

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INCORPORATED

835 Georgia Avenue, Suite 600
Chattanooga, Tennessee 37402

Assistant Federal Defenders:

Myrlene R. Marsa
Gianna Maio
Jennifer Niles Coffin
Erin Rust
Presita West
Joe Austin

Phone (423) 756-4349
Fax (423) 756-4345

January 23, 2020

Honorable Scott S. Harris, Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Borden v. United States*, No. 19-5410, and *Walker v. United States*, No. 19-373

Dear Mr. Harris:

In *Walker*, this Court granted certiorari to consider the question whether a criminal offense that can be committed with a mens rea of recklessness can qualify as a “violent felony” under the Armed Career Criminal Act, 18 U.S.C. § 924(e). Yesterday, counsel for the petitioner in *Walker* filed a suggestion of death, indicating that the petitioner in that case had passed away and that the writ of certiorari should therefore be dismissed.

The petition for certiorari in this case, *Borden*, presents the same question as *Walker*, along with a distinct second question. Before the Court granted certiorari in *Walker*, the Solicitor General filed a brief in this case acquiescing in certiorari as to the first question. The Solicitor General explained that the decision below “implicates a circuit conflict that warrants resolution by this Court,” that the question is “important and frequently recurring,” and that this case “presents a suitable vehicle for resolving” that question. U.S. Br. 11, 15. While indicating that *Walker* “may be a marginally better vehicle,” the government urged the Court to grant certiorari in either or both cases because “the interests of judicial economy favor resolution of the issue this Term.” *Id.* at 14, 16, 20. The Court has not acted on the petition in this case after granting certiorari in *Walker*.

The Court should consider this petition again at its earliest available opportunity and then grant certiorari. Given the importance of the first question, which is awaiting resolution in courts around the country -- including multiple en banc proceedings that had been stayed pending the Court’s resolution in *Walker* -- petitioner agrees with the government that resolution of the question this Term would serve the interests of judicial economy.

Having previously suggested that this case was a suitable vehicle for the Court's review, the government now contends that the Court should instead grant certiorari in *Burris v. United States*, No. 19-6186 -- a case the government had previously suggested was a poor vehicle for the Court's review. See U.S. Br. 16 (noting that *Burris* "does not cleanly present" the question). Petitioner takes no position on whether the petition in *Burris* should be granted.

But regardless, the Court should grant the petition in this case. The government's sole explanation for its sudden change of heart is that *Burris* involves the same predicate offense (Texas robbery) as *Walker*. But that is immaterial, because the question presented across these cases encompasses all state-law offenses with a mens rea of recklessness. The petitioner's brief in *Walker* interchangeably discussed both the predicate offense at issue in *Walker* and the predicate offense at issue here (Tennessee aggravated assault). See 19-375 Br. at 38. This case therefore remains a "suitable vehicle" for resolving the question presented. U.S. Br. 16.

The petitioner in *Walker* had already filed his merits brief before his death, and Mr. Borden intends to engage Mr. Walker's counsel, an experienced practitioner in this Court, in the event certiorari is granted. Counsel is prepared to proceed to file a brief on an expedited basis and to present oral argument in the March or April sitting.

Sincerely,

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Erin Rust
Assistant Federal Defender