NO. _____

In the

Supreme Court of the United States

JAMAILE HUEY,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I. QUESTION PRESENTED FOR REVIEW

Whether a state robbery conviction, sustained under a statute without a specified *mens rea* for the element of violence or threat of violence, but with a specific *mens rea* for the theft element of the offense, is a "crime of violence" under U.S.S.G. § 4B1.2(a), in light of this Court's decision in *Borden v. United States*, 141 S. Ct. 1817 (2021).

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IV. LIST OF ALL DIRECTLY RELATED PROCEEDINGS

- *United States v. Huey*, No. 3:21-cr-00030, U.S. District Court for the Southern District of West Virginia. Judgment entered July 14, 2021.
- *United States v. Huey*, Appeal No. 21-4374, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on October 12, 2023.

V. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Huey's sentence is unpublished and is attached to this Petition as Appendix A. The portion of the sentencing transcript containing the district court's oral ruling regarding Huey's prior conviction is attached to this Petition as Appendix B. The judgment order is unpublished and is attached to this Petition as Exhibit C.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on October 12, 2023. No petition for rehearing was filed. This Petition is filed within 90 days of the date the court's entry of its judgment. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. STATUTES AND REGULATIONS INVOLVED

The issue in this Petition requires interpretation and application of several related provisions of the 2018 edition of the United States Sentencing Guidelines, including U.S.S.G. § 2K2.1(a), which provides, in pertinent part:

> Base Offense Level (Apply the Greatest):
>
> (1) 26, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense

Along with U.S.S.G. § 2K2.1, Application Note 13(A), which provides, in pertinent part:

> "Crime of violence" and "controlled substance offense" have the meaning given those terms in § 4B1.2

And U.S.S.G. § 4B1.2, which provides, in pertinent part:

> (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).

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction

On January 11, 2021, a criminal complaint was filed in the Southern District of West Virginia charging Jamaile Huey with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). J.A. 6-12.[1] On February 23, 2021, a grand jury returned an indictment charging the same offense. J.A. 13-14. Because that charge constitutes an offense against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after Huey pleaded guilty to the indictment. J.A. 69. A Judgment and Commitment Order was entered on entered on July 14, 2021. J.A. 59-65. Huey filed a timely notice of appeal on July 28, 2021. J.A. 66. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

B. Facts Pertinent to the Issue Presented

In October 2019 investigators in Huntington, West Virginia, received a tip with a photograph of Huey in possession of a "black pistol that appeared to have a high-capacity magazine." J.A. 69. Fifteen months later, investigators learned that Huey had an active arrest warrant for a parole violation in Michigan and obtained a warrant to search his home. As a result of that search, investigators seized a 9

[1] "JA" refers to the Joint Appendix filed in this appeal before the Fourth Circuit.

millimeter pistol. J.A. 70. They also seized a "loaded high-capacity magazine." J.A. 71.

In light of Huey's prior convictions, he was charged with being a felon in possession of a firearm and pleaded guilty to that offense. J.A. 13-14, 69. Following his guilty plea, a Presentence Investigation Report ("PSR") was prepared to assist the district court at sentencing. J.A. 67-93.

1. Huey objects to the classification of his prior Michigan robbery offenses as crimes of violence.

The probation officer recommended Huey's base offense level be 26, because the pistol was "capable of accepting a large-capacity magazine" and Huey had two prior convictions in Michigan for unarmed robbery that "appear to meet the definition of a crime of violence." J.A. 72; U.S.S.G. § 2K2.1(a)(1). The only recommended adjustment was a three-level reduction for acceptance of responsibility. J.A. 73. With a final offense level of 23 and a Criminal History Category V, Huey's recommended advisory Guideline range was 84 to 105 months in prison. J.A. 79, 84.

Huey objected to those calculations, particularly to the classification of his prior Michigan robbery convictions as crimes of violence. In his letter to the probation officer, Huey explained that this was "a place holder objection, only because of *Borden*,[2] and how fast the COV case law is changing" and promising additional research and argument. J.A. 91. That argument came as part of a memorandum filed

[2] *Borden v. United States*, 141 S. Ct. 1817 (2021).

prior to sentencing. J.A. 15-24. Huey identified the issue with his prior convictions as the *mens rea* required to commit them, noting that while the "Sixth Circuit has been consistent" in finding the offense to be a violent felony under 18 U.S.C. § 924(e), "none of the leading case law discuss the mental state required to sustain an unarmed robbery conviction, and in particular whether or not 'recklessness' is sufficient to establish the elements of 'felonious taking' or the use of force and violence." J.A. 19-20. After *Borden*, "this is now very important – and a completely separate inquiry going beyond whether 'violence' under" the statute "is the same as 'violence' defined by" this Court. J.A. 20. He argued that the "use of force and violence, assault, or putting someone in fear element . . . may be committed recklessly, even if the felonious taking of property element ends up being intentional." J.A. 21. As a result, his two prior Michigan convictions were not crimes of violence and his base offense level should be 20, not 27. J.A. 21-22. The Government did not file a written memorandum prior to sentencing.

2. The district court overrules Huey's objection, considers his prior convictions as crimes of violence, and imposes sentence accordingly.

A sentencing hearing for Huey was held on July 12, 2021. J.A. 25-58. Huey renewed his argument that the Michigan unarmed robbery convictions should not count as crimes of violence, arguing that "in the absence of controlling authority saying explicitly that recklessness is not a mens rea" and "knowing the three elements the state of Michigan requires," after *Borden* "it would not be a crime of violence." J.A. 29. The Government responded that in *Borden* this Court "does say an

offense qualifies as a violent felony . . . if it has an element of use or attempted use or threatened use of physical force against the person of another, which is exactly what the Michigan Penal Code specifies." *Ibid.* Huey responded that the Government's argument "miss[es] the point about mens rea" and that "[w]e're not talking about the level of force here." J.A. 31. He disputed the Government's interpretation of *Borden* ,arguing that it "didn't say if it was reckless, even if you use force, it would be a crime of violence" but that "if the mens rea is recklessness, then it's not a crime of violence even if force was involved." *Ibid.*

The district court overruled Huey's objection. It concluded that *Borden* "explicitly deals with a case where the charge in front of the court was a charge explicitly based on recklessness," whereas "even at common law when an offense like robbery is charged, it involves a mens rea of [an] intentional act directed at a specific person." J.A. 32. The district court did not see *Borden* "as opening up a door for every offense to then be determined and reviewed whether or not it . . . might include a recklessness element." *Ibid.* The district court also concluded that Huey's offenses were "one of the enumerated offenses of robbery." *Ibid.*

In light of its overruling of that objection, the district court adopted the Guideline calculations from the PSR. J.A. 34. However, the district court did vary downward from Criminal History Category V to IV to take account of the fact that Huey faced a state parole revocation due to this offense. J.A. 45-46. The district court imposed a sentence of 80 months in prison, within the newly calculated Guideline range, followed by a three-year term of supervised release. J.A. 46.

3. The Fourth Circuit affirms Huey's sentence.

Huey appealed to the Fourth Circuit, renewing his argument that after *Borden* his Michigan robbery convictions were not crimes of violence. *United States v. Huey*, Appeal No. 21-4374, Dkt. No. 12 at 8-13. Specifically, Huey noted that under *Borden* the result was the same under a force clause analysis or enumerated offense analysis. *Id*. at 13, n.4. The court affirmed Huey's sentence in an unpublished opinion. *United States v. Huey*, 2023 WL 6638076 (4th Cir. 2023). Defining robbery as "the misappropriation of property under circumstances involving [immediate] danger to the person," *Id*. at *1, quoting *United States v. Simmons*, 917 F.3d 312, 316 (4th Cir. 2019), the court concluded that "Michigan's unarmed robbery statute, as it existed" at the time of Huey's prior convictions, "is a categorial match for this definition of robbery." *Ibid*. Because "Michigan unarmed robbery, just as generic robbery, requires the perpetrator to use force or put the victim in fear of immediate danger to induce the victim to part with his or her property," it therefore "qualifies as a crime of violence under the enumerated offenses clause in U.S.S.G. § 4B1.2(a)(2)." *Ibid*. Nowhere in its opinion did the Fourth Circuit mention *Borden*.

IX. REASON FOR GRANTING THE WRIT

The writ should be granted to determine whether a state robbery conviction, sustained under a statute without a specified *mens rea* for the element of violence or threat of violence, but with a specific *mens rea* for the theft element of the offense, is a "crime of violence" under U.S.S.G. § 4B1.2(a), in light of this Court's decision in *Borden v. United States*, 141 S. Ct. 1817 (2021)

In *Borden v. United States*, 141 S. Ct. 1817 (2021), this Court held that an offense that required "only a *mens rea* of recklessness" could not qualify as a "violent felony" under the Armed Career Criminal Act. *Id*. at 1821. Courts use the same analysis to determine whether an offense qualifies as a "crime of violence" in other contexts, including under the Sentencing Guidelines. *See James v. United States*, 550 U.S. 192, 205 (2007)(Guidelines' "definition of a predicate 'crime of violence' closely tracks ACCA's definition of 'violent felony'"); *United States v. Hood*, 628 F.3d 669, 671 (4th Cir. 2010)(the two analyses are "substantially similar"). *Borden* presented a clear example of an offense with a recklessness *mens rea* because that was the specific language of the statute. *Borden*, 141 S. Ct. at 1822.

This case presents a related question – what is the status of a prior state conviction sustained under a statute that does not require a particular *mens rea* as to the element of force in the offense, but does with regard to the element of theft or taking? The Michigan robbery statute under which Huey sustained his prior convictions was such a statute. Whether such an offense qualifies as a crime of violence is an important question of federal law that this Court should resolve. *See* Rules of the Supreme Court 10(c).

A. Huey's offense level is increased based on two prior unarmed robbery convictions.

The base offense level for a defendant convicted of illegally possessing a firearm is based on a combination of the type of weapon possessed and his prior criminal history. U.S.S.G. § 2K2.1(a). In Huey's case, the firearm he possessed was "capable of accepting a large capacity magazine," subjecting him to a base offense level of at least 20. U.S.S.G. § 2K2.1(a)(4)(B). However, the probation officer recommended a base offense level of 26 because Huey "committed any part of the instant offense subsequent to sustaining at least two felony convictions of . . . a crime of violence." U.S.S.G. § 2K2.1(a)(1). The definition of "crime of violence" is the same as that used in determining whether someone qualifies as a career offender under U.S.S.G. § 4B1.2.

An offense qualifies as a crime of violence if it is "punishable by imprisonment for a term exceeding one year" and it either "has as an element the use, attempted use, or threatened use of physical force against the person of another" or one of a number of listed offenses not relevant here. U.S.S.G. § 4B1.2(a). In determining whether prior conviction qualifies as a crime of violence, courts must employ the categorical approach. *See Descamps v. United States*, 570 U.S. 254, 260-261 (2013); *United States v. Royal*, 731 F.3d 333, 341-41 (4th Cir. 2013).[3] This approach requires

[3] As noted above, although *Descamps* is an Armed Career Criminal Act case, courts have routinely used the same analysis for those and career offender predicates, given the similarity between the two provisions. *United States v. Montes-Flores*, 736 F.3d 357, 363 (4th Cir. 2013).

that courts "look only to the statutory definitions – *i.e.*, the elements – of a defendant's [prior conviction] and not to the particular facts underlying [it]" in whether the offense qualifies as a crime of violence. *Descamps*, 133 S. Ct. at 261 (cleaned up); *Royal*, 731 F.3d at 341-342. In addition, under the categorical approach, an offense can only qualify as a crime of violence if all of the criminal conduct covered by a statute – "including the most innocent conduct" – matches or is narrower than the definition of crime of violence. *United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir. 2012). If the most innocent conduct penalized by a statute does not constitute a crime of violence, then the statute categorically fails to qualify as a crime of violence.

B. Huey's prior unarmed robbery convictions did not require any particular *mens rea* related to the use or threatened use of force.

In this case, the two prior crimes of violence identified by the probation officer were Huey's convictions in 2000 and 2002 for unarmed robbery in Michigan. J.A. 72, 74-78. As in many states, "Michigan's unarmed robbery statute is derived from the common law." *People v. Randolph*, 648 N.W.2d 164, 167 (Mich. 2002).[4] In order to obtain a conviction, the state must prove that a defendant did "(1) feloniously take the property of another, (2) by force or violence or assault or putting in fear; and (3) be unarmed." *People v. Harverson*, 804 N.W.2d 757, 761 (Mich. Ct. App. 2010). It is "a specific intent crime for which the prosecution must establish that the defendant intended to permanently deprive the owner of property." *Ibid.* There is no dispute

[4] In 2004, Michigan's robbery statute was amended. *People v. Williams*, 814 N.W.2d 270, 273-274 (Mich. 2012).

that the element of "force or violence or assault or putting in fear" meets the definition of "violent force" necessary to make a conviction for unarmed robbery a crime of violence. *See Chaney v. United States*, 917 F.3d 895 (6th Cir. 2019). Nonetheless, it cannot be classified as such due to the *mens rea* attached to that element.

This Court recently addressed the requisite *mens rea* for prior convictions that enhance sentences in *Borden*. Borden was convicted of being a felon in possession of a firearm and sentenced under the Armed Career Criminal Act. In the courts below, Borden had unsuccessfully argued that his prior Tennessee conviction for reckless aggravated assault was not a "violent felony" under ACCA because the force involved in the offense was only required to be done recklessly. *Borden*, 141 S. Ct. at 1822. This Court agreed and remanded Borden's case for resentencing. In reaching that conclusion, this Court recognized "four states of mind, as described in modern statutes and cases, that may give rise to criminal liability." *Id*. at 1823. The two most culpable states of mind – purpose and knowledge – would support a violent felony designation. Noting that the distinction between the two was "limited," this Court explained that a person who acts knowingly with regard to violence "makes a deliberate choice with full awareness of consequent harm," even "though not affirmatively wanting the result." *Ibid*. By contrast, the two lesser states of mind – recklessness and negligence – do not lead to offenses being violent felonies. Recklessness requires acting in disregard of a risk, but "[t]hat risk need not come anywhere close to a likelihood." *Id*. at 1824. Looking to the definition of violent felony in ACCA, the Court held that the "phrase 'against another,' when modifying 'use of

force,' demands that the perpetrator direct his action at, or target, another individual. Reckless conduct is not aimed in that prescribed manner." *Id*. at 1825.

Huey's prior convictions do not require that violent force to be "aimed in that prescribed manner." For unarmed robbery in Michigan, the required felonious taking is of "property that may be the subject of a larceny from the person." *People v. Himmelein*, 442 N.W.2d 667, 673 (Mich. Ct. App. 1989). Thus "***the*** intent element of this offense" of unarmed robbery is related to the taking of property, not the use of force. *Harverson*, 804 N.W.2d at 762 (emphasis added); *see also People v. Crawford*, 923 N.W.2d 296, 301 (Mich. Ct. App. 2018)("[a]rmed robbery is a specific-intent crime, requiring proof that the defendant intended to permanently deprive the owner of his or her property").[5] As one judge put it, "The intent necessary for the offense of armed robbery is the intent necessary to commit larceny . . . which is the intent to steal another person's property or to permanently deprive the owner of his or her property." *Crawford*, 923 at 307 (Markey, P.J., concurring). Without any intent element related to the use of force, unarmed robbery in Michigan can be committed with a *mens rea* of recklessness and fails to be a crime of violence under *Borden*. For example, in *People v. Sanders*, 184 N.W.2d 269 (Mich. Ct. App. 1970), the defendant "took a bag of money from the bedroom by stealth" and then, after being discovered, "fled from the house to a waiting automobile." *Id*. at 276. The victim's grandson gave chase, prompting the defendant to "fire[] a shot into the air to prevent the grandson from

[5] *Crawford* was partly vacated and partly affirmed on other grounds by the Michigan Supreme Court. *People v. Crawford*, 924 N.W.2d 248 (Mich. 2019).

catching him or obtaining the license number of the car." *Ibid.*[6] Firing into the air like that, without any particular person being targeted, is a paradigmatic reckless act, one that is not "aimed in that prescribed manner."

A crime of violence under § 4B1.2(a) requires not just an element of violent force, but force that is intentionally directed at another person. Huey's convictions in Michigan for unarmed robbery do not require the proof of such an element, as the element of force in that offense may be shown to have been the result of reckless conduct. As a result, those offenses are not crimes of violence and Huey's advisory Guideline range was miscalculated, resulting in the imposition of a procedurally unreasonable sentence.

For the same reason, Huey's prior convictions do not qualify as generic robbery under the enumerated offense clause of U.S.S.G. § 4B1.2(a)(2), which was the basis the Fourth Circuit relied upon for affirming his sentence. The court concluded that Michigan's robbery statute at the time of Huey's convictions "is a categorical match" for the generic definition of robbery used in the Guidelines, which is "the misappropriation of property under circumstances involving [immediate] danger to the person." *Huey*, 2023 WL 6638076 at *1, quoting *United States v. Gattis*, 877 F.3d 150, 156 (4th Cir. 2017). But Michigan law makes clear not only that the use of force

[6] As explored in *Randolph*, *Sanders* was the first of many cases in the Michigan Courts of Appeals to hold that the force element of robbery could be committed during the escape following the taking of property, a position the state supreme court ultimately concluded was incorrect. *Randolph*, 648 N.W.2d at 168-172. Nonetheless, for more than three decades it was possible to be convicted based on force used during an escape which could, as *Sanders* shows, be committed recklessly.

can occur after the taking but can be done recklessly, making the offense broader than the generic definition of robbery. As a result, it cannot be a crime of violence. *See Mathis v. United States*, 579 U.S. 500, 504-505 (2016).

X. CONCLUSION

For the reasons stated, the Supreme Court should grant certiorari in this case.

Respectfully submitted,

JAMAILE HUEY

By Counsel

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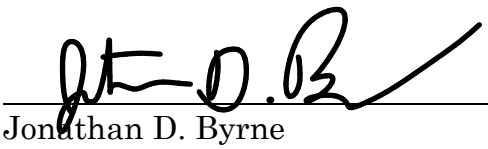

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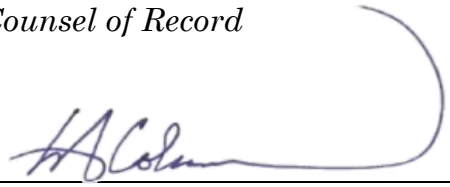

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