LATROY LEON BURRIS,
*PETITIONER*,

v.

UNITED STATES OF AMERICA,
*RESPONDENT*,

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
**FILED**
April 10, 2019
Lyle W. Cayce
Clerk

No. 17-10478

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

LATROY LEON BURRIS,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas

Before WIENER, GRAVES, and HO, Circuit Judges.

WIENER, Circuit Judge:

Defendant-Appellant Latroy Leon Burris pleaded guilty to being a felon in possession of a firearm and was sentenced under the Armed Career Criminal Act (ACCA), which provides for an increased sentence if the defendant has been convicted of three prior violent felonies. Burris contends that he was not eligible for the increase because his prior Texas conviction for robbery was not a violent felony.

By a divided vote, we previously held that Texas robbery does not have as an element the "use, attempted use, or threatened use of physical force."[1]

[1] *United States v. Burris*, 896 F.3d 320 (5th Cir. 2018), *opinion withdrawn*, 908 F.3d 152 (5th Cir. 2018) (per curiam).

The government moved for rehearing en banc, and we withdrew our opinion pending the en banc court's decision in *United States v. Reyes-Contreras*.[2] After the en banc court decided *Reyes-Contreras*, the Supreme Court decided *Stokeling v. United States*, which held that Florida robbery qualified as a crime of violence under the ACCA.[3] The parties filed supplemental briefs addressing *Reyes-Contreras* and *Stokeling*.

Those cases apply to Burris's sentence and govern the outcome of this case. We hold that robbery under Texas Penal Code § 29.02(a) requires the "use, attempted use, or threatened use of physical force" and affirm Burris's increased sentence under the ACCA.

## I. FACTS AND PROCEEDINGS

In July 2016, Burris pleaded guilty to (1) being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and (2) possession with intent to distribute a controlled substance, under 21 U.S.C. § 841(a)(1) & (b)(1)(C).[4] The presentence investigation report (PSR) determined that Burris was an armed career criminal under 18 U.S.C. § 924(e), *viz.*, the ACCA. A defendant is an armed career criminal if he (1) is convicted of violating § 922(g), as Burris was by virtue of his guilty plea, and (2) has three prior convictions for violent felonies or serious drug offenses.[5] If a defendant meets these criteria, he is subject to a minimum sentence of fifteen years imprisonment.[6]

The PSR states that Burris had three prior convictions qualifying him for the ACCA: (1) a 1993 Texas conviction for robbery, (2) a 1993 Texas conviction for aggravated robbery, and (3) a 2012 Texas conviction for

[2] 910 F.3d 169 (5th Cir. 2018) (en banc).
[3] *Stokeling v. United States*, 139 S. Ct. 544 (2019).
[4] The facts of Burris's instant offenses are not relevant to the issue on appeal, which concerns only his prior Texas state court convictions.
[5] 18 U.S.C. § 924(e)(1).
[6] *Id.*

manufacturing/delivering a controlled substance. When he pleaded guilty, Burris disputed that he qualified for the enhanced penalties of the ACCA. After the probation office issued the PSR, Burris objected, insisting that his convictions for robbery and aggravated robbery do not qualify for the ACCA.[7] The district court adopted the findings of the PSR, concluding that Burris's prior convictions for robbery and aggravated robbery qualified him for the ACCA's enhancement. The court then sentenced him to 188 months in custody, a sentence at the low end of the applicable guidelines range.

Burris timely appealed, challenging the district court's ruling that his Texas convictions for robbery and aggravated robbery were "violent felonies." After Burris filed his opening brief, another panel of this court held that the version of aggravated robbery for which Burris was convicted is a violent felony under the ACCA.[8] Burris conceded that his aggravated robbery conviction qualified as a violent felony,[9] so this appeal concerns only whether Burris's conviction for simple robbery also qualifies as a violent felony.

The panel majority previously held that Burris's conviction for simple robbery was not a violent felony under the ACCA.[10] The government moved for rehearing en banc, and we withdrew our opinion pending the en banc court's decision in *Reyes-Contreras*.[11] After that, the Supreme Court decided *Stokeling v. United States*, which considered a similar issue to the one presented here. The parties filed supplemental briefing addressing those cases.

[7] Burris does not appear to dispute that the 2012 conviction for manufacturing/delivering a controlled substance is a serious drug offense under the ACCA.

[8] *United States v. Lerma*, 877 F.3d 628, 631, 635 (5th Cir. 2017) (explaining that aggravated robbery is divisible and the defendant's aggravated robberies involved robbery-by-threat and using and exhibiting a deadly weapon). Burris was convicted of the same type of aggravated robbery.

[9] He does, however, preserve this argument for further review.

[10] *Burris*, 896 F.3d 320.

[11] *Burris*, 908 F.3d 152.

## II. STANDARD OF REVIEW

The government acknowledges that Burris preserved his objection in the district court. We therefore review de novo the district court's conclusion that his simple robbery conviction was a violent felony under the ACCA.[12]

## III. ANALYSIS

### A. The Relevant Statutes

The ACCA defines a "violent felony," in relevant part, as:

> [A]ny crime punishable by imprisonment for a term exceeding one year . . . that—
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.][13]

Before the Supreme Court's decision in *Samuel Johnson v. United States*,[14] Texas robbery was considered a violent felony under the second part of clause (ii), known as the "residual clause," because it "involve[d] conduct that presents a serious potential risk of physical injury to another."[15] In *Samuel Johnson*, however, the Court struck down the residual clause as unconstitutionally vague.[16] Consequently, robbery is a violent felony under the ACCA if it has as an element the use, attempted use, or threatened use of "physical force."

### B. Divisibility

Texas robbery is defined in § 29.02(a) of the Texas Penal Code as follows:

> A person commits an offense if, in the course of committing theft . . . and with intent to obtain or maintain control of the property, he:

[12] *United States v. Constante*, 544 F.3d 584, 585 (5th Cir. 2008).
[13] 18 U.S.C. § 924(e)(2)(B).
[14] 135 S. Ct. 2551 (2015).
[15] *United States v. Davis*, 487 F.3d 282, 285 (5th Cir. 2007).
[16] *Samuel Johnson*, 135 S. Ct. at 2557.

> (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.[17]

We refer to the alternatives delineated by subparts (1) and (2) as "robbery-by-injury" and "robbery-by-threat." This court has never addressed whether § 29.02(a) is divisible or indivisible[18]—that is, whether robbery-by-injury and robbery-by-threat are (a) different crimes or (b) a single crime that can be committed by two different means.[19]

If § 29.02(a) is indivisible, we "focus solely on whether the elements of the crime of conviction" include the use of force.[20] This focus on the elements of the offense of conviction is known as the "categorical approach."[21] Under that approach, if the least culpable conduct covered by either robbery-by-injury or robbery-by-threat requires the use, attempted use, or threatened use of physical force, Texas robbery is a violent felony.[22]

To determine what a state statute covers, "federal courts look to, and are constrained by, state courts' interpretations of state law."[23] "[T]he focus on the minimum contact criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense; there must be a 'realistic probability, not a theoretical possibility, that the state would apply its statute to conduct

[17] TEX. PENAL CODE ANN. § 29.02(a).

[18] *Cf. United States v. Garza*, No. 2:04-CR-269, 2017 WL 318861, at *3 (S.D. Tex. Jan. 23, 2017) (implicitly characterizing robbery as a divisible statute by using the "modified categorical approach"); *United States v. Roman*, No. CR H-92-160, 2016 WL 7388388, at *3 (S.D. Tex. Dec. 20, 2016) (characterizing the robbery statute as divisible); *United States v. Fennell*, No. 3:15-CR-443-L (01), 2016 WL 4491728, at *5 (N.D. Tex. Aug. 25, 2016), *reconsideration denied*, No. 3:15-CR-443-L (01), 2016 WL 4702557 (N.D. Tex. Sept. 8, 2016), *and aff'd*, 695 F. App'x 780 (5th Cir. 2017) (appearing to avoid the issue by holding that the robbery statute was not a violent felony "even applying the categorical approach").

[19] *See Lerma*, 877 F.3d at 631.

[20] *Id.* (citing *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016)).

[21] *Id.*

[22] *See Stokeling*, 139 S. Ct. at 556 (Sotomayor, J., dissenting).

[23] *Id.*

that falls outside [the use-of-force clause.]'"[24] "Without supporting state case law, interpreting a state statute's text alone is simply not enough to establish the necessary 'realistic probability.'"[25]

On the other hand, if § 29.02(a) is divisible, we use the "'modified categorical approach,' and look to a 'limited class of documents,' such as the indictment, jury instructions, and plea agreements and colloquies to determine the crime of conviction."[26] "Those sources may be used not to locate facts supporting a [crime-of-violence] enhancement, but only 'as a tool to identify the elements of the crime of conviction.'"[27] Under that approach, we first determine the specific subsection under which Burris was convicted and then consider whether that offense "has as an element the use . . . of . . . force."[28]

Burris's conviction documents do not specify whether he was convicted of robbery-by-injury or robbery-by-threat. His indictment states that he caused injury, but it charges him with *aggravated* robbery. We cannot look to the indictment to narrow the subsection of conviction if it indicts Burris for a crime other than the one to which he pleaded guilty.[29]

*Reyes-Contreras* confirmed, however, that we may "make reasonable use of the indictment, together with the judgment, to identify the crime of conviction."[30] The judgment and indictment state that Burris caused "serious bodily injury." Based on those documents, it appears that Burris pleaded guilty

[24] *Reyes-Contreras*, 910 F.3d at 184 & n.35 (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013)).

[25] *Id.* at 184–85 (quoting *United States v. Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017) (en banc)).

[26] *Id.* at 175 (quoting *Mathis*, 136 S. Ct. at 2249).

[27] *Id.* (quoting *Mathis*, 136 S. Ct. at 2253).

[28] *Id.* (quoting U.S.S.G. § 2L1.2 cmt. 1(B)(iii)).

[29] *Id.* (noting the "general rule that we cannot use an indictment to narrow the statute of conviction if the indictment is for a crime different from the crime stated in the judgment of conviction").

[30] *Id.* at 179.

to robbery-by-injury under § 29.02(a)(1) rather than robbery-by-threat under 29.02(a)(2).

We need not decide whether § 29.02(a) is divisible here, however, because our conclusion under either approach would be the same. As we explain in greater detail below, we hold that § 29.02(a)(1), robbery-by-injury, categorically requires the use of physical force. Section 29.02(a)(2), robbery-by-threat, requires "threaten[ing] or plac[ing] another in fear of" imminent bodily injury or death. Causing bodily injury requires the use of physical force, so threatening or placing another in fear of imminent bodily injury likewise requires the "attempted use, or threatened use of physical force."[31]

**C. Robbery-by-Injury**

We first address robbery-by-injury. Section 29.02(a)(1) requires that a defendant "cause[] bodily injury." Texas defines "bodily injury" as "physical pain, illness, or any impairment of physical condition."[32] We must determine whether "caus[ing] bodily injury" under Texas law requires the use of physical force under federal law. This involves two issues: (1) the relationship between causing bodily injury and the use of physical force and (2) the degree of force necessary to qualify as a violent felony under the ACCA's elements clause. The en banc court resolved the first issue in *Reyes-Contreras*, and the Supreme Court resolved the second issue in *Stokeling*.

**1. Causing Bodily Injury Versus Using Force**

*a. Prior Precedent*

In *United States v. Vargas-Duran*, the en banc court considered whether the Texas crime of "intoxication assault," which requires the defendant to have "cause[d] serious bodily injury to another," was a crime of violence under United States Sentencing Guideline ("U.S.S.G.") § 2L1.2, which "has as an

[31] 18 U.S.C. § 924(e)(2)(B)(i).
[32] TEX. PENAL CODE ANN. § 1.07(a)(8).

element the use, attempted use, or threatened use of physical force against the person of another."[33] The en banc court held that it did not, for two reasons. First, the court explained, the Texas statute does not require that the defendant have the state of mind needed to "use" force: "[T]he fact that the statute requires that serious bodily injury result . . . does not mean that the statute requires that the defendant have used the force that caused the injury."[34] Second, the court added that "[t]here is also a difference between a defendant's causation of an injury and the defendant's use of force."[35]

We reiterated this difference in *United States v. Villegas-Hernandez*, when we considered whether the Texas crime of assault—requiring that one "intentionally, knowingly, or recklessly cause[] bodily injury" or threaten to do so—was an "aggravated felony" under U.S.S.G. § 2L1.2(b)(1)(C).[36] Aggravated felonies also must have an element of "use, attempted use, or threatened use of physical force."[37] We held that Texas's assault offense did not have use or threatened use of physical force as an element.[38] The panel approvingly cited *Vargas-Duran*'s explanation that "[t]here is . . . a difference between a defendant's causation of an injury and the defendant's use of force."[39] The panel listed examples of acts that could cause bodily injury without physical force: "making available to the victim a poisoned drink while reassuring him

[33] 356 F.3d 598, 600 (5th Cir. 2004) (en banc) (citation omitted). Although this Guideline is not part of the ACCA, we have explained that "[b]ecause of the similarities between U.S.S.G. §§ 2L1.2(b)(1)(A), 4B1.2(a), 4B1.4(a), and 18 U.S.C. § 924(e), we treat cases dealing with [the elements clauses of] these provisions interchangeably." *United States v. Moore*, 635 F.3d 774, 776 (5th Cir. 2011) (citation omitted).

[34] *Vargas-Duran*, 356 F.3d at 606.

[35] *Id.*

[36] 468 F.3d 874, 877–78 (5th Cir. 2006).

[37] *Id.* at 878. This "aggravated felony" definition incorporates a statutory provision using the term "crime of violence," which is different from the "crime of violence" provision in *Vargas-Duran*. *See id.*; *Vargas-Duran*, 356 F.3d at 605.

[38] *Villegas-Hernandez*, 468 F.3d at 882.

[39] *Id.* at 880 (quoting *Vargas-Duran*, 356 F.3d at 606) (omission in original).

the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim."[40]

*b. The Supreme Court and the En Banc Court Weigh In*

Under *Vargas-Duran*, a person could "cause bodily injury" per Texas law without using "physical force" per federal law. But subsequent Supreme Court precedent and the en banc court's overruling of *Vargas-Duran* in *Reyes-Contreras* foreclose that conclusion.

In *Curtis Johnson v. United States*, the Supreme Court interpreted the phrase "physical force" within the ACCA. The Court noted that the common-law definition of "force" could be "satisfied by even the slightest offensive touching."[41] But the Court held that the common-law definition of force did *not* apply to the ACCA; in the ACCA context, "the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person."[42]

In *United States v. Castleman*, the Supreme Court considered the term "physical force" in the context of 18 U.S.C. § 922(g)(9), which prohibits the possession of firearms by anyone convicted of a "misdemeanor crime of domestic violence" (MCDV). A MCDV is defined using identical language to the ACCA: It "has, as an element, the use or attempted use of physical force."[43] But the Court distinguished "physical force" in the MCDV context from "physical force" in the ACCA. The Court held that in the context of a MCDV, "physical force" is defined as "the common-law meaning of 'force,'" which can be satisfied by mere offensive touching.[44] In making this distinction, the Court relied on

[40] *Id.* at 879.
[41] *Curtis Johnson v. United States*, 559 U.S. 133, 139 (2010) (emphasis in original).
[42] *Id.* at 140.
[43] 18 U.S.C. § 921(a)(33)(A)(ii).
[44] *United States v. Castleman*, 572 U.S. 157, 168 (2014).

the differences between the two contexts in which the term "physical force" arises: "[W]hereas the word 'violent' or 'violence' standing alone 'connotes a substantial degree of force,' that is not true of 'domestic violence.' 'Domestic violence' is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context."[45]

Applying this common-law definition of "physical force," the Court held that the defendant's conviction for "caus[ing] bodily injury" to the mother of his child categorically qualified as a MCDV.[46] In doing so, the Court explained that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force" in the MCDV context.[47] The Court added that "the common-law concept of 'force' encompasses even its indirect application," such as poisoning a victim.[48] The Court expressly declined to reach the question "[w]hether or not the causation of bodily injury necessarily entails violent force."[49] Neither did the Court decide the question whether minor injuries, such as a "cut, abrasion, [or] bruise . . . . necessitate violent force, under [*Curtis*] *Johnson*'s definition of that phrase."[50]

The Court next decided *Voisine v. United States*, which concerned the meaning of "use" rather than "physical force." Like *Castleman*, *Voisine* arose in the context of an MCDV.[51] Specifically, the Court considered whether a

[45] *Id.* at 164–65 (quoting *Curtis Johnson*, 559 U.S. at 140).
[46] *Id.* at 169, 167–71.
[47] *Id.* at 169.
[48] *Id.* at 170.
[49] *Id.* at 167. The Court added:

> The Courts of Appeals have generally held that mere offensive touching cannot constitute the "physical force" necessary to a "crime of violence," just as we held in [*Curtis*] *Johnson* that it could not constitute the "physical force" necessary to a "violent felony." Nothing in today's opinion casts doubt on these holdings, because—as we explain—"domestic violence" encompasses a range of force broader than that which constitutes "violence" *simpliciter*.

*Id.* at 164 n.4 (citations omitted).
[50] *Id.* at 170.
[51] *Voisine v. United States*, 136 S. Ct. 2272, 2276–77 (2016).

person could recklessly "use" physical force—in the context of an MCDV—or if such "use" required knowledge or intent.[52] The Court held that there was no requirement of intent or knowledge: A person can "use" force while acting recklessly.[53] The Court added that use of force does require a "volitional" action; by contrast, involuntary or accidental movements are not uses of force in the context of a MCDV.[54]

In *Reyes-Contreras*, the en banc court resolved five questions that arose after *Castleman* and *Voisine*: (1) whether *Castleman*'s holding was limited to MCDVs, as this court had previously held,[55] (2) whether this court's previous distinction between "direct" and "indirect" force[56] was compatible with *Castleman*, (3) whether this court's previous requirement of "bodily contact" to qualify as a crime-of-violence[57] survived *Castleman* (4) whether this court's precedent holding that "the 'use' of force required that [a] defendant *intentionally* avail himself of that force"[58] survived *Voisine*, and (5) whether this court's previous precedent that imposed a distinction between "causing injury" and the "use of force"[59] survived *Castleman* and *Voisine*.

The en banc court answered "no" to all of these. It held that "*Castleman* is not limited to cases of domestic violence" and that "for purposes of identifying a conviction as a [crime-of-violence], there is no valid distinction between direct and indirect force."[60] The court also overruled the "requirement of bodily

[52] *Id.*

[53] *Id.* at 2278–80.

[54] *Id.* at 2278–79.

[55] *See United States v. Rico–Mejia*, 859 F.3d 318, 321–23 (5th Cir. 2017) ("By its express terms, *Castleman*'s analysis is not applicable to the physical force requirement for a crime of violence[.]").

[56] *See id.*

[57] *See United States v. Calderon-Pena*, 383 F.3d 254, 260–61 (5th Cir. 2004) (en banc).

[58] *See Vargas-Duran*, 356 F.3d at 599 (emphasis added).

[59] *See id.* at 606 ("There is also a difference between a defendant's causation of an injury and the defendant's use of force.").

[60] *Reyes-Contreras*, 910 F.3d at 182.

contact" for a crime-of-violence.[61] Importantly for our purposes today, the en banc court held that "the 'use of force' does not require intent because it can include knowing *or reckless* conduct"[62] and that "*Castleman* and *Voisine* d[id] away with *Vargas-Duran*'s unnatural separation of causing injury from the use of force."[63]

In his supplemental brief to this panel, Burris contends that *Reyes-Contreras* did not actually hold that reckless causation of injury was sufficient to satisfy the elements clause. Burris maintains that *Reyes-Contreras*'s overruling of *Vargas-Duran* is dicta. *Vargas-Duran* held that that the "use" of force requires an intentional action; *Reyes-Contreras* overruled that holding, explaining "the 'use of force' does not require intent because it can include knowing or reckless conduct."[64] According to Burris, the Missouri manslaughter statute at issue in *Reyes-Contreras* criminalized only *knowing* and *intentional* causation of death, so the *Reyes-Contreras* court's conclusion that *reckless* conduct constitutes the "use" of force did not affect the statute at issue in the case.

We disagree with Burris. To the extent the en banc court's conclusion in *Reyes-Contreras* did not address an issue central to that case, the court cabined its reasoning by explaining that the Supreme Court in *Voisine* had already "abrogated the reasoning in *Vargas-Duran*" on that issue. Notably, although *Voisine* was an MCDV case and not an ACCA elements-clause case, Burris does not challenge *Reyes-Contreras*'s application of *Voisine*'s reasoning to the ACCA's similarly worded violent-felony provision,[65] or this court's earlier

[61] *Id.* at 183.
[62] *Id.* (emphasis added).
[63] *Id.*
[64] *Id.*
[65] *See id.* at 183–85; *see also United States v. Haight*, 892 F.3d 1271, 1280–81 (D.C. Cir. 2018) ("The statutory provision at issue in *Voisine* contains language nearly identical to ACCA's violent felony provision: Both penalize defendants convicted of crimes that have 'as

precedent applying *Voisine* outside the MCDV context.[66] So, even assuming *Reyes-Contreras*'s "disavow[al]" of *Vargas-Duran* was dicta, *Voisine*, a subsequent Supreme Court decision, binds this court and confirms that the use of force under the ACCA includes reckless conduct.[67]

The combination of (1) *Castleman*'s holding that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force,"[68] (2) *Reyes-Contreras*'s holding that *Castleman* is not limited to the MCDV context,[69] (3) *Voisine*'s holding that reckless conduct constitutes the use of physical force,[70] and (4) *Reyes-Contreras*'s holding that *Castleman* and *Voisine* eliminated the "unnatural separation of causing injury from the use of force"[71] governs the outcome here. Section 29.02(a)(1) prohibits the reckless causation of bodily injury. *Castleman*, *Voisine*, and *Reyes-Contreras* confirm that reckless conduct constitutes the "use" of physical force under the ACCA, and that the distinction between causing an injury and the use of force is no longer valid. Causing bodily injury under § 29.02(a)(1) necessarily requires the use of physical force.

*c. Retroactivity*

Faced with this change in precedent, Burris contends that *Voisine* and *Reyes-Contreras* should not apply retroactively. He insists that those decisions

an element' the 'use' of 'physical force.' 18 U.S.C. §§ 921(a)(33)(A)(ii), 924(e)(2)(B)(i). So *Voisine*'s reasoning applies to ACCA's violent felony provision.").

[66] *E.g.*, *United States v. Mendez-Henriquez*, 847 F.3d 214, 220–22 (5th Cir. 2017), *cert. denied*, 137 S. Ct. 2177 (2017) (applying *Voisine*'s holding in the context of a "crime of violence" under the sentencing guidelines).

[67] *See Voisine*, 136 S. Ct. at 2279 ("But the word 'use' does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so. Or, otherwise said, that word is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct.").

[68] *Castleman*, 572 U.S. at 169.

[69] *Reyes-Contreras*, 910 F.3d at 180–82

[70] *Voisine*, 136 S. Ct. at 2279.

[71] *Reyes-Contreras*, 910 F.3d at 183.

amount to a substantial change in this court's precedent and a "significant departure" from the prior legal regime that relaxed the government's burden. We hold that retroactive application of those decisions to Burris's sentence does not violate due process.

The *Ex Post Facto* Clause does not apply to the judiciary.[72] "Strict application of *ex post facto* principles in that context would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system. The common law . . . presupposes a measure of evolution that is incompatible with stringent application of *ex post facto* principles."[73] In *Bouie v. City of Columbia*, for example, the Court held that a South Carolina Supreme Court's interpretation of a statute could not apply retroactively because the construction was (1) "clearly at variance with the statutory language"; (2) had "not the slightest support in prior South Carolina decisions"; (3) was "inconsistent with the law of other States"; (4) was anticipated by "neither the South Carolina Legislature nor the South Carolina police"; and (5) applied to conduct that could not "be deemed improper or immoral."[74] Under those circumstances, the Court held that a retroactive application of a judicial construction of a criminal statute violates the Due Process Clause if that decision is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue."[75]

This court recently held in *United States v. Gomez Gomez* that even though *Reyes-Contreras* significantly changed this court's ACCA jurisprudence, retroactive application of that decision does not violate due

[72] *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001) ("The *Ex Post Facto Clause*, by its own terms, does not apply to courts.").

[73] *Id.*

[74] *Bouie v. City of Columbia*, 378 U.S. 347, 356, 361–62 (1964).

[75] *Id.* at 354 (quoting *Smith v. Cahoon*, 283 U.S. 553, 61 (1931)).

process.[76] We explained that *Reyes-Contreras* "merely reconciled our circuit precedents with the Supreme Court's decision in *Castleman*" and "aligned our circuit with the precedents of other circuits."[77] "In short, *Reyes-Contreras* was neither unexpected nor indefensible."[78]

The same is true of *Voisine*. That case resolved a circuit split over whether a misdemeanor conviction for reckless assault required the use of "physical force" in the MCDV context.[79] *Voisine*'s holding that reckless conduct qualifies as the "use" of force focused on § 922(g)(9)'s text, including (1) the definition of a "misdemeanor crime of violence" that "contain[ed] no exclusion for convictions based on reckless behavior"[80] and (2) the "ordinary meaning" of the word "use," as the Court had interpreted that term in *Castleman*.[81]

*Voisine* is consistent with the ACCA's statutory language and lacks the problems identified in *Bouie*. We agree with the other circuits that have applied *Voisine* retroactively[82] and note that the *Voisine* Court itself applied its holding to the petitioner-defendants there.[83] We conclude that *Voisine* was neither "unexpected" nor "indefensible" and may apply retroactively.[84]

**2. Degree of Force**

Although *Reyes-Contreras* resolved several ACCA issues, it did not address the *degree* of force necessary to qualify as a violent felony under the

[76] *United States v. Gomez Gomez*, 917 F.3d 332, 334 (5th Cir. 2019).
[77] *Id.*
[78] *Id.*
[79] *Voisine*, 136 S. Ct. at 2277–78.
[80] *Id.* at 2280.
[81] *Id.* at 2279 (citing *Castleman*, 572 U.S. at 170–71).
[82] *See Haight*, 892 F.3d at 1281 (applying *Voisine* to an ACCA predicate offense committed before *Voisine* was decided); *United States v. Pam*, 867 F.3d 1191, 1207–08 (10th Cir. 2017) (applying *Voisine* to an ACCA predicate offense committed before *Voisine* was decided).
[83] *See Voisine*, 136 S. Ct. at 2280 ("The relevant text thus supports prohibiting petitioners, and others with similar criminal records, from possessing firearms.").
[84] Our recent description of *Voisine* as "clarify[ing] long-debated interpretation[s]" of sentencing-enhancement issues bolsters this conclusion. *Mendez-Henriquez*, 847 F.3d at 218.

ACCA's elements clause.[85] Burris contends that causing a minor injury, such as a bruise, meets the Texas definition of causing "bodily injury," but does not require physical force under federal law. The Supreme Court's recent decision in *Stokeling*—which held that "'physical force,' or 'force capable of causing physical pain or injury,' includes the amount of force necessary to overcome a victim's resistance"[86]—forecloses Burris's contention. Force necessary to overcome a victim's resistance entails *less* force than is necessary to cause bodily injury under Texas law.

*a. "Physical Force" Under the ACCA*

*Curtis Johnson* defined "physical force" under the ACCA as "*violent* force—that is, force capable of causing physical pain or injury to another person."[87] After *Curtis Johnson*, the Court left open the question whether minor injuries, such as a "cut, abrasion, [or] bruise . . . . necessitate violent force, under [*Curtis*] *Johnson*'s definition of that phrase."[88] The Supreme Court recently answered that question in *Stokeling*.

In *Stokeling*, the Court held that the ACCA's elements clause "encompasses robbery offenses that require the criminal to overcome the victim's resistance."[89] The Court explained Congress's 1986 amendment of that statute, in which Congress removed "robbery" as an enumerated predicate offense and added the elements clause. By retaining the term "force," Congress intended that the "'force' required for common-law robbery would be sufficient to justify an enhanced sentence under the new elements clause."[90] The Court explained in *Stokeling* that "it would be anomalous to read 'force' as *excluding*

[85] *See Reyes-Contreras*, 910 F.3d at 182 & n.28.
[86] *Stokeling*, 139 S. Ct. at 555.
[87] *Curtis Johnson*, 559 U.S. at 140.
[88] *Castleman*, 572 U.S. at 170.
[89] *Stokeling*, 139 S. Ct. at 550.
[90] *Id.* at 551.

the quintessential ACCA-predicate crime of robbery, despite the amendment's retention of the term 'force' and its stated intent to expand the number of qualifying offenses."[91]

The Court went on to explain that under *Curtis Johnson*'s definition of "physical force," the force used need not be "substantial" and the "altercation need not cause pain or injury or even be prolonged; it is the physical contest between the criminal and the victim that is itself 'capable of causing physical pain or injury.'"[92] Focusing on *Johnson*'s use of the word "capable" of causing physical pain or injury, *Stokeling* held that the "physical force" under the ACCA does not require "any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality."[93]

The petitioner in *Stokeling* contended—as Burris does here—that, under *Castleman*, the level of force must "be 'severe,' 'extreme,' or 'vehement.'" The Court expressly rejected that argument. "These adjectives cannot bear the weight Stokeling would place on them. They merely supported *Johnson*'s actual holding: that common-law battery does not require 'force capable of causing physical pain or injury.' . . . *Johnson* did not purport to establish a force threshold so high as to exclude even robbery from ACCA's scope."[94]

Instead, the Court adopted Justice Scalia's *Castleman* concurrence, in which he concluded that minor uses of force and minor forms of injury qualified as "physical force" under *Curtis Johnson*:

> Stokeling next contends that *Castleman* held that minor uses of force do not constitute "violent force," but he misreads that opinion. In *Castleman*, the Court noted that for purposes of a statute focused on domestic-violence misdemeanors, crimes involving relatively "minor uses of force" that might not "constitute 'violence' in the generic sense" could nevertheless qualify as predicate

[91] *Id.*
[92] *Id.* at 553 (quoting *Curtis Johnson*, 559 U.S. at 140).
[93] *Id.* at 554.
[94] *Id.* at 553.

> offenses. The Court thus had no need to decide more generally whether, under [*Curtis*] *Johnson*, conduct that leads to relatively minor forms of injury—such as "a cut, abrasion, [or] bruise"—"necessitate[s]" the use of "violent force." Only Justice Scalia's separate opinion addressed that question, and he concluded that force as small as "hitting, slapping, shoving, grabbing, pinching, biting, and hair pulling," satisfied *Johnson*'s definition. He reasoned that "[n]one of those actions bears any real resemblance to mere offensive touching, and all of them are capable of causing physical pain or injury." This understanding of "physical force" is consistent with our holding today that force is "capable of causing physical injury" within the meaning of *Johnson* when it is sufficient to overcome a victim's resistance. Such force satisfies ACCA's elements clause.[95]

In short, under *Curtis Johnson*, physical force under the ACCA is force "capable of causing physical pain or injury."[96] That definition encompasses the force necessary to overcome a victim's resistance. The degree of force entails more force than the "slightest offensive touching,"[97] but does not require "any particular degree of likelihood or probability that the force used will cause pain or injury; only potentiality."[98] The emphasis is on "capable." Even minor uses of force—including hitting, slapping, shoving, grabbing, pinching, biting, and hair pulling—that lead to minor forms of injury, such as a cut, abrasion, or bruise, qualify as "physical force" under *Curtis Johnson*.[99]

*b.* *Texas Robbery*

In his supplemental brief, Burris contends that Texas robbery requires less force than Florida robbery because Texas robbery does not require a physical struggle or confrontation between the robber and the victim. We disagree.

[95] *Id.* at 554 (citations omitted).
[96] *Curtis Johnson*, 559 U.S. at 140.
[97] *Id.* at 139.
[98] *Stokeling*, 139 S. Ct. at 554.
[99] *Id.*

Burris cites *Howard v. State*, in which the Court of Criminal Appeals of Texas upheld a conviction for aggravated robbery-by-threat even though there was no physical interaction between the defendant and the victim.[100] In *Howard*, the defendant entered a store wielding a rifle while the cashier was in the back office.[101] The cashier observed the defendant on a security camera, locked the office door, and dialed 911. The defendant took the cashier's wallet and left.[102] There was no evidence that the defendant was aware of the cashier. The court held that "robbery-by-placing-in-fear does not require that a defendant know that he actually places someone in fear, or know whom he actually places in fear. Rather, it requires that the defendant is aware that his conduct is reasonably certain to place someone in fear, and that someone actually is placed in fear."[103]

*Howard* is distinguishable. *Stokeling* did not consider a robbery-by-threat statute, so the Court did not have the opportunity to consider a "threat" statute. Even so, *Howard*'s explanation of robbery-by-threat comports with *Stokeling*'s definition of physical force. *Howard* held that a defendant must be "aware that his conduct is reasonably certain to place someone in fear, and that someone actually is placed in fear."[104] *Stokeling* held that force "capable of causing physical pain or injury" does not require "any particular degree of likelihood or probability that the force used will cause pain or injury; only potentiality."[105] Force that includes the "potentiality" of causing physical pain or injury encompasses conduct "reasonably certain" to place someone in fear of bodily injury. The defendant in *Howard* entered a store wielding a rifle. That

[100] 333 S.W.3d 137, 138 (Tex. Crim. App. 2011).
[101] *Id.*
[102] *Id.*
[103] *Id.* at 140.
[104] *Id.*
[105] *Stokeling*, 139 S. Ct. at 554.

necessarily involved the "*attempted* . . . or threatened use of physical force" under the ACCA.

This court has already held that the aggravated robbery-by-threat statute considered in *Howard* satisfies *Curtis Johnson*'s definition of physical force. "There can be no question that a crime under Texas Penal Code § 29.03(a)(2), that is, threatening someone with imminent bodily injury or death, or placing someone in fear of such, while using or exhibiting a deadly weapon in the course of committing theft with intent to obtain or maintain control of the property, has as an element the threatened use of physical force against the person of another."[106]

Finally, Texas caselaw indicates that robbery-by-injury does involve a physical confrontation with the victim. The Texas Court of Criminal Appeals has held that "so long as the 'violence' is clearly perpetrated against another '*for the purpose of . . . preventing or overcoming resistance to theft*,' it does not serve the legislative intent to engage in fine distinctions as to degree or character of the physical force exerted."[107] Notably, this explanation matches *Stokeling*'s definition of physical force.

*c. "Bodily Injury" Under Texas Law*

Burris next contends that Texas's definition of "bodily injury" is too broad to satisfy the ACCA's elements clause. That definition includes, "physical pain," "illness," or "any impairment of physical condition."[108] According to Burris, Texas robbery requires less force than the Florida robbery statute considered in *Stokeling*. We disagree.

The Court of Criminal Appeals of Texas has interpreted the definition of "bodily injury" quite expansively, noting that "[t]his definition appears to be

[106] *Lerma*, 877 F.3d at 636.

[107] *Lane v. State*, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989) (en banc) (emphasis added).

[108] Tex. Penal Code § 1.07(a)(8).

purposefully broad and seems to encompass even relatively minor physical contacts so long as they constitute more than mere offensive touching."[109] In *Lane v. State*, the court found bodily injury when the victim's "wrist was twisted" and she sustained a "bruise on her right wrist."[110] The court also approvingly cited an earlier decision holding that "a small bruise" constituted bodily injury.[111] In both cases, the victims suffered some "physical pain."[112] It appears that pain is not a requirement, however. Any "impairment of physical condition" is bodily injury.[113]

Burris cites Texas cases affirming convictions for assaultive offenses involving the transmission of HIV[114] and a case upholding an assault conviction when the defendant caused a first responder to "'feel not right' and 'to sweat very profusely more than normal.'"[115] Although these cases use the statutory term "bodily injury," they are aggravated-assault and arson cases. They therefore are not helpful in determining whether there is a "realistic possibility" that Texas would apply its *robbery* statute to force that is not capable of causing physical pain or injury under the ACCA.

The closest case Burris cites is *Martin v. State*, in which the state court upheld a robbery conviction when the defendant, in flight from a store, shouted

[109] *Lane*, 763 S.W.2d at 786.

[110] *Id.* at 787.

[111] *Id.* at 786–87 (citing *Lewis v. State*, 530 S.W.2d 117, 117–18 (Tex. Crim. App. 1975)); *see Gay v. State*, 235 S.W.3d 829, 833 (Tex. App.—Fort Worth 2007) (indicating that "pinch[ing]" or "rubb[ing]" a child's face amounted to bodily injury).

[112] *Lane*, 763 S.W.2d at 787; *Lewis*, 530 S.W.2d at 118.

[113] *See* TEX. PENAL CODE ANN. § 1.07 (a)(8) ("'Bodily injury' means physical pain, illness, or any impairment of physical condition."); *Gay*, 235 S.W.3d at 834 (Dauphinot, J., dissenting) ("[I]f the actor causes physical pain, it is not necessary that he also cause impairment of the [victim's] physical condition [to cause bodily injury]. Similarly, if the actor causes impairment of the [victim's] physical condition, he is not required to cause physical pain as well.").

[114] *Billingsley v. State*, 2015 WL 1004364, at *2 (Tex. App.—Eastland Feb. 27, 2015); *Padieu v. State*, 2010 WL 5395656, at *1 (Tex. App.—Dallas Dec. 30, 2010).

[115] *In re M.V., Jr.*, 2009 WL 3163522, at *2 (Tex. App.—Corpus Christi Oct. 1, 2009, no pet.).

"I have AIDS" at employees trying to detain her.[116] The court focused on the physical struggle between the robber and the victims:

> [The defendant] asserts that her statement, "I have AIDS," did not threaten or place [the victim] in fear of "any immediate danger" of bodily injury or death. However, on the circumstances in which the statement was made, the jury could have reasonably inferred otherwise. [The victims] both testified that [the defendant] had told them that she had AIDS as they were engaged in a protracted, physical struggle with [the defendant] to prevent her from escaping the store. According to [the victim], at one point during the struggle, they were "wrestling on the ground" with [the defendant], and the jury could have reasonably inferred from this and other evidence (including the 911 call in which [the defendant] can be heard yelling and screaming in the background) that [the defendant] was behaving in a violent manner as the men were holding onto her. This violent behavior, the jury could have further inferred, included not only [the defendant] "swinging and kicking" at the men but also, according [the victim's] statement to the dispatcher during the 911 call, attempting to bite them.[117]

The physical struggle in *Martin*, in which the defendant swung, kicked, struck, and attempted to bite the victims, satisfies *Stokeling*'s definition of physical force.[118] And threatening to transmit a deadly disease falls under the distinction between direct and indirect force that this court eliminated in *Reyes-Contreras*.

Burris has not established a "realistic probability" that Texas would apply its robbery statute to cover conduct that is not capable of causing physical pain or injury.[119] And, as we have explained, the *Stokeling* Court

[116] No. 03-16-198-CR, 2017 WL 5985059 (Tex. App.—Austin Dec. 1, 2017, no pet.).

[117] *Id.* at *6.

[118] *See Stokeling*, 139 S. Ct. at 554 (concluding that biting satisfies the ACCA's elements clause).

[119] *Reyes-Contreras*, 910 F.3d at 184–85.

expressly rejected Burris's contention that minor uses of force do not qualify as physical force under the ACCA.[120]

We hold that § 29.02(a)(1) requires more force than Florida robbery. Florida robbery requires the "force necessary to overcome a victim's physical resistance."[121] Texas robbery, in contrast, requires that a defendant, in the course of committing a theft, actually "cause[] bodily injury to another."[122] In *Stokeling*, the Court explained that minor uses of force satisfied this definition, including (1) seizing another's watch or purse and using enough force "to break the chain or guard by which it is attached to the person," (2) "rudely push him about, for the purpose of diverting his attention and robbing him," or (3) "pull[ing] a diamond pin out of a woman's hair when doing so tore away hair attached to the pin."[123] The Texas cases Burris cites require more force than these examples.

Therefore, causing bodily injury under Texas law requires more force than is necessary to overcome a victim's resistance, and Texas robbery-by-injury requires force "capable of causing physical pain or injury to another person."[124]

**D. Robbery-by-Threat**

Finally, we conclude that § 29.02(a)(2), robbery-by-threat, also has as an element the attempted or threatened use of physical force. That subsection criminalizes "intentionally or knowingly threaten[ing] or plac[ing] another in fear of imminent bodily injury or death."[125] We have held that § 29.02(a)(1), robbery-by-injury, requires the use of physical force. It follows that if *causing*

[120] *Id.*
[121] *Stokeling*, 139 S. Ct. at 553.
[122] Tex. Penal Code § 29.02(a)(1).
[123] *Stokeling*, 139 S. Ct. at 550.
[124] *Curtis Johnson*, 559 U.S. at 140.
[125] Tex. Penal Code § 29.02(a)(2).

bodily injury requires the use of physical force, *threatening* to cause imminent bodily injury similarly requires the "attempted use, or threatened use of physical force."[126]

## IV. CONCLUSION

We AFFIRM Burris's sentence.

[126] 18 U.S.C. § 924(e)(2)(B)(1).

# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
**FILED**
April 10, 2019
Lyle W. Cayce
Clerk

No. 17-10478

D.C. Docket No. 3:16-CR-163-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

LATROY LEON BURRIS,

Defendant - Appellant

Appeal from the United States District Court for the
Northern District of Texas

Before WIENER, GRAVES, and HO, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

No. 17-10478

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

LATROY LEON BURRIS,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 04/10/2019, 5 Cir., _____, _____ F.3d _____ )

Before WIENER, GRAVES, and HO, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court

having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

JACQUES L. WIENER, JR.
UNITED STATES CIRCUIT JUDGE

**MODIFIED July 16, 2018**
**REVISED August 3, 2018**

# IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-10478

United States Court of Appeals
Fifth Circuit
**FILED**
June 18, 2018
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

LATROY LEON BURRIS,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas

Before WIENER, GRAVES, and HO, Circuit Judges.

WIENER, Circuit Judge:

Defendant-Appellant Latroy Leon Burris pleaded guilty to being a felon in possession of a firearm and was sentenced under the Armed Career Criminal Act (ACCA), which provides for an increased sentence if the defendant has been convicted of three prior violent felonies. Burris contends that he was not eligible for the increase because his prior Texas conviction for robbery was not a violent felony. We agree with Burris, and hold that the Texas robbery statute underlying one of his prior convictions does not have "use, attempted use, or

threatened use of physical force" as an element. We therefore vacate his sentence and remand for resentencing.

## I. FACTS AND PROCEEDINGS

In July 2016, Burris pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and possession with intent to distribute a controlled substance, under 21 U.S.C. § 841(a)(1) & (b)(1)(C).[1] The presentence investigation report (PSR) determined that Burris was an armed career criminal under 18 U.S.C. § 924(e), *viz.*, the ACCA. A defendant is an armed career criminal if he (1) is convicted of violating § 922(g), as Burris undoubtedly was, and (2) has three prior convictions for violent felonies or serious drug offenses.[2] If a defendant meets these criteria, he is subject to a minimum sentence of fifteen years imprisonment.[3]

The PSR states that Burris had three prior convictions qualifying him for the ACCA: (1) a 1993 Texas conviction for robbery, (2) a 1993 Texas conviction for aggravated robbery, and (3) a 2012 Texas conviction for manufacturing/delivering a controlled substance. When he pleaded guilty, Burris disputed that he qualified for the enhanced penalties of the ACCA. After the probation office issued the PSR, Burris objected, insisting that his convictions for robbery and aggravated robbery do not qualify for the ACCA.[4] The district court ultimately adopted the findings of the PSR, concluding that Burris's prior convictions for robbery and aggravated robbery did qualify him for the ACCA's enhancement. The court then sentenced him to 188 months in custody, a sentence at the low end of the applicable guidelines range. Burris

[1] The facts of Burris's instant offenses are not relevant to the issue on appeal, which concerns only his prior Texas state court convictions.

[2] 18 U.S.C. § 924(e)(1).

[3] *Id.*

[4] Burris does not appear to dispute that the 2012 conviction for manufacturing/delivering a controlled substance is a serious drug offense under the ACCA.

timely appealed, challenging the district court's ruling that his Texas convictions for robbery and aggravated robbery were "violent felonies." After Burris filed his opening brief, another panel of this court held that the version of aggravated robbery for which Burris was convicted is a violent felony under the ACCA.[5] Burris now concedes that his aggravated robbery conviction qualifies as a violent felony,[6] so this appeal now concerns only whether Burris's conviction for simple robbery qualifies as a violent felony.

## II. STANDARD OF REVIEW

The government acknowledges that Burris preserved his objection in the district court. We therefore review de novo the district court's conclusion that his simple robbery conviction was a violent felony under the ACCA.[7]

## III. DISCUSSION

### A. The Relevant Statutes

The ACCA defines a "violent felony," in relevant part, as:

> [A]ny crime punishable by imprisonment for a term exceeding one year . . . that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.][8]

Before the Supreme Court's decision in *Samuel Johnson v. United States*,[9] Texas robbery was considered a violent felony under the second part of

[5] *United States v. Lerma*, 877 F.3d 628, 631, 635 (5th Cir. 2017) (explaining that aggravated robbery is divisible and the defendant's aggravated robberies involved robbery-by-threat and using and exhibiting a deadly weapon). Burris was convicted of the same type of aggravated robbery.

[6] He does, however, preserve this argument for further review.

[7] *United States v. Constante*, 544 F.3d 584, 585 (5th Cir. 2008).

[8] 18 U.S.C. § 924(e)(2)(B).

[9] 135 S. Ct. 2551 (2015).

clause (ii), known as the "residual clause," because it "involve[d] conduct that presents a serious potential risk of physical injury to another."[10] In *Samuel Johnson*, however, the Court struck down the residual clause as unconstitutionally vague.[11] Consequently, robbery is a violent felony under the ACCA if it has as an element the use, attempted use, or threatened use of "physical force."

**B. The Elements of Texas Robbery**

Texas robbery is defined in § 29.02(a) of the Texas Penal Code as follows:

> A person commits an offense 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.[12]

For today's purpose, we refer to the alternatives delineated by subparts (1) and (2) as "robbery-by-injury" and "robbery-by-threat." This court has never addressed whether § 29.02(a) is indivisible or divisible[13]—that is, whether robbery-by-injury and robbery-by-threat are (1) different crimes or (2) a single crime that can be committed by two different means.[14] We need not decide that

[10] *United States v. Davis*, 487 F.3d 282, 287 (5th Cir. 2007).

[11] *Samuel Johnson*, 135 S. Ct. at 2557.

[12] TEX. PENAL CODE ANN. § 29.02(a).

[13] *Cf. United States v. Garza*, No. 2:04-CR-269, 2017 WL 318861, at *3 (S.D. Tex. Jan. 23, 2017) (implicitly characterizing robbery as a divisible statute by using the "modified categorical approach"); *United States v. Roman*, No. CR H-92-160, 2016 WL 7388388, at *3 (S.D. Tex. Dec. 20, 2016) (characterizing the robbery statute as divisible); *United States v. Fennell*, No. 3:15-CR-443-L (01), 2016 WL 4491728, at *5 (N.D. Tex. Aug. 25, 2016), *reconsideration denied*, No. 3:15-CR-443-L (01), 2016 WL 4702557 (N.D. Tex. Sept. 8, 2016), *and aff'd*, 695 F. App'x 780 (5th Cir. 2017) (appearing to avoid the issue by holding that the robbery statute was not a violent felony "even applying the categorical approach").

[14] *See Lerma*, 877 F.3d at 631.

issue here, however, because our analysis under either outcome would be the same.

If § 29.02(a) is indivisible, the court "focus[es] solely on whether the elements of the crime of conviction" include the use of force.[15] Therefore, if either robbery-by-injury or robbery-by-threat does not require the use of force, robbery is not a violent felony.

On the other hand, if § 29.02(a) is divisible, "we isolate the alternative under which the defendant was convicted," then determine whether force is an element of that particular offense.[16] To do so, courts may "look 'to a limited class of documents . . . to determine what crime, with what elements, a defendant was convicted of.'"[17]

Burris's conviction documents do not specify whether he was convicted of robbery-by-injury or robbery-by-threat. His indictment states that he caused injury, but it charges him with *aggravated* robbery. We cannot look to the indictment to narrow the subsection of conviction if it indicts Burris for a crime other than the one to which he pleaded guilty.[18] The only exception to this rule does not apply here because the conviction documents do not reference the lesser-included offense to that of the indictment.[19] Because we cannot ascertain

[15] *Id.* (citing *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016)). This focus on the elements of the offense of conviction is known as the "categorical approach." *Id.*

[16] *See United States v. Herrold*, 883 F.3d 517, 522 (5th Cir. 2018) (en banc); *Lerma*, 877 F.3d at 631.

[17] *Lerma,* 877 F.3d 631 (quoting *Mathis*, 136 S. Ct. at 2249). This is known as the "modified categorical approach." *Id.*

[18] *United States v. Turner*, 349 F.3d 833, 836 (5th Cir. 2003) ("Because Turner pleaded guilty to a lesser included offense, and was not reindicted on that lesser count, there is no document actually charging him with the offense for which he was ultimately convicted. In this case, therefore, the indictment is not applicable to the analysis of whether the conviction was a conviction of a crime of violence." (citation omitted)).

[19] Although the conviction documents refer to "the charging instrument," we have invoked this exception only when conviction documents *explicitly* reference the lesser-included offense to that in the indictment. *Compare United States v. Hernandez-Borjas*, 641 F. App'x 367, 372 (5th Cir. 2016) ("The judgment provides that Hernandez–Borjas pleaded

the variant of robbery for which Burris was convicted, we must analyze both robbery-by-injury and robbery-by-threat, even if § 29.02(a) is divisible. This is why we need not decide here whether robbery is divisible or indivisible.[20]

We first address robbery-by-injury. If a defendant can "cause bodily injury" without "using force," then the Texas robbery statute—or at least its robbery-by-injury prong—does not have use of force as an element.[21] As explained below, we conclude that a person can "cause bodily injury" without using force, so Burris's conviction under § 29.02(a) is not a violent felony.

**C. A Plethora of Precedent**

As an initial matter, we note that another panel of this court, in an unpublished, one-sentence opinion, recently affirmed a district court's ruling that Texas robbery is *not* a violent felony under the ACCA.[22] Even though that holding does not bind us, relevant authority has evolved in recent years. We find it helpful to recount that evolution here.

*1. The En Banc Court Answers Our Question*

Texas defines "bodily injury" as "physical pain, illness, or any impairment of physical condition."[23] Our court has previously considered

guilty to a lesser-included offense. And under Texas law, there is only one possible lesser-included offense[.]"), *and United States v. Martinez-Vega*, 471 F.3d 559, 563 (5th Cir. 2006) ("Here, the judgment provides that Appellant pleaded guilty to '*the* lesser charge contained in the Indictment.'"), *with United States v. Bonilla*, 524 F.3d 647, 652–53 & n.4 (5th Cir. 2008) ("[T]he district court could not consider the criminal information" when "[the court had] a certificate of disposition that does not refer back to a lesser offense in the original indictment.").

[20] Moreover, as explained below, we conclude that robbery-by-injury does not have use of force as an element. Thus, even if we *did* look to the indictment to determine that Burris was convicted of robbery by injury, the outcome of this case would not change.

[21] If a defendant could cause injury without using force, then using force is not a constituent part of a crime that requires causing injury. *See Mathis*, 136 S. Ct. at 2248–52; *United States v. Garcia-Figueroa*, 753 F.3d 179, 184 (5th Cir. 2014).

[22] *United States v. Fennell*, 695 F. App'x 780, 781 (5th Cir. 2017) (affirming *United States v. Fennell*, No. 3:15-CR-443-L (01), 2016 WL 4702557 (N.D. Tex. Sept. 8, 2016) and *Fennell*, 2016 WL 4491728).

[23] TEX. PENAL CODE ANN. § 1.07(a)(8).

whether this broad definition of bodily injury requires physical force. In *United States v. Vargas-Duran*, the en banc court considered whether the Texas crime of "intoxication assault," which requires the defendant to have "cause[d] serious bodily injury to another" was a "crime of violence" under United States Sentencing Guideline ("U.S.S.G.") § 2L1.2, which "has as an element the use, attempted use, or threatened use of physical force against the person of another."[24] The en banc court held that it did not, for two reasons. First, the court explained, the Texas statute does not require that the defendant have the state of mind needed to "use" force: "the fact that the statute requires that serious bodily injury result . . . does not mean that the statute requires that the defendant have used the force that caused the injury."[25] Second, the court added that "[t]here is also a difference between a defendant's causation of an injury and the defendant's use of force."[26]

We reiterated this difference in *United States v. Villegas-Hernandez*, when we considered whether the Texas crime of assault—requiring that one "intentionally, knowingly, or recklessly cause[] bodily injury" or threaten to do so—was an "aggravated felony" under U.S.S.G. § 2L1.2(b)(1)(C).[27] Aggravated felonies also must have an element of "use, attempted use, or threatened use of physical force."[28] We held that Texas's assault offense did not have use or threatened use of physical force as an element.[29] The panel approvingly cited

[24] 356 F.3d 598, 600 (5th Cir. 2004) (en banc) (citation omitted). Although this Guideline is not part of the ACCA, we have explained that "[b]ecause of the similarities between U.S.S.G. §§ 2L1.2(b)(1)(A), 4B1.2(a), 4B1.4(a), and 18 U.S.C. § 924(e), we treat cases dealing with [the elements clause of] these provisions interchangeably." *United States v. Moore*, 635 F.3d 774, 776 (5th Cir. 2011) (citation omitted).

[25] *Vargas-Duran*, 356 F.3d at 606.

[26] *Id.*

[27] 468 F.3d 874, 877–78 (5th Cir. 2006).

[28] *Id.* at 878. This "aggravated felony" definition incorporates a statutory provision using the term "crime of violence," which is different from the "crime of violence" provision in *Vargas-Duran*. *See id.*; *Vargas-Duran*, 356 F.3d at 605.

[29] *Villegas-Hernandez*, 468 F.3d at 882.

*Vargas-Duran*'s explanation that "[t]here is . . . a difference between a defendant's causation of an injury and the defendant's use of force."[30] The panel listed examples of acts that could cause bodily injury without physical force: "making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim."[31]

*2. The Supreme Court Weighs In*

Looking solely at this precedent, *Vargas-Duran* would compel the holding that a person may "cause bodily injury" per Texas law without using "physical force" per federal law. But the Supreme Court has recently decided three cases that are related to the issue before us. First, in *Curtis Johnson v. United States*, the Court interpreted the phrase "physical force" within the ACCA. The Court noted that the common law definition of "force" can be "satisfied by even the slightest offensive touching."[32] But the Court held that the common law definition of force did *not* apply to the ACCA; in the ACCA context, "the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person."[33] The Court relied heavily on the use of "physical force" in the context of a "violent felony": "When the adjective 'violent' is attached to the noun 'felony,' its connotation of strong physical force is even clearer."[34]

[30] *Id.* at 880 (quoting *Vargas-Duran*, 356 F.3d at 606) (omission in original).
[31] *Id.* at 879.
[32] *Curtis Johnson v. United States*, 559 U.S. 133, 139 (2010).
[33] *Id.* at 140.
[34] *Id.*; *see also id.* at 140 ("[T]he word 'violent' in § 924(e)(2)(B) connotes a substantial degree of force."), 142 ("[T]he term 'physical force' itself normally connotes force strong enough to constitute 'power'—and all the more so when it is contained in a definition of 'violent felony.'").

Second, and more recently, the Court decided *United States v. Castleman*, in which it considered the term "physical force" in the context of a "misdemeanor crime of domestic violence" (MCDV). A MCDV is defined using identical language to the ACCA: it "has, as an element, the use or attempted use of physical force."[35] But the Court distinguished "physical force" in the MCDV context from "physical force" in the ACCA, as defined in *Curtis Johnson*. The Court held that in the context of a MCDV, "physical force" is defined as "the common-law meaning of 'force,'" which can be satisfied by mere offensive touching.[36] In making this distinction, the Court relied on the differences between the two contexts in which the term "physical force" arises: "[W]hereas the word 'violent' or 'violence' standing alone 'connotes a substantial degree of force,' that is not true of 'domestic violence.' 'Domestic violence' is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context."[37]

Applying this common-law definition of "physical force," the Court held that the defendant's conviction for "caus[ing] bodily injury" to the mother of his child categorically qualified as a MCDV.[38] In doing so, the Court explained that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force" in the MCDV context.[39] The Court added that "the common-law concept of 'force' encompasses even its indirect application," such as poisoning a victim.[40] Importantly, though, the Court expressly declined to reach the question "[w]hether or not the causation of bodily injury necessarily

[35] *United States v. Castleman*, 134 S. Ct. 1405, 1409 (2014) (quoting 18 U.S.C. § 921(a)(33)(A)).
[36] *Id.* at 1410.
[37] *Id.* at 1411 (quoting *Curtis Johnson*, 559 U.S. at 140).
[38] *Id.* at 1409, 1413–15.
[39] *Id.* at 1414.
[40] *Id.* at 1414–15.

entails *violent* force."[41] Neither did the Court decide the question whether minor injuries, such as a "cut, abrasion, [or] bruise . . . . necessitate violent force, under [*Curtis*] *Johnson*'s definition of that phrase."[42]

Even more recently, the Court decided *Voisine v. United States*, which concerned the meaning of "use" rather than "physical force." Like *Castleman*, *Voisine* arose in the context of an MCDV.[43] Specifically, the Court considered whether a person could recklessly "use" physical force—in the context of an MCDV—or if such "use" required knowledge or intent.[44] The Court held that there was no requirement of intent or knowledge: A person can "use" force while acting recklessly.[45] The Court added that use of force does require a "volitional" action; by contrast, involuntary or accidental movements are not uses of force in the context of a MCDV.[46]

*3. The Impact Of* Castleman *and* Voisine

The crux of the government's contention is that *Castleman*, an MCDV case, should apply to ACCA/violent felony cases. But prior panels of this court have determined that, while *Voisine*'s holding applies outside of the MCDV context, *Castleman*'s does not.

First, in *United States v. Howell* and *United States v. Mendez-Henriquez*, this court adopted *Voisine*'s holding in the context of a "crime of violence" under

[41] *Id.* at 1413 (emphasis added). The Court added:

> The Courts of Appeals have generally held that mere offensive touching cannot constitute the 'physical force' necessary to a 'crime of violence,' just as we held in [*Curtis*] *Johnson* that it could not constitute the 'physical force' necessary to a 'violent felony.' . . . Nothing in today's opinion casts doubt on these holdings, because—as we explain—'domestic violence' encompasses a range of force broader than that which constitutes 'violence' *simpliciter*.

*Id.* at 1411 n.4.

[42] *Id.* at 1414.

[43] *Voisine v. United States*, 136 S. Ct. 2272, 2276–77 (2016).

[44] *Id.*

[45] *Id.* at 2278–80.

[46] *Id.* at 2278–79.

two sentencing guidelines.[47] Those cases effectively abrogated the first part of *Vargas-Duran*, which had held that "using" force requires a mental state of intent.[48] We have treated the definition of crime of violence in those guidelines "interchangeably" with the definition of violent felony in the ACCA.[49] Thus, to "use" force under the ACCA, a person must only act volitionally; a statute need not have an intent requirement for that offense to "use" force and qualify as a violent felony under the ACCA.

This court has also held, in two published decisions, that—unlike *Voisine*—*Castleman*'s holding does *not* apply outside of the MCDV context. In *United States v. Rico-Mejia*, this court acknowledged the rule from *Villegas-Hernandez*, and other cases stemming from *Vargas-Duran*, that "a person could cause physical injury without using physical force."[50] The *Rico-Mejia* panel acknowledged *Castleman*, but held that "[b]y its express terms, *Castleman*'s analysis is not applicable to the physical force requirement for a crime of violence[.] . . . Accordingly, *Castleman* does not disturb this court's precedent regarding the characterization of crimes of violence[.]"[51]

**D. Causing Injury Without Using Force**

The government maintains that *Vargas-Duran* does not control. It first argues that because *Voisine* applies outside the MCDV context, *Castleman* must as well; as a result, the government contends, *Rico-Mejia* was wrongly

[47] *United States v. Mendez-Henriquez*, 847 F.3d 214, 220–22 (5th Cir.), *cert. denied*, 137 S. Ct. 2177 (2017); *United States v. Howell*, 838 F.3d 489, 499–501 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 1108 (2017).

[48] Both cases stopped short of expressly saying that *Voisine* abrogated this part of *Vargas-Duran*. *See Mendez-Henriquez*, 847 F.3d at 221 (acknowledging that part of *Vargas-Duran* remains good law); *cf. Howell*, 838 F.3d at 501.

[49] *Moore*, 635 F.3d at 776 (citation omitted).

[50] *United States v. Rico-Mejia*, 859 F.3d 318, 321 (5th Cir. 2017).

[51] *Id.* at 322–23. More recently, a panel of this court reached the same conclusion in *United States v. Reyes-Contreras*. 882 F.3d 113, 123, *vacated*, 2018 WL 3014176. But on June 15, 2018, this court voted to rehear *Reyes-Contreras* en banc. Accordingly, that panel opinion has been vacated.

decided because it conflicts with the earlier decisions in *Howell* and *Mendez-Henriquez*. Second, the government insists that *Castleman* overruled our precedent that causing injury captures more conduct than using force.

But we need not rely on the line of cases constituted by, e.g., *Vargas-Duran*, *Villegas-Hernandez*, and *Rico-Mejia*. Even if the government is correct that *Vargas-Duran* and its line of cases no longer control, we nevertheless reverse because there are other examples of how a person may cause injury without using physical force. Specifically, Burris contends that causing a minor injury, such as a bruise, meets the Texas definition of causing "bodily injury,"[52] but does not require physical force under *Curtis Johnson*.

The Texas Court of Criminal Appeals has interpreted the definition of "bodily injury" quite expansively, noting that "[t]his definition appears to be purposefully broad and seems to encompass even relatively minor physical contacts so long as they constitute more than mere offensive touching."[53] In *Lane v. State*, the court found bodily injury when the victim's "wrist was twisted" and she sustained a "bruise on her right wrist."[54] The court also approvingly cited an earlier decision holding that "a small bruise" constituted bodily injury.[55] In both cases, the victims suffered some "physical pain."[56] It appears that pain is not a requirement, however. Any "impairment of physical condition" is bodily injury.[57]

[52] Which, again, is defined as "physical pain, illness, or any impairment of physical condition." TEX. PENAL CODE ANN. § 1.07 (a)(8).

[53] *Lane v. State*, 763 S.W.2d 785, 786 (Tex. Crim. App. 1989) (en banc).

[54] *Id.* at 787.

[55] *Id.* at 786–87 (citing *Lewis v. State*, 530 S.W.2d 117–18 (Tex. Crim. App. 1975)); *see Gay v. State*, 235 S.W.3d 829, 833 (Tex. App.—Fort Worth 2007) (indicating that "pinch[ing]" or "rubb[ing]" a child's face amounted to bodily injury).

[56] *Lane*, 763 S.W.2d at 787; *Lewis*, 530 S.W.2d at 118.

[57] *See* TEX. PENAL CODE ANN. § 1.07 (a)(8) ("'Bodily injury' means physical pain, illness, ***or*** any impairment of physical condition." (emphasis added)); *Gay*, 235 S.W.3d at 834 (Dauphinot, J., dissenting) ("[I]f the actor causes physical pain, it is not necessary that he also cause impairment of the [victim's] physical condition [to cause bodily injury]. Similarly,

The question, then, is whether causing such a minor injury that impairs a physical condition, but with no or minimal pain, necessarily requires the "violent force" described in *Curtis Johnson*.[58] As explained above, the Court, in *Curtis Johnson*, defined "physical force" as "*violent force*—that is, force capable of causing physical pain or injury to another person."[59] In doing so, the Court explained that "the word 'violent' . . . connotes a substantial degree of force" and "strong physical force."[60] It approvingly cited several sources that defined "violent" as "extreme and sudden," "furious[,] severe[,] [and] vehement," and "great physical force."[61] This language suggests that causing "relatively minor physical contacts"[62] (which are still more than "mere offensive touching"[63]) does not entail the "violent force" described in *Curtis Johnson*.

*Castleman* itself also suggests that a minor injury does not require *Curtis Johnson*'s violent force. First, the Court noted that the Tennessee statute at issue, like § 29.02, broadly defined "bodily injury," even though that statute specifically included a mere abrasion or bruise.[64] The Court expressly declined to decide whether "these forms of injury necessitate violent force, under [*Curtis*] *Johnson*'s definition of that phrase."[65] Second, in discussing the difference between violence in the ACCA/violent felony context and in the domestic violence context, the *Castleman* Court explained that "[m]inor uses

if the actor causes impairment of the [victim's] physical condition, he is not required to cause physical pain as well.").

[58] *Curtis Johnson* remains the defining case for "physical force" in the ACCA. *See Castleman*, 134 S. Ct. at 1410. As we understand it, the government does not contend that *Castleman*'s broad definition of "physical force" in the domestic violence context overrules the ACCA definition of "physical force" in *Curtis Johnson*.

[59] *Curtis Johnson*, 559 U.S. at 140.

[60] *Id.*

[61] *Id.*

[62] *Lane*, 763 S.W.2d at 786.

[63] *Id.*

[64] *Castleman*, 134 S. Ct. at 1414.

[65] *Id.*

of force may not constitute 'violence' in the generic sense."[66] The Court then added:

> For example, in an opinion that we cited with approval in [*Curtis*] *Johnson*, the Seventh Circuit noted that it was "hard to describe . . . as 'violence'" "a squeeze of the arm [that] causes a bruise." But an act of this nature is easy to describe as "domestic violence," when the accumulation of such acts over time can subject one intimate partner to the other's control.[67]

Although the Court did not say so explicitly, this suggests that a bruise illustrates the difference between "violent force" in the ACCA context on the one hand and domestic violence on the other. By setting up this contrast, the Court indicated that causing a bruise is not "substantial" enough to be "violent force."[68]

The government's remaining arguments are unavailing. It first cites several cases in which Texas courts defined robbery in terms of force or violence. But "[t]he meaning of 'physical force' in § 924(e)(2)(B)(i) is a question

[66] *Id.* at 1412.

[67] *Id.* (quoting *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003)) (alterations in original).

[68] The government contends that there is no material difference between a bruise (and similar minor injuries) and a "slap in the face," which it contends satisfies *Curtis Johnson*'s "violent force" definition. *See Curtis Johnson*, 559 U.S. at 143. It is not clear, however, that a slap in the face would be "violent force." In making this reference, the Court was refuting the government's argument that because "bodily injury" was not present in § 924(e)(2)(B), but was in other statutes, the Court should interpret "physical force" broadly and not require bodily injury. The Court explained:

> Specifying that "physical force" must rise to the level of bodily injury does not suggest that without the qualification "physical force" would consist of the merest touch. It *might* consist, for example, of only that degree of force necessary to inflict pain—a slap in the face, for example.

*Id.* (emphasis added). It is unclear whether the Court was positing "that degree of force necessary to inflict pain" as a potential alternate definition, or as synonymous with "violent force." Moreover, it declined to expressly put a slap in the face on one side of the "physical force" line.

of federal law, not state law."[69] This is particularly salient given that the Court has defined "physical force" differently for different federal statutes.[70]

Second, the government cites *United States v. Santiesteban-Hernandez*, in which this court held that Texas robbery was a crime of violence per U.S.S.G. § 2L1.2.[71] There, however, we analyzed § 29.02 as a "predicate offense" of § 2L1.2,[72] not under the "elements" clause. We acknowledged that Texas defines robbery in terms of its result—bodily injury—rather than in terms of "force," as do a majority of states.[73] But we stated that Texas's result-oriented approach and other states' force approach were "two sides of the same coin[.]"[74] We therefore held that the Texas statute "substantially" corresponds to other robbery statutes that require force, and that "the difference is not enough to remove [§ 29.02] from the family of offenses commonly known as 'robbery.'"[75] *Santiesteban-Hernandez* does not support the government's argument. These statements acknowledge that there is some overlap between "causing injury" and "using force," but "substantial" similarity is not enough when we ask whether "using force" is an *element* of an offense. The *Santiesteban-Hernandez*

[69] *Curtis Johnson*, 559 U.S. at 138.

[70] The government also points to the fact that robbery was initially included in the enumerated offenses clause, but was removed before passage. *United States v. Mathis*, 963 F.2d 399, 405–07 (D.C. Cir. 1992). But that draft also explicitly required "use of force." *See id.* As explained above, Texas robbery is broader. Further, the fact that robbery was removed from the enumerated-offenses clause makes it difficult to infer that this necessarily favors the government. *Cf. United States v. Green*, 882 F.2d 999, 1002 (5th Cir. 1989) ("[R]eliance on this legislative history is misplaced, however, as it relates to an earlier version of this provision which was amended to its present form during floor debates.").

[71] 469 F.3d 376, 378 (5th Cir. 2006), *abrogated by United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013).

[72] *Id.* Unlike the ACCA, U.S.S.G. § 2L1.2 counts robbery as a predicate offense. *Id.* (citing U.S.S.G. § 2L1.2, cmt. n.1(B)(iii) (2005)).

[73] *Id.* at 380. The approach taken by other states was important because a "predicate offense" analysis requires that we "determin[e] the generic, contemporary meaning of the predicate offense, [and] compare it to the statute governing the prior conviction." *Id.* at 379.

[74] *Id.* at 381. We need not consider whether this reasoning would survive *Curtis Johnson*'s clarification of the meaning of physical force.

[75] *Id.*

court even acknowledged this, adding that if we analyzed the statute under the "elements" prong instead, "th[e] omission [of the word 'force' from the statute] would be dispositive," and robbery would not be a crime of violence because it did not have force as an element.[76]

Third, the government contends that, even if there are hypothetical examples of causing bodily injury without using physical force, those examples are not feasible in the robbery context. The government cites earlier decisions of this court maintaining that examples of robbery convictions which do not involve use of force must be "realistic probabilit[ies]," and "[t]heoretical applications of a statute to conduct that would not constitute a crime of violence do not demonstrate that the statutory offense is categorically not a crime of violence."[77] But consider this hypothetical: (1) a robber picks a victim's pocket; (2) the victim gives chase; and (3) the robber or his accomplice trips the victim, causing the victim to fall and allowing the robber to get away. By tripping the victim and causing him to fall, the robber "impaired" the victim's "physical condition," satisfying the Texas definition of "bodily injury,"[78] but

[76] *Id.* at 378–79.

[77] *United States v. Carrasco-Tercero*, 745 F.3d 192, 197–98 (5th Cir. 2014). Supreme Court cases have required this "realistic probability" only when considering whether a given conviction is an enumerated offense, but this court appears to have expanded this requirement to the elements clause in some cases. *Compare Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013), *and Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), *with, e.g., United States v. Ceron*, 775 F.3d 222, 227, 229 (5th Cir. 2014), *and Carrasco-Tercero*, 745 F.3d at 195. Burris disputes this line of cases requiring a "realistic probability" that particular conduct would be subject to a robbery prosecution, contending that they are inconsistent with earlier Fifth Circuit cases. Earlier cases do indeed state that a component of a crime is not an element if "*any* set of facts would support a conviction without proof of that component." *Vargas-Duran*, 356 F.3d at 605 (emphasis added). We need not consider whether Burris is correct, because, as explained below, there are realistic examples of non-violent-force robberies.

[78] A person may be convicted under § 29.02 for injuring someone during flight from the scene of a theft. *White v. State*, 671 S.W.2d 40, 42 (Tex. Crim. App. 1984) (en banc); *see Lightner v. State*, 535 S.W.2d 176, 177–78 (Tex. Crim. App. 1976); *see also* TEX. PENAL CODE ANN. § 29.01 (The injury must be "in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft.").

falling outside the boundaries of "violent force" in *Curtis Johnson*. A conviction for such an offense certainly appears to be a realistic probability. In fact, Texas appears to occasionally take novel approaches to the "causing bodily injury" element—Texas has recently charged a man with assault (that is, "caus[ing] bodily injury") by sending a Tweet with animation that caused the victim to have a seizure.[79] With this significant departure from the common understanding of assault, it is hardly more of a stretch to envision a defendant causing a seizure in this way, and then dashing into the victim's home or office to steal his property while the victim is afflicted.

Finally, the government points out that the Eighth Circuit recently held that Texas robbery is a violent felony.[80] The court in that case, however, made no effort to grapple with Texas's broad definition of bodily injury.[81] With its limited analysis, that case is unpersuasive.

In sum, Texas robbery-by-injury does not have use of physical force as an element. As a result, Burris's prior conviction under § 29.02 was not a violent felony under the ACCA.[82]

## IV. CONCLUSION

We VACATE Burris's sentence and REMAND for resentencing, consistent with this opinion.

[79] Indictment, *State v. Rivello*, No. F1700215 (Crim. Dist. Ct. No. 5, Dallas County, Tex, filed Mar. 20, 2017).

[80] *United States v. Hall*, 877 F.3d 800, 808 (8th Cir. 2017).

[81] *Id.* at 807.

[82] As noted above, we need not address robbery-by-threat.

JAMES C. HO, Circuit Judge, dissenting:

The majority rules that robbery-by-injury under Texas law is not a violent felony for purposes of the Armed Career Criminal Act. The ACCA defines "violent felony" to include any crime that "has as an element the use, attempted use, or threatened use of *physical force* against the person of another." 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). And the Supreme Court has defined "physical force" under the ACCA as "force *capable of causing physical pain or injury*." *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis added). So a crime that requires proof that the defendant used force capable of causing physical pain or injury is a violent felony under the ACCA.

Texas robbery-by-injury criminalizes "intentionally, knowingly, or recklessly *caus[ing] bodily injury*" in the course of committing theft. Tex. Penal Code § 29.02(a)(1) (emphasis added). "[T]o constitute the crime of robbery[-by-injury], *there must be violence*." *Devine v. State*, 786 S.W.2d 268, 271 (Tex. Crim. App. 1989) (emphasis added). So Texas robbery-by-injury fits squarely within the definition of a violent felony. After all, "it is impossible to cause bodily injury without using force 'capable of' producing that result." *United States v. Castleman*, 134 S. Ct. 1405, 1416–17 (2014) (Scalia, J., concurring). In other words, Texas robbery-by-injury's element of "'caus[ing] bodily injury' categorically involves the use of 'force capable of causing physical pain or injury to another person.'" *Id.* at 1417 (alteration in original, internal citation omitted) (quoting *Curtis Johnson*, 559 U.S. at 140).[1]

[1] The same analysis applies to Texas robbery-by-threat. Just as causing bodily injury requires the use of physical force, threatening or placing someone in fear of imminent bodily injury similarly requires the attempted or threatened use of physical force. *See* Tex. Penal Code § 29.02(a)(2). *See also United States v. Brewer*, 848 F.3d 711, 715 (5th Cir. 2017) ("[W]hile an express threat to use force may not be required for a conviction of robbery by intimidation, an implicit threat to use force is required. . . . It is hard to imagine any

My colleagues disagree, concluding that "Texas robbery-by-injury does not have use of physical force as an element." 892 F.3d 801, 812 (5th Cir. 2018). The majority reaches this conclusion by misreading both federal law (*Curtis Johnson*'s definition of "physical force") and Texas law (the definition of "bodily injury"). And, in doing so, the majority creates a split with the Eighth Circuit on whether Texas robbery is a violent felony. *See United States v. Hall*, 877 F.3d 800, 807 (8th Cir. 2017) (ruling that Texas robbery is a violent felony "[b]ecause there must be actual bodily injury or 'actual or perceived threat of imminent bodily injury'"). Even more concerning is that, under the majority's rationale, any statute has as an element "causing bodily injury" would not qualify as a violent felony under the ACCA—or, for that matter, as a "crime of violence" under 18 U.S.C. § 16(a). I respectfully dissent.

I.

In *Curtis Johnson*, the Supreme Court explained that "physical force" as used in the ACCA "means *violent* force—that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140.

Curtis Johnson argued—and the Court agreed—that his Florida conviction for felony battery did not qualify as a "violent felony" under the ACCA. As the Court noted, the Florida Supreme Court had held that "the element of 'actually and intentionally touching' under Florida's battery law is satisfied by *any* intentional physical contact, 'no matter how slight.'" *Id.* at 138. Even the "most nominal contact, such as a tap on the shoulder without consent, establishes a violation" under Florida law. *Id.* (alterations, citation, and quotation marks omitted).

successful robbery accomplished by threatening some far-removed reprisal that does not involve physical force.").

The Government argued that Florida battery was a "violent felony" under the ACCA based on the common-law meaning of force. At common law, force was "satisfied by even the slightest offensive touching." *Id.* at 139. Accordingly, the Government contended, "physical force" under the ACCA was satisfied by even "only the slightest unwanted physical touch." *Id.* at 137.

The Court rejected the Government's reliance on the common law. "Although a common-law term of art should be given its established common-law meaning, we do not assume that a statutory word is used as a term of art where that meaning does not fit." *Id.* at 139 (internal citation omitted). "Ultimately, context determines meaning, and we 'do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense.'" *Id.* at 139–40 (internal citation omitted). The Court concluded that importing the common-law meaning of force into the ACCA would be inappropriate because the Court was "interpreting the phrase 'physical force' as used in defining not the crime of battery, but rather the statutory category of 'violent felonies.'" *Id.* at 140 (alteration omitted). "[T]here is no reason to define 'violent felony' by reference to [common-law battery, which is] a nonviolent misdemeanor." *Id.* at 142.

Accordingly, the Court ruled that Curtis Johnson's Florida conviction for felony battery did not qualify as a "violent felony" because "only the slightest unwanted physical touch" did not rise to the level of "force capable of causing physical pain or injury to another person." *Id.* at 137, 140. *See also United States v. Harris*, 844 F.3d 1260, 1265 (10th Cir. 2017) ("It is important to keep in mind why it was necessary for the Court to use the language it did. For it was rejecting the government's argument that physical force means 'force' known in common law battery parlance.").

The majority acknowledges that *Curtis Johnson* "defined 'physical force' as '*violent force*—that is, force capable of causing physical pain or injury to

another person.'" 892 F.3d at 809 (quoting 559 U.S. at 140). It concludes, however, that a "slap in the face" or "causing a bruise" is "not 'substantial' enough to be 'violent force.'" 892 F.3d at 810 & n.69.

But that conclusion conflicts with *Curtis Johnson* itself. *Curtis Johnson* explained that "physical force" requires "only that degree of force necessary to inflict pain—*a slap in the face, for example*." 559 U.S. at 143 (emphasis added).

The majority claims that it is "not clear" whether "a slap in the face would be 'violent force,'" because it is "unclear whether the Court was positing 'that degree of force necessary to inflict pain' . . . as synonymous with 'violent force.'" 892 F.3d at 810 n.69. But *Curtis Johnson* expressly defines "physical force" in terms of physical pain: "We think it clear that . . . the phrase 'physical force' means *violent* force—that is, *force capable of causing physical pain* or injury to another person." 559 U.S. at 140 (second emphasis added). The majority's contention is also inconsistent with no fewer than six of our sister circuits.[2]

[2] *See United States v. Bowles*, 2018 WL 2230626, at *3 (4th Cir. May 16, 2018) ("If a slap in the face qualifies as force capable of causing physical pain, then so must a push or a shove meant to rip property from a person who is resisting a theft.") (internal citation omitted); *United States v. Pyles*, 888 F.3d 1320, 1322 (8th Cir. 2018) ("[T]he force required is 'only that degree of force necessary to inflict pain—a slap in the face, for example.'"); *United States v. Swopes*, 886 F.3d 668, 671 (8th Cir. 2018) ("A blind-side bump, brief struggle, and yank—like the 'slap in the face' posited by *Johnson*—involves a use of force that is capable of inflicting pain.") (internal citation omitted); *United States v. Vail–Bailon*, 868 F.3d 1293, 1299 (11th Cir. 2017) (en banc) ("Nevertheless, physical force 'might consist . . . of only that degree of force necessary to inflict pain—a slap in the face, for example.'") (alteration in original); *United States v. Calvillo–Palacios*, 860 F.3d 1285, 1292 (9th Cir. 2017) ("Since under *Johnson*, a simple slap can qualify as violent, physical force, there is no question that a simple assault which is aggravated by *means* of serious bodily injury . . . is a crime of violence.") (internal citation omitted); *United States v. Jennings*, 860 F.3d 450, 457 (7th Cir. 2017) ("Any number of physical acts may cause physical pain: *Curtis Johnson* itself suggested that a slap in the face might suffice."); *United States v. Taylor*, 848 F.3d 476, 494 (1st Cir. 2017) ("If 'a slap in the face' counts as violent force under *Johnson* because it is 'capable' of causing pain or injury, a 'forcible' act that injures does, too, because the defendant 'necessarily must have committed an act of force in causing the injury.'") (internal citation omitted).

Nor does *Castleman* support the majority's contention. Indeed, the majority acknowledges that *Castleman* "expressly declined" to "decide the question whether minor injuries, such as a 'cut, abrasion, [or] bruise . . . . necessitate violent force, under [*Curtis*] *Johnson*'s definition of that phrase.'" 892 F.3d at 807 (alterations in original). Instead, as the *Castleman* majority explained, "Justice Scalia's concurrence suggests that these forms of injury"—"a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty"—"necessitate violent force, under *Johnson*'s definition of that phrase." 134 S. Ct. at 1414.

In his concurrence, Justice Scalia explained that "[h]itting, slapping, shoving, grabbing, pinching, biting, [and] hair pulling" all entail the use of "physical force" as defined by *Curtis Johnson* because each act is "capable of causing physical pain or injury." *Id.* at 1421 (Scalia, J., concurring) (alterations in original) ("None of those actions bears any real resemblance to mere offensive touching.").[3]

In sum, "since it is impossible to cause bodily injury without using force 'capable of' producing that result," a statute that requires "'caus[ing] bodily injury,' *categorically* involves the use of 'force capable of causing physical pain or injury to another person.'" *Id.* at 1416–17 (second alteration in original,

[3] *See Harris*, 844 F.3d at 1264–66; *Jennings*, 860 F.3d at 457 ("Justice Scalia's concurrence in *United States v. Castleman* thus makes the point that physical actions such as hitting, slapping, shoving, grabbing, pinching, biting, and hair-pulling all qualify as violent force under *Curtis Johnson*. . . . Because he was the author of the majority opinion in *Curtis Johnson*, courts have treated his concurrence on this point as more authoritative than it otherwise might be.") (internal citation omitted) (citing *Harris*, 844 F.3d at 1265, *United States v. Hill*, 832 F.3d 135, 142 (2d Cir. 2016), and *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016)). *See also United States v. Garcia*, 877 F.3d 944, 949–50 (10th Cir. 2017) ("Justice Scalia, *Johnson I*'s author, provided additional examples of actions which exceed 'mere offensive touching' and, similar to a slap in the face, are 'capable of causing physical pain or injury.'" He cited 'hitting, slapping, shoving, grabbing, pinching, biting, and hair pulling.'") (internal citation omitted).

emphasis added, internal citation omitted). So a statute that requires "causing bodily injury" necessarily requires using "physical force" and therefore qualifies as a "violent felony."

II.

Texas robbery-by-injury requires the State to prove that the defendant "cause[d] bodily injury to another." Tex. Penal Code § 29.02(a)(1). Bodily injury "means physical pain, illness, or any impairment of physical condition." Tex. Penal Code § 1.07(a)(8). "[E]ven relatively minor physical contacts" are capable of causing bodily injury—"*so long as* they constitute *more than mere offensive touching*." *Lane v. State*, 763 S.W.2d 785, 786 (Tex. Crim. App. 1989) (emphases added). In other words, Texas robbery-by-injury falls squarely within *Curtis Johnson*'s definition of a violent felony—it requires using force "capable of causing physical pain or injury." 559 U.S. at 140. *See also Castleman*, 134 S. Ct. at 1416–17 (Scalia, J., concurring) ("[I]t is impossible to cause bodily injury without using force 'capable of' producing that result.").

The majority disagrees, citing concerns regarding both the degree of force required to cause and the degree of injury required to suffer bodily injury under Texas law. 892 F.3d at 809.

As to requisite degree of force, the majority asserts that "causing 'relatively minor physical contacts' (which are still more than 'mere offensive touching') does not entail the 'violent force' described in *Curtis Johnson*." 892 F.3d at 809–10. But that is precisely what *Curtis Johnson* requires: "violent force" is merely "force *capable of* causing physical pain or injury." 559 U.S. at 140, 143 (emphasis added) (requiring "only that degree of force necessary to inflict pain—a slap in the face, for example").[4]

[4] *See also Jennings*, 860 F.3d 450 at 457 ("[I]n suggesting that the force employed must be of such a degree as to cause (or threaten) more serious injuries in order to qualify as

As to the degree of injury, the majority first contends that "a minor injury, such as a bruise, . . . does not require *Curtis Johnson*'s violent force." 892 F.3d at 809–10. As explained above, that contention is inconsistent with the precedents of the Supreme Court and our sister circuits. *See supra* nn.2–3 and accompanying text.

Indeed, as one of the majority's own sources explains: "A bruise 'is a traumatic injury of the soft tissues which results in breakage of the local capillaries and leakage of red blood cells.' A person who causes a bruise causes physical impairment by causing the local capillaries to break, allowing red blood cells to leak into the surrounding tissue." *Gay v. State*, 235 S.W.3d 829, 834 (Tex. App.—Fort Worth 2007, pet. ref'd) (Dauphinot, J., dissenting). Put another way, bruising "corroborates the fact that [the victim] was indeed injured to some extent." *Lane*, 763 S.W.2d at 787. *See also* 892 F.3d at 809 ("In both cases, the [bruising] victims suffered some 'physical pain.'").

The majority further asserts that causing bodily injury does not necessarily require physical force because it "appears that pain is not a requirement" of bodily injury. 892 F.3d at 809 ("Any 'impairment of physical condition' is bodily injury."). But even if that were true, it is beside the point. *Curtis Johnson* defines physical force in the disjunctive, as "force capable of causing *physical pain or injury*." 559 U.S. at 140 (emphasis added).

Finally, the majority crafts a "robbery-by-tripping" hypothetical to argue that causing bodily injury does not require using physical force. *See* 892 F.3d at 811–12 ("By tripping the victim and causing him to fall, the robber 'impaired' the victim's 'physical condition,' satisfying the Texas definition of 'bodily injury,' but falling outside the boundaries of 'violent force' in *Curtis Johnson*.").

violent force, Jennings is setting the bar higher than *Curtis Johnson* itself does. *Curtis Johnson* held that force sufficient to cause physical pain or harm qualifies as violent force.").

In other words, based on nothing more than its novel interpretation of "impairment of physical condition," the majority contends that a defendant could cause bodily injury *without* causing injury or pain. From that premise, the majority concludes that robbery-by-injury is not a violent felony. But neither the majority's premise, nor its conclusion, withstands scrutiny.

Even if it were hypothetically possible to cause bodily injury without also causing pain or injury, that would be wholly beside the point. *Curtis Johnson* defines "physical force" as "force *capable of* causing physical pain or injury"—it does not require that pain or injury actually result. 559 U.S. at 140 (emphasis added).

In addition, the majority does not cite a single case to support its contention that a defendant could impair someone's physical condition without causing either pain or injury.[5]

Nor could it: Texas courts have explained that "impairment" occurs when "a part of a person's . . . body is damaged or does not work well, esp. when the condition amounts to a disability." *Marshall v. State*, 479 S.W.3d 840, 844 (Tex. Crim. App. 2016). *See also Garcia v. State*, 367 S.W.3d 683, 688 (Tex. Crim. App. 2012) ("Texas courts have interpreted 'impairment' to include the diminished function of a bodily organ.").

It is hard to understand how a defendant could cause "damage" to the victim's body (or internal organs) without also causing physical pain or injury. Instead, the majority's robbery-by-tripping hypothetical—like "tapping a victim on the shoulder and causing him to fall down and suffer great bodily harm"—"is a clever hypothetical," but it is also precisely "type of argument the

[5] The cases the majority cites when it introduces its robbery-by-tripping hypothetical merely confirm that Texas robbery-by-injury can be committed by "injuring someone during flight from the scene of a theft." 892 F.3d at 812 n.79 (citing *White v. State*, 671 S.W.2d 40, 42 (Tex. Crim. App. 1984), *Lightner v. State*, 535 S.W.2d 176, 177–78 (Tex. Crim. App. 1976), and Tex. Penal Code § 29.01).

Supreme Court has instructed us to avoid crediting." *United States v. Ceron*, 775 F.3d 222, 229 (5th Cir. 2014). As we have made clear, the "categorical approach requires 'more than the application of legal imagination to a state statute's language.'" *Id.* (quoting *Gonzales v. Duenas–Alvarez*, 549 U.S. 183, 193 (2007)). *See also United States v. Brewer*, 848 F.3d 711, 714 (5th Cir. 2017) ("'[T]heoretical applications of a statute to conduct that would not constitute a [violent felony] do not demonstrate that the statutory offense is categorically not a [violent felony].'") (quoting *Duenas–Alvarez*, 549 U.S. at 197–98).

Indeed, the only case cited by the majority is an indictment (not a judicial decision) that charges a defendant with knowingly causing epileptic seizures. 892 F.3d at 812 & n.80 (citing *State v. Rivello* indictment). Surely the majority does not contend that epileptic seizures do not cause pain or injury.

Even holding all those problems to the side, the majority's contention that "tripping the victim" who is "giv[ing] chase" "and causing him to fall" does not involve "force capable of causing physical pain or injury" is simply unpersuasive. 892 F.3d at 812. If a slap in the face is capable of causing physical pain or injury, then so too is tripping someone and causing them to fall. *See United States v. Bowles*, 2018 WL 2230626, at *3 (4th Cir. May 16, 2018); *United States v. Verwiebe*, 874 F.3d 258, 261 (6th Cir. 2017) (Sutton, J.) (suggesting that "tripping somebody into oncoming traffic" requires the use of physical force). *See also Zuliani v. State*, 52 S.W.3d 825, 831 (Tex. App.—Austin 2001) ("The threshold for 'bodily injury'—physical pain—is low; no rational jury could believe the evidence that Dwinell slapped him, hit him, or pushed him down without also finding that she caused him at least physical pain."), *rev'd on other grounds*, 97 S.W.3d 589 (Tex. Crim. App. 2003).

* * *

Texas robbery-by-injury requires proof that the defendant "cause[d] bodily injury to another." Tex. Penal Code § 29.02(a)(1). Because "it is

impossible to cause bodily injury without using force 'capable of' producing that result," Texas robbery-by-injury qualifies as a violent felony—it "*categorically* involves the use of 'force capable of causing physical pain or injury to another person.'" *Castleman*, 134 S. Ct at 1416–17 (Scalia, J., concurring) (emphasis added).

As the Eighth Circuit recently put it: a "Texas robbery conviction constitutes a 'violent felony' under the force clause of the ACCA" because "Texas second-degree robbery requires at least as much violent force as required by *Johnson*." *Hall*, 877 F.3d at 808. "Because there must be actual bodily injury or 'actual or perceived threat of imminent bodily injury,' Texas second-degree robbery 'has as an element the use, attempted use, or threatened use of [violent] physical force,' which 'is force capable of causing physical pain or injury to another person.'" *Id.* at 807 (alteration in original, internal citation omitted).

In ruling otherwise, the majority creates a circuit split, misinterprets both *Curtis Johnson* and *Castleman*, and relies on what can only be described as "legal imagination" in defining bodily injury under Texas law to require neither pain nor injury. I respectfully dissent.

# United States District Court

NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

v.

**LATROY LEON BURRIS**

**JUDGMENT IN A CRIMINAL CASE**

Case Number: **3:16-CR-00163-D(1)**
USM Number: **54243-177**
**Lauren Anita Woods**
Defendant's Attorney

**THE DEFENDANT:**

| | | |
|---|---|---|
| ☒ | pleaded guilty to count(s) | **1 and 2 of the indictment filed on April 20, 2016** |
| ☐ | pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court. | |
| ☐ | pleaded nolo contendere to count(s) which was accepted by the court | |
| ☐ | was found guilty on count(s) after a plea of not guilty | |

The defendant is adjudicated guilty of these offenses:

| Title & Section / Nature of Offense | Offense Ended | Count |
|---|---|---|
| 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(e): Felon In Possession Of A Firearm | 01/20/2016 | 1 |
| 21 U.S.C. § 841(a)(1) and (b)(1)(C): Possession With Intent To Distribute A Controlled Substance | 01/20/2016 | 2 |

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

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

**April 21, 2017**
Date of Imposition of Judgment

Signature of Judge

**SIDNEY A. FITZWATER**
**UNITED STATES DISTRICT JUDGE**
Name and Title of Judge

April 25, 2017
Date

DEFENDANT: LATROY LEON BURRIS
CASE NUMBER: 3:16-CR-00163-D(1)

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

one hundred eighty-eight (188) months as to counts 1 and 2.

It is ordered that the sentences on counts 1 and 2 shall run concurrently with one another.

It is ordered that the sentences on counts 1 and 2 shall run concurrently with any sentences hereafter imposed in Case Nos. F-1651495, F-1651496, F-1651497, and MA1651729, pending in Criminal District Court 1, Dallas County, Texas, and Case No. F-1651498, pending in the 265th Judicial District Court of Dallas County, Dallas, Texas; and consecutively to any sentences hereafter imposed in Case No. 199-80666-2012, pending in the 199th Judicial District Court of Collin County, McKinney, Texas, Case No. F-1545380, pending in the 204th Judicial District Court of Dallas County, Dallas, Texas, Case No. F-1545381, pending in the 204th Judicial District Court of Dallas County, Dallas, Texas, Case No. MA1545913, pending in Dallas County Criminal Court 1, Dallas, Texas, Case No. CR-2016-04954-B, pending in Denton County Criminal Court 2, Denton, Texas, and Case No. CM-2011-91, pending in Atoka County District Court, Atoka, Oklahoma.

☒ The court makes the following recommendations to the Bureau of Prisons:

that the defendant be allowed to participate in the Institutional Residential Drug Abuse Program, if eligible, and be assigned to serve his sentence at a facility where he can participate in the Program.

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

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: LATROY LEON BURRIS
CASE NUMBER: 3:16-CR-00163-D(1)

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **three (3) years.**

## MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
6. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

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

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

DEFENDANT: LATROY LEON BURRIS
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## STANDARD CONDITIONS OF SUPERVISION

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

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

## U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: LATROY LEON BURRIS
CASE NUMBER: 3:16-CR-00163-D(1)

## SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least $10 per month.

DEFENDANT: LATROY LEON BURRIS
CASE NUMBER: 3:16-CR-00163-D(1)

# CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | Assessment | JVTA Assessment* | Fine | Restitution |
|---|---|---|---|---|
| **TOTALS** | $200.00 | $.00 | $.00 | $.00 |

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

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

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

☐ the interest requirement is waived for the ☐ fine ☐ restitution

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

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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# SCHEDULE OF PAYMENTS

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

**A** ☒ Lump sum payments of $200 due immediately, balance due

☐ not later than , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

**B** ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

**C** ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

**D** ☐ Payment in equal 20 *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

**E** ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

**F** ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

DEFENDANT: LATROY LEON BURRIS
CASE NUMBER: 3:16-CR-00163-D(1)

## ADDITIONAL FORFEITED PROPERTY

It is ordered that the defendant shall forfeit to the United States of America the following property: a Smith & Wesson, Model SD40VE, .40-caliber handgun, bearing Serial No. HFS4262; any ammunition recovered with the weapon; and any U.S. currency recovered