No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CUEDELL JAVON HENRY,
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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit has continued to misapply *Taylor* and *Descamps* by ignoring *Borden* and expanding "robbery" (as enumerated as a "crime of violence" in Section 4B1.2 of the Guidelines) to include injury inflicted with a *reckless* mental state?

LIST OF PARTIES

All parties to the petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Sentencing Guidelines

PRAYER

Petitioner Cuedell Javon Henry prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at *United States v. Henry*, No. 22-10909, 2023 WL 5346066 (5th Cir. Aug. 18, 2023).

No petition for rehearing was timely filed. The district court did not issue a written opinion on the question presented.

JURISDICTION

The United States Court of Appeals entered a decision August 18, 2023.

The petition is timely filed within 90 days of the August 18, 2023 order of the court of appeals denying Henry's appeal. Sup. Ct. R. 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

UNITED STATES SENTENCING GUIDELINE INVOLVED

U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (U.S. SENTENCING COMM'N 2018) (Pet. App. B)

U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 (U.S. SENTENCING COMM'N 2018) (Pet. App. C)

STATEMENT OF THE CASE

A. The indictment and plea.

On July 19, 2021, a federal grand jury returned a two-count indictment charging Cuedell Javon Henry (Henry) with *Possession of Stolen Firearm* and *Aiding and Abetting* (Violation of 18 U.S.C. §§ 922(j) & 924(a)(2) & 2). On January 5, 2022, Mr. Henry pleaded "Guilty" to the Court without plea agreement to Count 1 of the charged offense. On January 20, 2022, the district court adjudged Henry guilty. The district court pronounced and imposed sentence on September 2, 2022.

B. The presentence report.

A United States Probation Officer prepared a presentence report (the PSR) and two addenda. The PSR reported an offense level of 25, applying guideline USSG §2K2.1. The PSR second addendum reported a Criminal History Score of 10 to result in advisory guideline range of 100 to 120 months imprisonment.

The Criminal History Score was increased because the PSR treated Henry's prior conviction for Texas aggravated robbery under Texas Penal Code §§ 29.02 and 29.03 as a crime of violence under guideline § 4B1.2(a). Henry objected to the application of an additional criminal history point based on the PSR's categorization of Texas aggravated robbery as a crime

of violence. Specifically, Henry argued that Texas aggravated robbery does not qualify as a crime of violence under Section 4B1.2(a) because it can be committed recklessly, and the threatened or inflicted injury does not fit within the generic, contemporary definition of robbery. Following Fifth Circuit precedent, the district court overruled Henry's objection.

The district court imposed an imprisonment sentence at the top of the guidelines: 120 months. Had the district court sustained Henry's objection, the Criminal History Score would have been reduced by 1 point, the Criminal History Category would have been IV, and the guideline imprisonment range would have been 85 to 105 months. USSG Ch. 5, Sentencing Table.

C. The appeal.

On appeal, Henry argued the district court erred by considering Texas *Aggravated Robbery* a crime of violence. However, Henry acknowledged the issue was potentially foreclosed by Fifth Circuit precedent. *See Santiesteban-Hernandez,* 469 F.3d 376, 379 (5th Cir. 2006); *United States v. Nava*, No. 21-50165, 2021 WL 5095976, at *1 (5th Cir. Nov. 2, 2021), cert. denied, 142 S. Ct. 1241, 212 L. Ed. 2d 241 (2022);

United States v. Tellez-Martinez, 517 F.3d 813, 815 (5th Cir. 2008); *United States v. Lerma*, 877 F.3d 628, 635-36 (5th Cir. 2017).

Henry also argued Texas *Aggravated Robbery* does not qualify as a crime of violence for purposes of § 4B1.2. Texas *Robbery* is an indivisible statute that fails to satisfy the definition of a crime of violence. Texas *Robbery*, which can be committed recklessly, does not come within the force or enumerated clauses of § 4B1.2. *See Borden*, 141 S. Ct. 1817 (2021). Because Texas *Robbery* fails to satisfy the force or enumerated clauses, the district court erred in increasing Henry's base offense level because Texas *Aggravated Robbery* is not a crime of violence.

The Government moved for summary affirmance citing the Fifth Circuit's binding authority. On August 18, 2023, the Fifth Circuit granted the Government's motion and issued an unpublished opinion. The opinion indicated the issue was foreclosed because the Fifth Circuit has concluded that Texas *Robbery* qualifies as a crime of violence under § 4B1.2(a)(2). *United States v. Henry*, No. 22-10909, 2023 WL 5346066, at *1 (5th Cir. Aug. 18, 2023) *citing United States v. Adair*, 16 F. 4th 469, 470-71 (5th Cir. 2021), cert denied, 142 S. Ct. 1215 (2022).

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve the question of whether the meaning of "robbery," as enumerated as a "crime of violence" in Section 4B1.2 of the Guidelines, includes injury performed with a *reckless* mental state.

The Fifth Circuit Court of Appeals has held that Texas *Aggravated Robbery* qualifies as a crime of violence. However, this Court has not. In fact, the Court's decision in *Borden v. United States*, 141 S. Ct. 1817 (2021), has undermined the Fifth Circuit's analysis of the guideline. Because Texas *Robbery* and *Aggravated Robbery* can be committed by reckless infliction of injury, those offenses are not generic robbery as contemplated by Section 4B1.2 of the Guidelines.

1. *The Fifth Circuit insists upon misapplication of* Taylor *and* Descamps *to allow state offenses, which are not categoric matches to generic offenses, to nonetheless qualify as generic offenses.*

The categorical approach governs whether a given offense constitutes a "generic offense" for determining enhancements under the Armed Career Criminal Act, the Sentencing Guidelines, and the Immigration and Nationality Act. The Court in *Taylor* stressed the importance of a "formal categorical approach," where courts "look only to

the statutory definitions" when determining a generic offense. *Taylor v. United States*, 495 U.S. 575, 600 (1990). If the relevant statute has the same elements as, or is narrower than, the generic crime, then the prior conviction can serve as a predicate for an enhancement. *Descamps v. United States*, 570 U.S. 254, 261 (2013) (*citing Taylor*, 495 U.S. at 600). "But if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as a [] predicate[.]" *Id.*

As an example, in *Torres-Jaime*, the Fifth Circuit analyzed Georgia aggravated assault. *United States v. Torres-Jaime*, 821 F.3d 577, 579 (5th Cir. 2016). The Fifth Circuit observed that generic aggravated assault required an intentional attempt to cause serious bodily in-jury or causing "injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of hu-man life," *id.* at 582, and the Georgia offense could be committed with only a negligent state of mind. *See id.* at 587 (Costa, J., dissenting) (collecting Georgia cases). Nonetheless, the Fifth Circuit found that the Georgia statute still fell within the generic definition. *Id.* at 585; *see also United States v. Sanchez-Ruedas*, 452 F.3d 409, 414 (5th Cir. 2006) (holding the same for

California's aggravated assault statute, even though an individual need not intend any harm to be convicted of California aggravated assault).

Judge Costa dissented. *Torres-Jaime*, 821 F.3d at 586 (Costa, J., dissenting). He criticized the majority for ignoring the demands of *Taylor* and *Descamps*. *Id*. Judge Costa further pointed out that, due to Georgia allowing a negligent state of mind in committing an assault, this removed Georgia's assault statute from the generic definition. *Id*. at 587–88.

Also, in *Santiesteban-Hernandez*—the decision the Fifth Circuit relied upon to affirm the sentence in the instant case—the Fifth Circuit analyzed Texas *Robbery* and observed that generic robbery and Texas *Robbery* have different "use of force" requirements. *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 381 (5th Cir. 2006). The Fifth Circuit noted that a "majority of states focus on an act of force in articulating the requisite level of immediate danger," whereas Texas focuses "on the realization of the immediate danger through actual or threatened bodily injury[.]" *Id*. Even though this definition changed the purposeful use of force or intimidation (generic robbery) into any realization of harm if committed recklessly (Texas robbery), the Fifth Circuit still found that "the difference is not enough to remove the Texas

statute from the family of offenses commonly known as 'robbery.'" *Id.* (emphasis added).

At their core, these Fifth Circuit decisions rest on the proposition that an offense can differ from a generic offense—even regarding an element as significant as whether a defendant intended to injure someone—and still constitute that generic offense. This type of "close enough" or "minor variation" analysis defies the categorical analysis in *Taylor* and *Descamps*, which requires "in no uncertain terms, that a state crime cannot qualify as [a] . . . predicate if its elements are broader than those of a listed generic offense." *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016). This Court should grant certiorari to resolve these errors and ensure that defendants in the Fifth Circuit receive the benefit of this Court's well-established jurisprudence.

2. The Fifth Circuit is the only circuit ignoring the demands of Taylor *and* Descamps.

Not only is the Fifth Circuit controverting Supreme Court precedent, no other circuit has adopted its "unprecedented, variable interpretation" of generic offenses. *Rodriguez*, 711 F.3d at 574 (Dennis J., dissenting). As the Eighth Circuit observed, the Fifth Circuit is alone in applying a "common sense approach" to allow offenses which are "close

enough" to satisfy the categorical approach. *United States v. Schneider*, 905 F.3d 1088, 1096 (8th Cir. 2018); *see also id.* ("This so-called 'common sense approach,' . . . is not what the Supreme Court has instructed us to do.").

As it has done repeatedly, the Fifth Circuit has strayed from the appropriate legal standard and constructed its own idiosyncratic standard. In these situations, the Court has granted certiorari to reverse the practice. *See, e.g.*, *Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020) (preservation of substantive-reasonableness challenges); *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018) (plain-error review under the Sentencing Guidelines); *Ayestas v. Davis*, 138 S. Ct. 1080 (2018) (funding for expenses "reasonably necessary for the representation of the defendant"); *Buck v. Davis*, 137 S. Ct. 759 (2017) (certificates of appealability); *Molina-Martinez v. United States*, 578 U.S. 189 (2016) (plain-error review under the Sentencing Guidelines).

3. Texas Aggravated Robbery does not qualify as a crime of violence.

A prior Texas conviction for *Aggravated Robbery* should not qualify as a "crime of violence" under Section 4B1.2 of the Guidelines.

A "crime of violence," is a felony offense that:

> (1) has an element the use, attempted use, or threatened use of physical force against the person or 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 . . . .

USSG §2K2.1, comment. (n.1) (incorporating USSG §4B1.2(a)(1)-(2)) (emphasis added). The first provision is referred to as the "force or elements clause" and the second as the "enumerated clause."

The Texas *Aggravated Robbery* statute provides, in pertinent part:

> (a) A person commits [aggravated robbery] if he commits robbery as defined in [Texas Penal Code] 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. Pen. Code § 29.03.

The Texas robbery statute, in turn, provides:

> (a) A person commits [robbery] if, in the course of committing theft . . . 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. Pen. Code § 29.02.

Texas *Aggravated Robbery* requires that the defendant commit robbery under certain aggravating circumstances. *See United States v. Lerma*, 877 F.3d 628, 633 (5th Cir. 2017). The Fifth Circuit has held that Texas *Aggravated Robbery* is a divisible statute as to those aggravating circumstances. *Id.* at 634. Therefore, Texas *Aggravated Robbery* convictions are for the offense of *Robbery* plus using or exhibiting a deadly weapon. Tex. Pen. Code § 29.03(a)(2). Notwithstanding the aggravating circumstance, *Aggravated Robbery* convictions are not "crimes of violence" because Texas *Aggravated Robbery* can be committed recklessly, and the generic definition of robbery does not include a reckless *mens rea.*

4. Texas Robbery does not qualify under the enumerated clause.

For purposes of §2K2.1(a), a crime of violence is defined by certain enumerated offenses, including robbery. USSG §4B1.2(a)(2). Texas robbery does not meet the generic definition of robbery because Texas

allows for the reckless causation of injury. To satisfy the enumerated clause of the guidelines, the defendant's prior conviction must match, or be narrower than, the generic offense. *Taylor*, 495 U.S. at 599. If the prior offense of conviction sweeps more broadly than this generic definition, that conviction does not fall within the enumerated category, regardless of the label a state attaches to the underlying offense. *Gonzales v. Duenas-Alv*arez, 549 U.S. 183, 188 (2007).

"[R]obbery may be thought of as aggravated larceny, containing at least the elements of misappropriation of property under circumstances involving immediate danger to the person." *United States v. Montiel-Cortes*, 849 F.3d 221, 226 (5th Cir. 2017) (cleaned up). The Fifth Circuit has held that Texas *Robbery* matches the generic definition. *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 381 (5th Cir. 2006), *abrogated on other grounds by United States v. Rodriguez*, 711 F.3d 541, 547–63 (5th Cir. 2013) (en banc); *see also United States v. Tellez-Martinez*, 517 F.3d 813, 815 (5th Cir. 2008). *Santiesteban-Hernandez*, however, did not address the *mens rea* required for generic robbery. Rather, *Santiesteban-Hernandez* explicitly left that question open:

> This appeal does not present the question of whether the mens rea differs between the statute governing the defendant's offense and

> the generic, contemporary meaning of the offense. However, such a situation would not alter the analysis; rather, mens rea would be another basic element on which the two definitions must correspond.

Id. at 379 n.4. [1] This Court has not answered this question—of the mens rea for generic robbery—that was left open in *Santiesteban- Hernandez*. Indeed, the Court held, in addressing the question on plain error review, that the defendant could not "show that any error in classifying his Texas robbery as a crime of violence is clear or obvious rather than subject to reasonable dispute." *United States v. Cruz*, 774 F. App'x 200 (5th Cir. 2019).

To determine the generic, contemporary meaning of generic robbery, the Court looks to federal law, a variety of state codes, criminal treatises, and the Model Penal Code. *Rodriguez*, 711 F.3d at 550– 53, 552 n.16, 553 n.17, 558. These sources show that generic robbery does not include the reckless causation of injury. Federal robbery statutes do not

[1] In an unpublished case, the Fifth Circuit took a different view of this quotation, stating that generic robbery had no *mens rea*. *United States v. Ortiz-Rojas*, 575 F. App'x 494, 495 (5th Cir. 2014). *Ortiz-Rojas* is unpersuasive for three reasons. First, this is an unpublished case on plain error review, and "[a]n error is not plain under current law if a defendant's theory requires the extension of precedent." *United States v. Trejo*, 610 F.3d 308, 319 (5th Cir. 2010) (cleaned up); *see also* 5th Cir. R. 47.5.4. Second, as *Griffin* explains, generic robbery does not include a *mens rea*. And third, *Santiesteban-Hernandez* explicitly noted that the generic and Texas definitions must correspond with respect to mens rea- it did not speak to the mens rea required for generic robbery. *Santiesteban-Hernandez*, 469 F.3d at 379 n.4.

allow for reckless causation of injury. *See, e.g.*, 18 U.S.C. § 2111, 2113, 2114, 2116, 2118; *see also United States v. Carr*, 946 F.3d 598, 607 (D.C. Cir. 2020) (holding that federal bank robbery, § 2113, requires knowledge; *United States v. Watson*, 881 F.3d 782, 785 (9th Cir. 2018) (same). Only two state robbery statutes, other than Texas, define their robbery offense to allow for the reckless causation of injury. *See* Haw. Rev. Stat. § 708-841(1)(c) (2006); Me. Rev. Stat. Ann. tit. 17-A, § 651(1)(A) (2017). Most states do not define robbery in terms of causation of injury but by use of force. *Santiesteban-Hernandez*, 469 F.3d at 380. And many of those states require that the use of force be accompanied by some type of intent or purpose—for example, with intent to overcome resistance or compel surrender of the property. *See, e.g.*, Alaska Stat. § 11.41.510(a); Ariz. Rev. Stat. § 13-1902(A); Conn. Gen. Stat. § 53a- 133; Del. Code Ann. tit. 11, § 831(a); Mo. Rev. Stat. §§ 570.010(13), 569.030; N.Y. Penal Law § 160.00; Or. Rev. Stat. § 164.395(1); Utah Code Ann. § 76-6-301(1); Wis. Stat. § 943.32(1). As the use of force must be accompanied by specific intent, these statutes necessarily imply the volitional use of force—not reckless or negligent uses of force.

Texas, in contrast, remains an outlier. Texas is among only a few states, along with Hawaii and Maine, that define robbery to allow for the reckless causation of injury. Among this small number of states, one district court held that the Maine robbery statute failed to constitute generic robbery, in part, due to the "lower standard of intentionality" in the statute's allowance of the reckless use of force. *United States v. Mulkern*, No. 1:15-cr-00054-JAW, 2017 U.S. Dist. Lexis 191486, at *19 (D. Me. 2017). Texas's outlier status among the states further demonstrates that its reckless robbery statute is not generic robbery. Because the generic, contemporary definition of robbery does not allow for the reckless causation of injury, Texas robbery is not generic robbery.

5. The Court should address the Question Presented, because the Force Clause also does not apply to Texas Robbery.

Under the force clause, an offense constitutes a "crime of violence" if it "has an element the use, attempted use, or threatened use of physical force against the person of another [.]" USSG §4B1.2(a)(1). The Court has held that offenses with a reckless *mens rea* do not contain the actual, attempted, or threatened use of force as an element. *Borden v. United States*, 141 S. Ct. 1817, 1834 (2021) (plurality). Because Texas *Robbery* can be committed recklessly, it does not contain the actual, attempted, or

threatened use of force as an element and is therefore it is not a crime of violence. *See* Tex. Pen. Code § 29.02(a)(1).

In determining whether an offense is a crime of violence, courts should employ the categorical approach. *Taylor v. United States*, 495 U.S. 575 (1990). The categorical approach looks to the elements of the prior conviction and not the defendant's actual conduct. *Id. at* 600. The categorical approach has three steps: (1) identify the elements of the offense underlying the conviction; (2) identify the elements of the generic offense; and (3) determine whether the former "substantially corresponds" to the latter. *Id. at* 592-602. If the statute of conviction has the same elements as the generic offense, or if the statute defines the offense more narrowly, then the prior conviction is a categorical match and can serve as a predicate offense for a sentencing enhancement. *Descamps v. United States*, 570 U.S. 254, 261 (2013). However, if the statute sweeps more broadly than the generic offense, then a conviction under that statute cannot serve as a predicate offense. *Id.*

Under the categorical approach, the Court should assume that a defendant committed the least culpable act under the statute if there exists a realistic probability that the state would apply its statute to that

conduct. *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013). Texas prosecutes aggravated robbery based on robbery by injury in which the defendant uses or exhibits a deadly weapon. *See, e.g.*, *Bradford v. State*, 178 S.W.3d 875, 877 (Tex. App.–Fort Worth 2005) (noting that robbery requires a person to intentionally, knowingly, or recklessly cause bodily injury, and that aggravated robbery has the additional element of using or exhibiting a deadly weapon); *Zapata v. State*, 449 S.W.3d 220, 224–25 (Tex. App.–San Antonio 2014) (indictment alleged aggravated robbery by intentionally, knowingly, and recklessly causing bodily injury and using and exhibiting a deadly weapon); *Wilson v. State*, 625 S.W.2d 331, 332–33 (Tex. Crim. App. 1981) (jury instruction alleged robbery by intentionally, knowingly, or recklessly causing bodily injury aggravated by using and exhibiting a deadly weapon). And the deadly weapon need not be the cause of the bodily injury. *Cf. Johnson v. State*, 91 S.W.3d 413, 417 (Tex. App.–Waco 2003) (aggravated assault). Because Texas *Robbery* is an indivisible statute, and the least culpable conduct—causing bodily injury and using or exhibiting a deadly weapon—includes the *mens rea* of recklessness, Texas *Aggravated Robbery* convictions are not crimes of violence. *See Borden*, 141 S. Ct. 1817, 1834.

Courts employ an additional step when the statute forming the basis of a defendant's prior conviction is "divisible," meaning that it provides "elements in the alternative, and thereby define[s] multiple crimes." *Mathis v. United States*, 579 U.S. 500, 503 (2016); *see also Descamps*, 570 U.S. at 260 (explaining that the modified categorical approach "helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction").

Under this "modified categorical approach," the sentencing court looks beyond the statute of conviction to a restricted set of documents—such as the charging document, plea agreement, and transcript of the plea colloquy—to identify the specific statutory offense that provided the basis for the prior conviction. *Shepard v. United States*, 544 U.S. 13, 26 (2005) (listing the charging document, plea agreement, plea colloquy transcript, or other comparable judicial record). The court then compares those elements to the elements of the generic offense using the formal categorical approach. *Mathis*, 579 U.S. at 505-6.

The determination of whether a statute is divisible turns on the distinction between "elements" and "means." *Mathis*, 579 U.S. at 506. A

divisible statute sets out one or more elements in the alternative, often using disjunctive language such as "or" to list multiple, alternative criminal offenses. *Mathis*, 579 U.S. at 506, 513. Each alternative offense listed in a divisible statute must be proven beyond a reasonable doubt to sustain a conviction. In contrast, "means" are "merely the factual ways that a criminal offense can be committed" that "need neither be found by a jury nor admitted by a defendant." *Mathis*, 579 U.S. at 504.

Courts have not decided whether the Texas *Robbery* statute, § 29.02, is a divisible or indivisible statute. *See United States v. Burris*, 920 F.3d 942, 948 (5th Cir. 2019) ("We need not decide whether § 29.02(a) is divisible here), *cert. granted and vacated in light of Borden,* 141 S. Ct. 2781 (2021); *see also United States v. Hall*, 877 F.3d 800, 807 (5th Cir. 2017) (assuming, without deciding that the Texas robbery statute was indivisible).

The Texas Court of Criminal Appeals, however, has indicated that the Texas *Robbery* statute is indivisible. *See Cooper v. State*, 430 S.W. 3d 426, 427 (Tex. Crim. App. 2014). In *Cooper*, the Court of Criminal Appeals held that the defendant's two convictions, one for aggravated robbery by causing bodily injury and one for aggravated robbery by threat, involving

the same victim during a single robbery, violated the Double Jeopardy Clause. *Id.* at 427. That was because robbery by causing injury and robbery by threat involved different means of committing the offense of robbery. The concurring opinion made the analysis clearer- "[t]he offense of aggravated robbery incorporates the elements of the lesser offense of robbery, and it is the provisions of the robbery statute, alone, that are at issue here." *Id.* at 428 (Keller, J., concurring). The issue the Court faced with the Texas robbery statute was "when the same statutory section lists multiple methods of committing the offense…to determine whether these different methods of commission are different offenses or merely alternate means of committing the same offense." *Id.* at 429. Any ambiguity should be resolved "in favor of a conclusion that they are alternative means of committing the same offenses." *Id.* [2]

Other Texas cases have held similarly. *See Burton v. State*, 510 S.W.3d 232, 237 (Tex. App.–Fort Worth 2017) (bound by *Cooper* holding that robbery causing injury and robbery by threat are alternative methods of committing the offense and that the jury does not need to be

[2] However, in *Lerma* the Fifth Circuit did opine that *Cooper* did not interpret the Texas *Aggravated Robbery* statute but "simply held that a defendant cannot be convicted of robbing the same person twice at the same time- once by threat and once by force." 877 F.3d at 634.

unanimous); *Wright v. State*, 1999 WL 143830 (Tex. App.–Austin 1999) (unpublished) (holding that the jury is not required to be unanimous as to whether defendant committed aggravated robbery with a deadly weapon by causing bodily injury or by threat). Given the Texas Court of Criminal Appeals' decision in *Cooper*, and other Texas state opinions, this Court should conclude that the Texas *Robbery* statute is not divisible between threats and injuries. Because the Texas *Robbery* statute is indivisible as to robbery by injury and robbery by threats, the modified categorical approach does not apply.

CONCLUSION

Because Texas aggravated robbery—by recklessly causing bodily injury and using or exhibiting a deadly weapon—does not have as an element the use or force and does not come within generic robbery, it is not a crime of violence for purposes of guidelines §2K2.1 and §4B1.2. Accordingly, the district court erred.

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,

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Date: November 14, 2023

APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 18, 2023
Lyle W. Cayce
Clerk

No. 22-10909
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

CUEDELL JAVON HENRY,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:21-CR-211-1

Before WIENER, STEWART, and DOUGLAS, *Circuit Judges*.

PER CURIAM:[*]

Defendant-Appellant Cuedell Javon Henry appeals his conviction and sentence for possession of a stolen firearm, in violation of 18 U.S.C. §§ 922(j), 924(a)(2), and 2. He contends that his prior conviction for Texas aggravated robbery is not a crime of violence under U.S.S.G. § 4B1.2(a). Henry acknowledges that this argument is foreclosed by our precedent but

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

seeks to preserve it for further review. The government filed an opposed motion for summary affirmance or, in the alternative, an unopposed motion for an extension of time to file its brief.

As Henry concedes, his position is foreclosed. *See United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380–81 (5th Cir. 2006), *abrogated on other grounds by United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013) (en banc). We have reaffirmed that holding and concluded that Texas robbery qualifies as a crime of violence under § 4B1.2(a)(2). *See United States v. Adair*, 16 F.4th 469, 470–71 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1215 (2022). The government is correct that summary affirmance is appropriate. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

The government's motion for summary affirmance is GRANTED, the government's alternative motion for an extension of time to file a brief is DENIED AS MOOT, and the district court's judgment is AFFIRMED.

consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

Subsection (c) provides rules for determining the sentence for career offenders who have been convicted of 18 U.S.C. § 924(c) or § 929(a). The Career Offender Table in subsection (c)(3) provides a sentence at or near the statutory maximum for these offenders by using guideline ranges that correspond to criminal history category VI and offense level 37 (assuming §3E.1.1 (Acceptance of Responsibility) does not apply), offense level 35 (assuming a 2-level reduction under §3E.1.1 applies), and offense level 34 (assuming a 3-level reduction under §3E1.1 applies).

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendments 47 and 48); November 1, 1989 (amendments 266 and 267); November 1, 1992 (amendment 459); November 1, 1994 (amendment 506); November 1, 1995 (amendment 528); November 1, 1997 (amendments 546 and 567); November 1, 2002 (amendment 642); November 1, 2011 (amendment 758); August 1, 2016 (amendment 798).

§4B1.2. Definitions of Terms Used in Section 4B1.1

(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, 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).

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

Commentary

Application Notes:

1. **Definitions.**—For purposes of this guideline—

"***Crime of violence***" and "***controlled substance offense***" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

"***Forcible sex offense***" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

"***Extortion***" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense". (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

"***Prior felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

2. **Offense of Conviction as Focus of Inquiry.**—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a

(3) If the offense involved—

(A) a destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by **15** levels; or

(B) a destructive device other than a destructive device referred to in subdivision (A), increase by **2** levels.

(4) If any firearm (A) was stolen, increase by **2** levels; or (B) had an altered or obliterated serial number, increase by **4** levels.

The cumulative offense level determined from the application of subsections (b)(1) through (b)(4) may not exceed level **29**, except if subsection (b)(3)(A) applies.

(5) If the defendant engaged in the trafficking of firearms, increase by **4** levels.

(6) If the defendant—

(A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.

(7) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with

knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)–(p), (r)–(w), (x)(1), 924(a), (b), (e)–(i), (k)–(o), 1715, 2332g; 26 U.S.C. § 5861(a)–(l). For additional statutory provisions, *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.—**For purposes of this guideline:

"***Ammunition***" has the meaning given that term in 18 U.S.C. § 921(a)(17)(A).

"***Controlled substance offense***" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

"***Crime of violence***" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

"***Destructive device***" has the meaning given that term in 26 U.S.C. § 5845(f).

"***Felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

"***Firearm***" has the meaning given that term in 18 U.S.C. § 921(a)(3).

2. **Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine.—**For purposes of subsections (a)(1), (a)(3), and (a)(4), a "***semiautomatic firearm that is capable of accepting a large capacity magazine***" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.

3. **Definition of "Prohibited Person".—**For purposes of subsections (a)(4)(B) and (a)(6), "***prohibited person***" means any person described in 18 U.S.C. § 922(g) or § 922(n).

4. **Application of Subsection (a)(7).**—Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.

5. **Application of Subsection (b)(1).**—For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.

6. **Application of Subsection (b)(2).**—Under subsection (b)(2), "lawful sporting purposes or collection" as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (*e.g.*, prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1)–(a)(5), subsection (b)(2) is not applicable.

7. **Destructive Devices.**—A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (*e.g.*, subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and the applicable enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.

   Offenses involving such devices cover a wide range of offense conduct and involve different degrees of risk to the public welfare depending on the type of destructive device involved and the location or manner in which that destructive device was possessed or transported. For example, a pipe bomb in a populated train station creates a substantially greater risk to the public welfare, and a substantially greater risk of death or serious bodily injury, than an incendiary device in an isolated area. In a case in which the cumulative result of the increased base offense level and the enhancement under subsection (b)(3) does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created, an upward departure may be warranted. *See also* §§5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).

8. **Application of Subsection (b)(4).—**

   (A) **Interaction with Subsection (a)(7).**—If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with an altered or obliterated serial number, apply subsection (b)(4)(B).

   Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, it the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(A).

(B) **Knowledge or Reason to Believe.**—Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.

9. **Application of Subsection (b)(7).**—Under subsection (b)(7), if a record-keeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (*e.g.*, if the defendant falsifies a record to conceal the sale of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person).

10. **Prior Felony Convictions.**—For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). *See* §4A1.2(a)(2).

Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

11. **Upward Departure Provisions.**—An upward departure may be warranted in any of the following circumstances: (A) the number of firearms substantially exceeded 200; (B) the offense involved multiple National Firearms Act weapons (*e.g.*, machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals (*see* Application Note 7).

12. **Armed Career Criminal.**—A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal. *See* §4B1.4.

13. **Application of Subsection (b)(5).—**

(A) **In General.**—Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant—

(i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and

(ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—

(I) whose possession or receipt of the firearm would be unlawful; or

(II) who intended to use or dispose of the firearm unlawfully.

(B) **Definitions.**—For purposes of this subsection:

"***Individual whose possession or receipt of the firearm would be unlawful***" means an individual who (i) has a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence; or (ii) at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, impris-

onment, work release, or escape status. "Crime of violence" and "controlled substance offense" have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1). "Misdemeanor crime of domestic violence" has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).

The term "***defendant***", consistent with §1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

(C) **Upward Departure Provision.**—If the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted.

(D) **Interaction with Other Subsections.**—In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (*i.e.*, an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6)(B) also would apply.

14. **Application of Subsections (b)(6)(B) and (c)(1).—**

(A) **In General.**—Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.

(B) **Application When Other Offense is Burglary or Drug Offense.**—Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.

(C) **Definitions.—**

"***Another felony offense***", for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

"***Another offense***", for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.

(D) **Upward Departure Provision.**—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.*, the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.

(E) **Relationship Between the Instant Offense and the Other Offense.**—In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. *See* §1B1.3(a)(1)–(4) and accompanying commentary.

In determining whether subsection (c)(1) applies, the court must also consider whether the firearm used in the other offense was a firearm cited in the offense of conviction.

For example:

(i) **Firearm Cited in the Offense of Conviction.** Defendant A's offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant A used the shotgun in connection with a robbery. Ordinarily, under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level.

Ordinarily, the unlawful possession of the shotgun on February 10 will be "part of the same course of conduct or common scheme or plan" as the unlawful possession of the same shotgun on October 15. *See* §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to §1B1.3). The use of the shotgun "in connection with" the robbery is relevant conduct because it is a factor specified in subsections (b)(6)(B) and (c)(1). *See* §1B1.3(a)(4) ("any other information specified in the applicable guideline").

(ii) **Firearm Not Cited in the Offense of Conviction.** Defendant B's offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant B unlawfully possessed a handgun (not cited in the offense of conviction) and used the handgun in connection with a robbery.

Subsection (b)(6)(B). In determining whether subsection (b)(6)(B) applies, the threshold question for the court is whether the two unlawful possession offenses (the shotgun on October 15 and the handgun on February 10) were "part of the same course of conduct or common scheme or plan". *See* §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to §1B1.3).

If they were, then the handgun possession offense is relevant conduct to the shotgun possession offense, and the use of the handgun "in connection with" the robbery is relevant conduct because it is a factor specified in subsection (b)(6)(B). *See* §1B1.3(a)(4) ("any other information specified in the applicable guideline"). Accordingly, subsection (b)(6)(B) applies.

On the other hand, if the court determines that the two unlawful possession offenses were not "part of the same course of conduct or common scheme or plan," then the handgun possession offense is not relevant conduct to the shotgun possession offense and subsection (b)(6)(B) does not apply.

Subsection (c)(1). Under these circumstances, the cross reference in subsection (c)(1) does not apply, because the handgun was not cited in the offense of conviction.

15. **Certain Convictions Under 18 U.S.C. §§ 922(a)(6), 922(d), and 924(a)(1)(A).**—In a case in which the defendant is convicted under 18 U.S.C. §§ 922(a)(6), 922(d), or 924(a)(1)(A), a downward departure may be warranted if (A) none of the enhancements in subsection (b) apply, (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit