g. weekly, monthly, quarterly) installments of \$ \_\_\_\_ over a period of \_\_\_\_ (e.g. months or years), to commence \_\_\_\_ (e.g. 30 or 60 days) after release from imprisonment to a term of supervision; or
- E.  Payment during the term of supervised release/probation will commence within \_\_\_\_ (e.g. 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F.  Special instructions regarding the payment of criminal monetary penalties:

If incarcerated, payment of any unpaid criminal monetary penalties in this case is due during imprisonment at the rate of 10% of the defendant's gross income per month or \$25 per quarter, whichever is greater. Payment shall be made through the Bureau of Prisons Inmate Financial Responsibility Program.

The defendant shall make payments toward any unpaid criminal monetary penalties in this case during supervision at the rate of at least 10% of your gross monthly income. Payments are to commence no later than 60 days from placement on supervision. This payment schedule does not prohibit the United States from collecting through all available means any unpaid criminal monetary penalties at any time, as prescribed by law.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States: The Preliminary Order of Forfeiture is hereby made final as to this defendant and shall be incorporated into the Judgment.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.