NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ANDRE REESE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

FILED
United States Court of Appeals
Tenth Circuit

September 29, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANDRE REESE,

Defendant - Appellant.

No. 23-1022
(D.C. No. 1:22-CR-00151-PAB-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **KELLY**, and **MORITZ**, Circuit Judges.**

In a bench trial based upon joint stipulations of fact, Mr. Reese was convicted of being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), and was sentenced to 37 months' imprisonment and three years' supervised release. On appeal, he argues that his prior Colorado state conviction for attempted first degree murder was not a "crime of violence" under either subsection of U.S.S.G. § 4B1.2(a), which defines the term and contains an "elements clause" and an "enumerated offenses

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

clause." Because the prior state conviction qualified as a crime of violence, Mr. Reese was sentenced based upon an enhanced base level offense of 20. U.S.S.G. § 2K2.1(a)(4)(A). Although the district court agreed with Mr. Reese that the prior state conviction was not a crime of violence under the elements clause, U.S.S.G. § 4B1.2(a)(1), 3 R. 30–35, it concluded that the conviction qualified under the enumerated offenses clause, U.S.S.G. § 4B1.2(a)(2), 3 R. 35–37, given the commentary which explains that a crime of violence includes "attempting to commit such offenses," U.S.S.G. § 4B1.2 cmt. n.1.[1]

Our jurisdiction arises under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). Whether a prior conviction constitutes a crime of violence under the Sentencing Guidelines is reviewed de novo. United States v. Benton, 876 F.3d 1260, 1262 (10th Cir. 2017). On appeal, Mr. Reese concedes that this claim is foreclosed by Tenth Circuit precedent.[2] Aplt. Br. 1 n.2, 5 n.3. The argument that application note 1 to § 4B1.2 is inconsistent with the plain text of the guideline, and therefore invalid, is foreclosed by our contrary rulings in United States v. Maloid, 71 F.4th 795, 803–05 (10th Cir. 2023), and United States v. Martinez, 602 F.3d 1166, 1173–74 (10th Cir. 2010). Mr. Reese's argument that we should apply Kisor deference to guidelines commentary is also foreclosed by our ruling in Maloid. 71 F.4th at 805–08

[1] We limit our review to the enumerated offenses clause but note that in United States v. Maloid this court held the commentary applies to both the elements clause and the enumerated offenses clause. 71 F.4th 795, 814 (10th Cir. 2023).

[2] The government agrees and informed us it would not file a brief absent a change in the law while the appeal was pending.

(discussing Kisor v. Wilkie, 139 S. Ct. 2400, 2413–16 (2019)); see also United States v. Coates, No. 22-2132, --- F.4th ---, 2023 WL 6053540, at *2 (10th Cir. Sept. 18, 2023) (Kisor does not apply to guidelines commentary).

"We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." United States v. Manzanares, 956 F.3d 1220, 1225 (10th Cir. 2020). Given the lack of contravening Supreme Court or en banc authority on the issue, we are bound by our prior cases.

AFFIRMED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 22-CV-00151-PAB

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANDRE REESE,

Defendant.

REPORTER'S TRANSCRIPT
Sentencing

Proceedings before the HONORABLE PHILIP A. BRIMMER, Judge, United States District Court for the District of Colorado, commencing at 10:02 a.m., on the 13th day of January, 2023, in Courtroom A701, United States Courthouse, Denver, Colorado.

APPEARANCES

Celeste Rangel, U.S. Attorney's Office, 1801 California Street, Suite 1600, Denver, CO 80202, appearing for the plaintiff.

David Johnson, Office of the Federal Public Defender, 633 17th Street, Suite 1000, Denver, CO 80202, appearing for the defendant.

Proceeding Recorded by Mechanical Stenography, Transcription Produced via Computer by Janet M. Coppock, 901 19th Street, Room A257, Denver, Colorado, 80294, (303) 335-2106

deciding *Taylor* in this case. We are not deciding what it means to do a substantial step that is necessary for an attempt conviction under federal law. We don't have to decide that. What we only have to decide is does the prior conviction require the attempted use of force, and it does not, and it ends the matter. That's the exact conclusion that this Court should reach.

THE COURT: Thank you. So the issue, there are two, really two issues before the Court. The first is the defendant's challenge to the elements clause. And the elements clause requires -- the elements clause in Guideline Section 4B1.1(a)(1) is whether the crime of conviction, and here what we are talking about is Mr. Reese having a conviction for attempted first-degree murder in the state of Colorado, the question is whether it has as an element the use, attempted use or threatened force against the person of another.

And then the second issue is whether or not it meets the enumerated clause. The enumerated clause defines a crime of violence as murder. It doesn't say anything about attempted murder, but the commentary does, and that is why we were talking about the *Stinson* case and *Martinez*, which was a 10th Circuit case from 2010.

So let's first of all focus on the elements clause. And Mr. Johnson on behalf of Mr. Reese relies upon the United States Supreme Court decision in *Taylor*. The *Taylor* decision

is reported at 142 S.Ct. 2015. It's a case from 2022. That case involved a Hobbs Act robbery, specifically attempted Hobbs Act robbery, and the Supreme Court held that attempted Hobbs Act robbery is not a crime of violence.

In *Taylor*, the Supreme Court used a hypothetical. On the hypothetical there was an issue of a threat. And as a result, various decisions since *Taylor* addressing very similar or the same issue have decided that the Supreme Court in *Taylor* did not rule out attempted murder being considered to be a crime of violence. And one of the opinions and one that the United States cites is *Alverado-Linares v. United States* reported at 44 F.4th 1324. That opinion came out in August of last year. And the Eleventh Circuit in that particular case held that both murder and attempted murder under Georgia law nevertheless qualify as crimes of violence.

I agree with Mr. Johnson, however, that I don't think that you can distinguish *Taylor* by that means of just the threats because the logic of *Taylor* is, I believe, focused on whether the crime at issue, namely attempted first-degree murder, has an element that involves the use, attempted use or threatened use of physical force against the person of another.

And as the Court in *Taylor* pointed out, it is necessary to focus not on whether first-degree murder is a crime of violence -- it obviously is and involves the use of force -- but whether or not attempted first-degree murder has

as an element the use of force. And Mr. Johnson cites the *Lehnert* case that was decided by the Colorado Supreme Court. And certainly the *Lehnert* case supplies -- and *Lehnert* is spelled L-E-H-N-E-R-T. And it's *People v. Lehnert* and it's reported at 163 P.3d 1111, a Colorado Supreme Court decision from 2007. And the facts of that case constitute an example of a person whose conviction for a first-degree murder was upheld even though the acts that she took certainly could not be considered to have involved the use of the force.

And as I mentioned with Ms. Rangel when I was talking to her about this issue, although it's certainly possible to -- and maybe even probable that most people who commit attempted first-degree murder perhaps do use force, the problem is that as the Supreme Court said in *Taylor*, but some cases are not all cases. And the government's problem is that no element of attempted Hobbs Act robbery requires the government to prove beyond a reasonable doubt that the defendant used, attempted to use or even threatened to use force. And I think that that same thing applies here, and *Lehnert* provides the example of a situation where a person was convicted of attempted first-degree murder and did not use force.

And once again, the elements of attempted first-degree murder under Colorado law, which Mr. Johnson correctly notes in Docket No. 49 on Page 2, are as follows: First of all, the elements of first-degree murder are as follows: "After

deliberation and with the intent to cause the death of a person other than himself caused the death of that person or of another person." That's Colorado Revised Statute 18-3-102(1)(a).

The definition of attempt under Colorado law is: "Acting with the kind of culpability otherwise required for the commission of the offense, ... engaged in conduct constituting a substantial step towards the commission of the offense." And that is Colorado Revised Statute 18-2-101(1).

The *Lehnert* case specifically held that: "An act of preparation" may constitute a "substantial step," so long as it sufficiently corroborates the defendant's purpose to commit the offense.

That holding in *Lehnert* I think also distinguishes some of the reasoning that has been used in cases since *Taylor* to distinguish *Taylor*, namely that if the mens rea that's required for, for instance, murder, and in particular murder in the first degree which requires deliberation, you know, that might suggest that it's at a higher level. It's corroborative of the person's intention to commit some type of bodily injury or death on the person, and therefore it satisfies the use of force element. But obviously, once again, *Lehnert*, it doesn't stand for that proposition in *Lehnert*. It in fact said that those preparatory activities, they need to be corroborative of the necessary intent, but the mere act of preparation could

constitute a substantial step.

And the facts in *Lehnert* are a perfect example of it. As I said before, I don't think any prosecutor would shy away from trying to convict Ms. Lehnert of attempted first-degree murder on those facts because they were corroborative of her intent to blow someone up. It's just that by the time she was apprehended, she had -- the attempt hadn't resulted in anything that you could call use of force. So I think in that regard you can't distinguish *Taylor*.

And moreover, I don't think that it's appropriate to distinguish *Taylor* the way that courts, for instance, the court in *Alverado-Linares* did by focusing just on threats because I don't think that the logic in *Taylor* revolved and can be limited to just some type of violent offense that could be performed through a threat.

Once again, going back to *Taylor*, and this is at Page 2022, quote, "The elements clause does not ask whether the defendant committed a crime of violence or attempted to commit one. It asks whether the defendant did commit a crime of violence and it proceeds to define a crime of violence as a felony that includes as an element the use, attempted use or threatened use of force."

So, you know, the question is not whether first-degree murder is a crime of violence. It obviously is a crime of violence because to murder someone you necessarily have to use

force, but rather the question is whether attempted first-degree murder has as an element, and I don't think that it necessarily does as the *Lehnert* case is a prime example of.

Moreover, I think that there is a danger that if the Court tries to focus on the serious nature of a given crime like first-degree murder, it's obviously probably the most serious crime other than a mass murder, and therefore say, well, by its very definition an attempt to commit that crime has to necessarily involve the use of force, you are in danger of kind of resurrecting the residual clause and focusing on whether some crimes by their very nature are such that, you know, use force. And I don't think that that's the appropriate analysis, and I think that *Taylor* cannot be distinguished by trying to just focus on the nature of the crime.

I think that there -- that's what is happening in some of the post-*Taylor* cases which rely upon long-standing precedent within those circuits defining particular crimes as crimes of violence and then assuming that the attempt must necessarily involve the use of force as well. So I will sustain the defendant's objection based upon *Taylor* to the elements clause.

Next we get to the enumerated offense clause. And as I read from the guideline section, the enumerated clause simply says -- has a list of crimes which are crimes of violence, and one of them is murder. It doesn't say -- it doesn't use the

attempt in the guideline, the word attempt. However, the commentary does expand the meaning to include attempting to commit such offenses, and that's in Application Note 1 under the definition of crime of violence.

As Mr. Johnson acknowledges on behalf of Mr. Reese, the 10th Circuit in United States v. *Martinez*, 602 F.3d 1166 from 2010 did hold that the Sentencing Commission appropriately exercised its authority to expand the guideline in that regard. And when the 10th Circuit did so, it was -- as I talked to Mr. Johnson about, the landscape involving the guidelines was a lot different. We didn't have an invalidation of the residual clause. And based upon the criteria that was appropriate then, the 10th Circuit decided that the sentencing commission appropriately exercised its authority.

As Ms. Rangel has mentioned in the government's response, there is Supreme Court authority backing up what the 10th Circuit held in *Martinez*, and that's authority from *Stinson*, S-T-I-N-S-O-N, which was -- which is reported at 508 U.S. 36 from 1993. And the government additionally relies appropriately on *Chavez*, which is a 10th Circuit opinion from 2011.

Mr. Reese is relying upon a later decision from the Supreme Court in an opinion that -- let's see if I can find the entire cite -- *Kisor v. Willkie*, reported at 139 S.Ct. 2400, specifically at 2420 from 2019 which has clarified that the

Court needs to go through a different series of steps when determining whether or not an agency's interpretation of a statute is to be deferred to.

An example of the 10th Circuit applying that analysis is *Reyes-Vargas v. Barr*, 958 F.3d 1295, a case from 2020 where the Court says that it needs to go through a three-step process. The question really becomes here that which I posed to Mr. Johnson, which is should I, district court, analyze *Kisor* and effectively ignore previous precedent from *Stinson* and also from *Chavez* and also *Martinez* and hold that the Sentencing Commission's expansion of the term murder to include attempted murder is now invalid and therefore the Court should just ignore it. And I don't think that that's an appropriate thing for the Court to do. I think that's up to the 10th Circuit to do that. And in the meantime, I think that I am bound by the precedent that exists.

I therefore overrule the defendant's objection to the guideline -- or rather to the presentence investigation finding that attempted first-degree murder is a crime of violence. I do find that the Presentence Investigation Report does appropriately under that authority find that the defendant gets the enhancement for a crime of violence based upon his previous conviction of attempted first-degree murder, and as a result that aspect of the objection will be overruled.

Next question becomes whether Mr. Johnson has any