No. --

IN THE

SUPREME COURT OF THE UNITED STATES

RODNEY DEWAYNE MITCHELL,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Texas offense of aggravated robbery is a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. §924(e)?

Subsidiary question: Whether the instant Petition should be held pending *Walker v. United States*, No. 19-373, __U.S.__, __S.Ct. __, 2019 WL 6042320 (Nov. 15, 2019)(granting cert.), and/or *Burris v. United States*, No. 19-6186 (cert. filed October 7, 2019)?

2. Whether the fact of a prior conviction must be proven to a jury beyond a reasonable doubt and placed in the indictment if it elevates the defendant's maximum punishment?

Subsidiary question: Whether the instant Petition should be held pending any forthcoming case addressing the viability of *Almendarez-Torres v. United States*, 523 U.S. 334 (1998)?

PARTIES

Rdoney Dewayne Mitchell is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

TABLE OF CONTENTS

Question Presented.. ii

Parties.. iii

Table of Contents.. iv

Index to Appendices.. v

Table of Authorities.. vi

Opinion Below.. 1

Jurisdictional Statement.. 1

Rules and Statutory Provisions. 1

Statement of the Case.. 3

Reasons for Granting the Writ.. 6

I. The instant Petition should be held pending *Walker v. United States*, No. 19-373, __U.S.__, __S.Ct. __, 2019 WL 6042320 (Nov. 15, 2019)(granting cert.), and/or *Burris v. United States*, No. 19-6186 (cert. filed October 7, 2019), and remanded in light of either of these forthcoming, or potentially forthcoming authorities, and in light of the Fifth Circuit's intervening *en banc* decision in *United States v. Herrold*, 941 F.3d 173, 177 (5th Cir. October 18, 2019)(*en banc*). 6

II. The Petition should be held and potentially remanded in light of any forthcoming authority addressing whether the fact of a prior conviction must be proven to a jury a beyond a reasonable doubt and placed in the indictment... 9

Conclusion.. 12

INDEX TO APPENDICES

Appendix A Judgment and Sentence of the United States District Court for the Northern District of Texas

Appendix B Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit

TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) . . . . . ii, 10, 11

Apprendi v. New Jersey, 530 U.S. 466 (2000) 10

Blakely v. Washington, 542 U.S. 296-02 (2004) 10

Burton v. State, 510 S.W.3d 232 (Tex. App. - Fort Worth 2017) 4, 7

Cooper v. State, 430 S.W.3d 426 (Tex. Crim. App. 2014) 4, 7, 8

Florida v. Burr, 496 U.S. 914 (1990) 11

Henderson v. United States, 568 U.S. 366 (2013) 11

Henry v. Rock Hill, 376 U.S. 776 (1964).. 11

Johnson v. United States, 135 S.Ct. 2551 (2015) 6

Lawrence v. Chater, 516 U.S. 163, 167 (1996). 9, 10

Mathis v. United States, 136 S.Ct. 2243 (2016) 4, 6, 7, 9

State Farm Mutual Auto Ins. Co. v. Duel, 324 U.S. 154 (1945) 11

State Tax Commission v. Van Cott, 306 U.S. 511 (1939) 11

Stutson v. United States, 516 U.S. 163 (1996) 9

Taylor v. United States, 495 U.S. 575 (1990) 6

Torres-Valencia v. United States, 464 U.S. 44 (1983) 11

Tyler v. Cain, 533 U.S. 656 (2001) 11

United States v. Burris, 920 F.3d 942 (5th Cir. 2019) 5, 6, 7

United States v. Clinton, 256 F.3d 311 (5th Cir. 2001) 10, 11

United States v. Hernandez-Gonzalez, 405 F.3d 260 (5th Cir. 2005) 10, 11

United States v. Herrold, 883 F.3d 517 (5th Cir. 2018) 4, 5, 9

United States v. Herrold, 941 F.3d 173 (5th Cir. October 18, 2019) 6, 8, 9

United States v. Lerma, 877 F.3d 628 (5th Cir. 2017) 4, 5, 8

United States v. Miro, 29 F.3d 194 (5th Cir. 1994) 11

United States v. Mitchell, No. 18-110047, 776 Fed. Appx. 227 (5th Cir. August 28, 2019) 1

United States v. Wright, 2017 U.S. App. LEXIS 4563 (5th Cir. March 15, 2017) 11

Walker v. United States, No. 19-373, __U.S.__, __S.Ct. __, 2019 WL 6042320 (Nov. 15, 2019). . . . . ii, 6, 7, 8

Williams v. State, 827 S.W.2d 614 (Tex. App. - Houston [1st Dist.] 1992) 4

Woodard v. State, 294 S.W.3d 605 (Tex. App. - Houston [1st Dist.] 2009) 4, 7, 8

STATUTES

18 U.S.C. § 924 ii

18 U.S.C. § 924(e). 10

18 U.S.C. § 924(e)(2). 6

18 U.S.C. § 924(e)(2)(B) 1, 6

28 U.S.C. § 1254(1). 1

Tex. Penal Code § 29.02 1

Tex. Penal Code § 29.02(a) 3, 7

Tex. Penal Code § 29.03 1

Tex. Penal Code § 29.03(a) 3, 9

MISCELLANEOUS

1 J. Bishop, Criminal Procedure § 87 10

4 W. Blackstone, Commentaries on the Laws of England 343 (1769). 9

Initial Brief in *United States v. Mitchell*, No. 18-10047, 2018 WL 2165536 (5th Cir. filed May 1, 2018) 3

Supplemental Brief for the United States in *United States v. Clinton*, 2001 WL 34353823 (5th Cir. 2001) 10

UNITED STATES CONSTITUTION

U. S. Const. amend. V 2

U. S. Const. amend. VI 2

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Rodney Dewayne Mitchell respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Mitchell,* No. 18-110047, 776 Fed. Appx. 227 (5th Cir. August 28, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appendix B]. The written judgment of conviction and sentence was issued Janusry16, 2018, and is also provided in the Appendix to the Petition. [Appendix A].

JURISDICTIONAL STATEMENT

The judgment and unpublished opinion of the United States Court of Appeals for the Fifth Circuit were filed on August 28, 2019. [Appendix A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 924(e)(2)(b) of Title 18 provides:

> ...the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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...

Tex. Penal Code §29.02 provides:

> (a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 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.
> (b) An offense under this section is a felony of the second degree.

Tex. Penal Code §29.03 provides:

(a) A person commits an offense if he commits robbery as defined in Section 29.02, and he:
(1) causes serious bodily injury to another;
(2) uses or exhibits a deadly weapon; or
(3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:
(A) 65 years of age or older; or
(B) a disabled person.
(b) An offense under this section is a felony of the first degree.
(c) In this section, "disabled person" means an individual with a mental, physical, or developmental disability who is substantially unable to protect himself from harm.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. Proceedings in District Court

Petitioner Rodney Mitchell pleaded guilty to possessing a firearm after having sustained a felony conviction. *See* (Record in the Court of Appeals,54-60). He had three felony convictions, all obtained on the same day, now 17 years ago, all for Texas aggravated robbery. *See* (Record in the Court of Appeals, 184-186). Because the Presentence Report (PSR) regarded these, Mr. Mitchell's only three felonies, as "violent felonies" under 18 U.S.C. §924(e), the Armed Career Criminal Act (ACCA), it concluded that he was subject to a 15 year mandatory minimum. *See* (Record in the Court of Appeals, 182-183).

The defense objected on the grounds that the Texas aggravated robbery statute did not constitute a "violent felony" under ACCA. *See* (Record in the Court of Appeals, 221-222).

At the January 8, 2018 sentencing, the district court overruled the objection and imposed a mandatory minimum sentence of 15 years imprisonment. *See* (Record in the Court of Appeals, 147).

B. Proceedings on Appeal

Petitioner appealed, contending that neither his Texas aggravated robbery conviction did not qualify him for ACCA. Specifically he maintained that the offense of Texas robbery did not have as an element the use, attempted use, or threatened use of physical force as an element, and that the least culpable – or least forceful – means of committing aggravated robbery did not supply the necessary element of force. *See* Initial Brief in *United States v. Mitchell*, No. 18-10047, 2018 WL 2165536, at *4-5 (5th Cir. filed May 1, 2018)("Initial Brief").

Texas simple robbery may be committed either by inflicting bodily injury during the course of a theft, by threatening such injury, or by placing another in fear of such injury. *See* Tex. Penal Code §29.02(a). Texas aggravated robbery is committed when a person commits simple robbery, and either causes serious injury, uses or exhibits a deadly weapon, or targets a senior or disabled victim. *See* Tex. Penal Code §29.03(a).

Although the judicial records from the prior offenses showed that Petitioner threatened injury, *see* (Record in the Court of Appeals, 197-198, 205-206, 213-214), he argued below that the two forms of simple robbery were not separate offenses under *Mathis v. United States*, __U.S.__, 136 S.Ct. 2243 (2016), but merely two means of committing the same offense, *see* Initial Brief, at *9; *Cooper v. State*, 430 S.W.3d 426 (Tex. Crim. App. 2014); *Burton v. State*, 510 .S.W3d 232, 237 (Tex. App. – Fort Worth 2017); *but see Woodard v. State*, 294 S.W.3d 605, 609 (Tex. App. - Houston [1st Dist.] 2009). Further, he argued that simple robbery by injury did not involve the use of physical force because it could be committed by the infliction of non-forceful injury during the course of a theft. *See* Initial Brief, at *9-13. He also maintained that robbery by threat did not have the threatened use of force, because it could be committed by threatening non-forceful injury, or by "placing another in fear," which conduct the Texas courts had held not to be equivalent to a threat. *See* Initial Brief, at *12-13; *Williams v. State*, 827 S.W.2d 614, 616 (Tex. App. - Houston [1st Dist.] 1992).

Finally, he argued that the Texas aggravated robbery statute did not create separate offenses based on the means by which an offense became aggravated, but rather set forth multiple ways or means that one could commit the single offense of aggravated robbery: causing serious injury, using a deadly weapon, or targeting a senior or disabled victim. *See* Initial Brief, at *13-15; *see Woodard*, 294 S.W.3d at 609. Although the Fifth Circuit had previously held in *United States v. Lerma*, 877 F.3d 628 (5th Cir. 2017), that Texas aggravated robbery actually sets forth multiple distinct offenses, he argued that it had been overruled by the intervening *en banc* decision of *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018)(en banc), *vacated by* __U.S.__, 139 S.Ct. 2712 (June 17, 2019), *reinstated in part by* __F.3d __, 2019 WL 5288154 (October 18, 2019). *See* Initial Brief, at *13-15. *Lerma* relied entirely on the structure of the Texas aggravated robbery statute to conclude that it contained more than one offense, expressly rejecting any reliance on Texas statute court decisions construing the statute. *See Lerma*, 877 F.3d at 633-634, & n.4. But *Herrold* had held that state court decisions, not inferences based on statutory structure, represent the superior authority on the question

of how many offenses lie within a state statute. *See United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018)(*en banc*), *vacated by* __U.S.__, 139 S.Ct. 2712 (June 17, 2019), *reinstated in part by* 941 F.3d 173, 177 (October 18, 2019).

The court of appeals affirmed. It first cited *Lerma* for the proposition that:

> Texas' aggravated robbery statute is divisible under *Mathis*, and a conviction for aggravated robbery while using or exhibiting a deadly weapon,§ 29.03(a)(2), is a violent felony under the ACCA's use-of-force clause, § 924(e)(2)(B)(i).

[Appendix B, at 2]. Answering Petitioner's contention that *Lerma* was overruled by *Herrold*, the court noted simply that the *en banc* opinion in *Herrold* had been vacated by this Court. The court also cited *United States v. Burris*, 920 F.3d 942, 945, 948 (5th Cir. 2019), *cert. pending*, for the proposition that Texas simple robbery is independently a violent felony. [Appendix B, at 2].

REASON FOR GRANTING THE PETITION

The instant Petition should be held pending *Walker v. United States*, No. 19-373, __U.S.__, __S.Ct. __, 2019 WL 6042320 (Nov. 15, 2019)(granting cert.), and/or *Burris v. United States*, No. 19-6186 (cert. filed October 7, 2019), and remanded in light of either of these forthcoming, or potentially forthcoming authorities, and in light of the Fifth Circuit's intervening *en banc* decision in *United States v. Herrold*, 941 F.3d 173 (5th Cir. October 18, 2019)(*en banc*).

The Armed Career Criminal Act (ACCA) provides for a 15 year mandatory minimum and a life maximum term of imprisonment if a person possesses a firearm following three or more "violent felonies." *See* 18 U.S.C. §924(e)(2). Among other provisions not at issue here, or potentially at issue, but no longer constitutionally available, *see Johnson v. United States*, __U.S.__,135 S.Ct. 2551 (2015), ACCA defines "violent felony" to include those offenses that have as an element the use, attempted use, or threatened use of physical force. *See* 18 U.S.C. §924(e)(2)(B).

In deciding whether an offense has such an element, sentencing courts should not look to the defendant's conduct, but rather at the requirements of the offense set forth in the statute of conviction. *See Taylor v. United States*, 495 U.S. 575, 600-601 (1990). Thus, if an offense may be committed in a way that lacks force (including attempted or threatened force), it does not satisfy ACCA's force requirement. Further, a statute may set forth multiple alternative means or ways of committing a single offense, rather than multiple distinct offenses. *See Mathis v. United States*, __U.S.__, 136 S.Ct. 2243, 2249 (2016). In such a case, the statute is said to be "indivisible," and any non-qualifying means or way of committing the offense housed in the statute may save the defendant from the draconian ACCA sentence. *See Mathis*, 136 S.Ct. at 2251.

The court below held that Texas simple robbery (and by extension aggravated robbery) qualifies as a "violent felony" under ACCA's "force clause." *See* [Appendix B, at 2]. But the case it cited for that proposition, *United States v. Burris*, 920 F.3d 942, 946-947 (5th Cir. 2019), *cert. pending, see* [Appendix B, at 2], is before this Court on writ of *certiorari*, *see* Petition for Certiorari

in *Burris v. United States*, No. 19-6186 (filed October 7, 2019). In the event that the cited precedent is vacated by this Court (likely in light of *Walker v. United States*, No. 19-373, __U.S.__, __S.Ct. __, 2019 WL 6042320 (Nov. 15, 2019)(granting cert.), the court below should be given an opportunity to reconsider this basis for its decision.

The decision should also be reconsidered in the event that the Petitioner prevails in *Walker*. In *Walker,* this Court has already granted *certiorari* to decide whether Texas simple robbery possesses the use of force as an element, notwithstanding the fact that it may be committed by recklessly inflicting bodily injury. *See Walker*, *supra*; Petition for Certiorari in *Walker v. United States*, 19-373, at p. I (filed September 19, 2019). The Petitioner in *Walker* suffered conviction for inflicting robbery during theft, *see* Petition for Certiorari in *Walker v. United States*, 19-373, at p.10 (filed September 19, 2019), while Petitioner's records show only threatened injury, *see* (Record in the Court of Appeals, 197-198, 205-206, 213-214).[1]

That distinction, however, will not likely save the sentence in the event that Walker prevails. The Fifth Circuit has not addressed whether Texas simple robbery may be subdivided under *Mathis* into robbery by injury and robbery by threat. *See Burris*, 920 F.3d at 946-947 ("This court has never addressed whether § 29.02(a) is divisible or indivisible —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), *cert. pending*. But the Texas state courts have issued conflicting decisions on this question. ***Compare*** *Cooper v. State*, 430 S.W.3d 426 (Tex. Crim. App. 2014)(different means of committing same offense); *Burton v. State*, 510 S.W.3d 232, 237 (Tex. App. – Fort Worth 2017)(same) ***with*** *Woodard v. State*, 294 S.W.3d 605, 608-609 (Tex. App. – Houston [1st Dist.] 2009])(different offenses). In a case of such uncertainty, *Mathis* holds that the statute should be treated as though it sets forth but one offense. *See Mathis*, 136 S.Ct. at 2256-2257. It certainly suggests that the statute

[1]A Texas defendant may not be convicted of threatened injury if he acted only recklessly. *See* Tex. Penal Code §29.02(a). Recklessness is available to the prosecution as a theory of the defendant's mental state only if injury is actually inflicted. *See* Tex. Penal Code §29.02(a).

is indivisible where, as here, the higher state court finds but one offense. *See id; Cooper, supra.* Thus, if Texas simple robbery by injury is not a violent felony, all of Texas simple robbery will fall outside the enhancement.

Finally, the court below held that Texas aggravated robbery represents a set of divisible offenses, and that the particular subsection at issue in Petitioner's cases – robbery with a deadly weapon – constitutes a "violent felony." *See* [Appendix B, at 2]. It is doubtful whether *any* portion of Texas aggravated robbery will qualify as a "violent felony" if *Walker* ultimately holds that Texas simple robbery lacks force as an element due to its reckless *mens rea*. A deadly weapon cannot transform reckless conduct into the "use" of force if the "use" of force "against" another necessarily requires intentional conduct.

In any case, the precedent cited by the court below in support of the divisibility of Texas aggravated robbery has again been overruled. The decision below relied explicitly on *Lerma* for this proposition. *See* [Appendix B, at 2]. Further, it rejected Petitioner's argument that *Lerma* had been overruled by an intervening *en banc* decision in *Herrold* for the sole reason that *Herrold* had been vacated by this Court. *See* [Appendix B, at 2]. Since the issuance of the opinion below, however, the prior *en banc* opinion in *Herrold* has been reinstated insofar as it addressed questions of divisibility. *See Herrold*, 941 F.3d at 177.

Lerma holds that Texas aggravated robbery may be treated as divisible because the structure of the statute suggests multiple offenses. *See Lerma*, 877 F.3d at 633-634. It rejects the defendant's effort to rely Texas state court opinions which state in clear terms that the aggravated robbery statute sets forth only ways or means of committing the offense, not distinct offenses. *See Lerma*, 877 F.3d at 634, & n.4; *Woodard*, 294 S.W.3d at 608-609 (Tex. App. – Houston [1st Dist.] 2009])("..the aggravating factors in this case are simply descriptions or means by which the underlying offense of robbery by causing bodily injury can be committed. ... Under these circumstances, unanimity as to the aggravating factors was not required, and the jury could convict appellant of aggravated

robbery if each juror concluded that at least one of the aggravating factors of section 29.03 was proved.")(internal citations omitted).

The reinstated portions of *Herrold*, however, hold that state court opinions control over the apparent structure of the statute (barring an elevated penalty range for certain statutory alternatives) when determining divisibility. *See United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018)(*en banc*)("...we decline to hold that these structural statutory features are sufficient to resolve the question of divisibility when they point in the opposite direction of sources that the *Mathis* Court did say were relevant—state decisions on the subject of jury unanimity."), *vacated by* __U.S.__, 139 S.Ct. 2712 (June 17, 2019), *reinstated in part by* 941 F.3d 173, 177 (October 18, 2019). This is consistent with *Mathis*. *See Mathis*, 136 S.Ct. at 2256. The precedent relied on below has thus been overruled by an intervening *en banc* decision. And in the absence of divisibility, Texas aggravated robbery may be committed by targeting a senior or disabled victim. *See* Tex. Penal Code §29.03(a). The identity of the victim does not change a forceless act into a forceful one.

As argued, the combination of intervening Fifth Circuit precedent and pending cases before this Court create a reasonable probability that serious flaws will be revealed in the decision below. In such a case, the court below should enjoy another chance to consider its decision in light of these new developments. *See Stutson v. United States*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting); *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

II. The Petition should be held and potentially remanded in light of any forthcoming authority addressing whether the fact of a prior conviction must be proven to a jury a beyond a reasonable doubt and placed in the indictment.

The Fifth and Sixth Amendment codify "two longstanding tenets of common-law criminal jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,' 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that 'an accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the

requirements of the common law, and it is no accusation in reason,' 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872).'" *Blakely v. Washington*, 542 U.S. 296, 301–02 (2004). A straightforward application of this principle would show constitutional error in this case. Petitioner's maximum penalty was increased from ten years to life on the basis of prior convictions as to which he enjoyed no right of jury trial, proof beyond a reasonable doubt, nor indictment. *See* 18 U.S.C. §924(e). This Court sanctioned this constitutional aberration in *Almendarez–Torres v. United States*, 523 U.S. 224, (1998).

In the event that it grants certiorari to determine the validity of *Almendarez-Torres* while the present case is pending, it should hold the instant case pending the resolution of that case. In the event *Almendarez-Torres* is overruled, it should then grant certiorari in the instant case, vacate the judgment below, and remand. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

It would be no barrier to relief that the *Almendarez-Torre*s issue was raised for the first time in a petition for *certiorari*. There is some authority in the Fifth Circuit for the proposition that arguments not raised until after the opinion may be raised only in "extraordinary circumstances." *United States v. Hernandez-Gonzalez*, 405 F.3d 260 (5th Cir. 2005). But an earlier decision of the court below applies plain error to claims made by the defendant for the first time in a *certiorari* petition. *See United States v. Clinton*, 256 F.3d 311 (5th Cir. 2001). The defendant in *Clinton* was convicted of a federal drug crime without a jury determination of drug quantity, and failed to raise any claim of Sixth Amendment error in the district court or before the court of appeals. *See Supplemental Brief for the United States in United States v. Clinton*, 2001 WL 34353823, at *3 (5th Cir. 2001). After this Court granted *certiorari*, vacated the sentence, and remanded in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), however, the *Clinton* court reached a very different conclusion about its obligations in light of this Court's order than did the *Hernandez-Gonzalez* court. Prior to reaching the merits of the *Apprendi* issue, the court below held:

> This case is on remand from the United States Supreme Court for further consideration in light of *Apprendi. Apprendi* was decided after this Court affirmed criminal defendant Johnny Clinton's drug trafficking convictions and sentences on direct appeal and the arguments presented herein were not presented to the district

> court or this Court on initial appeal. We have, therefore, carefully considered the record in light of Clinton's arguments on remand and the plain error standard of review. Having concluded that review, we find no remediable error and once again affirm Clinton's criminal convictions as well as the sentences imposed by the district court.

Clinton, 256 F.3d at 313 (internal citations omitted). Because *Clinton* predates *Hernandez-Gonzalez*, the court below is bound to apply *Clinton* and review for plain error. *See United States v. Miro*, 29 F.3d 194, 199 n.4 (5th Cir. 1994)("When faced with conflicting panel opinions, the earlier controls our decision."). Because an error may become "plain" while a case is on direct appeal, *see Henderson v. United States*, 568 U.S. 366 (2013), plain error may be shown if *Almendarez-Torres* is overruled in a forthcoming case. And, indeed, the court below has recently granted relief when the defendant secured GVR on a basis raised for the first time in a petition for *certiorari*. *See United States v. Wright*, 2017 U.S. App. LEXIS 4563, at *6 (5th Cir. March 15, 2017)(unpublished).

In any case, GVR is not a decision on the merits. *See Tyler v. Cain*, 533 U.S. 656, 665, n.6 (2001); *accord State Tax Commission v. Van Cott*, 306 U.S. 511, 515-516 (1939). Accordingly, procedural obstacles to reversal – such as the consequences of non- preservation – should be decided in the first instance by the court of appeals. *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964)(*per curiam*)(GVR "has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent"); *Torres-Valencia v. United States*, 464 U.S. 44 (1983)(*per curiam*)(GVR utilized over government's objection where error was conceded; government's harmless error argument should be presented to the Court of Appeals in the first instance); *Florida v. Burr*, 496 U.S. 914, 916-919 (1990)(Stevens, J., dissenting)(speaking approvingly of a prior GVR in the same case, wherein the Court remanded the case for reconsideration in light of a new precedent, although the claim recognized by the new precedent had not been presented below); *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945)(remanding for reconsideration in light of new authority that party lacked opportunity to raise because it supervened the opinion of the Court of Appeals). If there is doubt about the outcome in light of the procedural hurdles to relief, this Court should vacate and remand.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, he prays for such relief as to which he may justly entitled.

Respectfully submitted this 26th day of November, 2019.

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