No. 19-6800

IN THE

SUPREME COURT OF THE UNITED STATES

RODNEY DEWAYNE MITCHELL, JR.,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Reply in Support of Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

KEVIN JOEL PAGE
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS 75202
(214) 767-2746

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ARGUMENT

This Court should hold the instant petition pending the outcome of *Borden v. United States*, __U.S.__, __S.Ct.__, 2020 WL 981806 (March 2, 2020)(granting cert.), and remand in light of that decision and/or *United States v. Herrold*, 941 F.3d 173 (5th Cir. October 18, 2019)(*en banc*).

This Court should hold the instant petition pending the outcome of *Borden v. United States*, __U.S.__, __S.Ct.__, 2020 WL 981806 (March 2, 2020)(granting cert.), which will decide whether reckless offenses may satisfy the "force clause" of 18 U.S.C. 924(e) ("ACCA"). Certain forms of the Texas robbery offense may be committed recklessly. This Court recognized as much when it granted *certiorari* to a defendant with a Texas robbery conviction to determine the same question presented: whether reckless offenses possess the use of physical force against the person of another. *See Walker v. United States*, __U.S.__, __S.Ct.__, 2019 WL 6042320 (Nov. 15, 2019)(granting cert.), *dismissed upon suggestion of death*, 2020 WL 411668 (Jan. 27, 2020).

The government urges the Court to decline review because Petitioner suffered conviction under the "threatening injury" prong of the Texas robbery statute, rather than its "causing injury" prong. *See* (Brief in Opposition ("BIO"), at p. 6). As the government correctly notes, a Texas defendant may not be convicted for recklessly threatening injury. *See* Tex. Penal Code §29.02. But the court below has never held that the Texas robbery statute is divisible into threatening and causing injury for the purposes of the categorical approach. To the contrary, it has expressly reserved that issue, finding that both forms of the offense possess the use or threatened use of force as an element, a conclusion expressly premised on the possibility that one may recklessly use force against the person of another. *See United States v. Burris*, 920 F.3d 942, 946-947 (5th Cir. 2019) ("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.* Notably, the case that so held, *Burris*, *supra* appears to be held now pending the outcome of *Borden*. And *Burris* was cited in the opinion below for the proposition that "Texas' robbery statute, §29.02(a), requires use of physical force and

constitutes ACCA predicate offense." [Appendix B to the Petition, at p.2]. If there is any doubt that *Borden* implicates the Texas robbery statute, it may be resolved by this Court's disposition of *Burris*.

And there is good reason to think that Texas robbery contains but one offense, which may be violated either by threatening or causing injury, not two (or more) distinct offenses. As noted in the Petition, and simply ignored in the Response, the Texas High court has held that threatening and causing injury are two manners or means of committing robbery, not separate offenses. *See Cooper v. State*, 430 S.W.3d 426 (Tex. Crim. App. 2014). Under *Mathis v. United States*, __U.S.__, 136 S.Ct. 2243 (2016), the statute is indivisible, and a non-qualifying prong will preclude application of ACCA. *See Mathis*, 136 S.Ct. at 2256-2257. In any case, there is at least a reasonable probability that the court below, correctly applying *Mathis*, would regard the offenses as indivisible. That is enough for a remand. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

The government also resists review because Petitioner suffered conviction for aggravated robbery, rather than simple robbery. *See* (BIO, at pp.5-6). As the government correctly notes, the court below held in *United States v. Lerma*, 877 F.3d 628 (5th Cir. 2017), that Texas aggravated robbery is divisible into robbery using a deadly weapon, robbery causing serious bodily injury, and robbery against a disabled or senior victim. *See Lerma*, 877 F.3d at 633-634. Even if that divisibility holding remains good law – and it plainly does not – *Lerma* probably would not survive a victory for the defendant in *Borden*. *Lerma* holds that robbery with a deadly weapon satisfies ACCA's force clause. *See Lerma*, 877 F.3d at 636. But if recklessness is simply incompatible with the use of physical force "against the person of another," it will not matter whether the reckless act is undertaken with an instrument of deadly force.

Further, *Lerma* is no longer good law in light of the *en banc* Fifth Circuit's most recent opinion in *United States v. Herrold*, 941 F.3d 173 (5th Cir. October 18, 2019)(*en banc*), cert. filed, which postdates the decision below. *See Herrold*, 941 F.3d at 177. Indeed, the court below rejected Petitioner's argument that *Lerma* conflicts with Herrold on the sole ground that *Herrold* "has been vacated in the light of *Quarles v. United States*, 139 S. Ct. 1872 (2019)." [Appendix to Petition B,

at p.2]. Since then, the portion of *Herrold* addressing divisibility has been reinstated. *See Herrold*, 941 F.3d at 177.

For the reasons discussed in the Petition, and scarcely contested by the Response, *Lerma* cannot survive *Herrold*. *See* (Petition, at pp.8-9). The sole ground advanced by the government here is a difference between the statutes at issue: *Lerma* addressed aggravated robbery, while *Herrold* addressed burglary. *See* (BIO, at pp.6-7). This very superficial distinction cannot save *Lerma* from the subsequent higher authority of *Herrold. Lerma* relies on the structure of the Texas aggravated robbery statute to conclude that it sets forth two offenses. *See Lerma*, 877 F.3d at 633-634. *Herrold* holds that, for *Mathis* purposes, the structure of a statute cannot prevail over the holdings of state courts as to whether the defendant enjoys a right of jury unanimity. *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). Texas courts hold that defendants do not enjoy a right of jury unanimity as to whether they committed aggravated robbery by deadly weapon, or by some other kind of aggravating circumstance. *See Woodard v. State*, 294 S.W.3d 605, 608-609 (Tex. App. – Houston [1st Dist.] 2009]). Under the very straightforward logic of *Herrold*, Texas aggravated robbery is not divisible. The court below cannot meet *en banc* each time it needs to apply an en banc precedent to a statute previously addressed, where an intervening *en banc* precedent clearly affects the outcome.

The government finally contends that the conflict between *Lerma* and *Herrold* would not warrant this Court's review, because it is an intra-circuit conflict concerning a question of state law. *See* (BIO, at p.7). This puzzling argument has no application here because Petitioner is not seeking plenary review. The sole question before this Court is whether there is a reasonable likelihood of a different outcome if the case were remanded in light of a favorable holding in *Borden*. *See Lawrence*, 516 U.S. at 167. This Court need not conclude for itself that *Herrold* overrules *Lerma* – it is enough

to note a reasonable probability that the court below would do so, given the reinstatement of *Herrold*'s divisibility holding, which had not occurred at the time of the decision below. Indeed, this Court may wish to vacate the judgment below and remand in light of the court below's intervening *Herrold* decision. An intervening *en banc* decision that might change the outcome, alone or in combination with an intervening decision of this Court, is sufficient reason to grant *certiorari*, vacate judgment, and remand. *See Lawrence*, 516 U.S. at 167 (noting that GVR has been deemed appropriate by this Court "in light of a wide range of developments," including "state supreme court decisions, new federal statutes, administrative reinterpretations of federal statutes, new state statutes, changed factual circumstances, and confessions of error or other positions newly taken by the Solicitor General, and state attorneys general.").

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 11th day of March, 2020.

/s/ Kevin Joel Page
KEVIN JOEL PAGE
COUNSEL OF RECORD
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS 75202
(214) 767-2746