No. _____

In the

Supreme Court of the United States

_____

Christopher Michael Sevier,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

Whether the Texas offense of aggravated assault by threat constitutes a "crime of violence" under USSG §4B1.2?

Subsidiary question: whether the decision below rests on a conclusion that it may reevaluate in light of *Borden v. United States*, No. 19-5410, __U.S.__, 140 S.Ct. 1262 (March 2, 2020)(granting cert.)?

PARTIES TO THE PROCEEDING

Petitioner is Christopher Michael Sevier, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Michael Sevier seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published opinion of the Court of Appeals is reported at *United States v. Sevier*, 803 Fed. Appx. 792 (5th Cir. May 6, 2020)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on May 6, 2020. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTES AND GUIDELINE

Federal Sentencing Guideline 4B1.2 states in relevant part:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

Texas Penal Code §22.01 states in relevant part:

> (a) A person commits an offense if the person:
> (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;

(2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

Texas Penal Code §22.02 states in relevant part:

(a) A person commits an offense if the person commits assault as defined in § 22.01 and the person:
(1) causes serious bodily injury to another, including the person's spouse; or
(2) uses or exhibits a deadly weapon during the commission of the assault.

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

Petitioner Christopher Michael Sevier pleaded guilty to one count of possessing a firearm after having sustained a prior felony conviction, and one count of possessing methamphetamine with intent to distribute it. *See* (Record in the Court of Appeals, at 90-93).

A Presentence Report (PSR) calculated an aggregate Guideline range of 70-87 months imprisonment, *see* (Record in the Court of Appeals, at 228), from which range the court departed downward one criminal history category under USSG §4A1.3, *see* (Record in the Court of Appeals, at 180). This resulted in an effective range of 57-71 months imprisonment. *See* (Record in the Court of Appeals, at 180).

The Guideline range stemmed from a base offense level of 20 under USSG §2K2.1. *See* (Record in the Court of Appeals, at 217). The court applied this elevated base offense level because it determined that Petitioner had previously sustained a conviction for a "crime of violence." *See* (Record in the Court of Appeals, at 217).

In particular, the court treated Petitioner's Texas conviction for aggravated assault with a deadly weapon as a crime of violence. *See* (Record in the Court of Appeals, at 217). Although the record does not contain any judicial records of this conviction, the Presentence Report (PSR) recited allegations from the indictment in that case. *See* (Record in the Court of Appeals, at 219-220). Specifically, it recited the allegation that Petitioner threatened bodily injury to another with a deadly weapon. *See* (Record in the Court of Appeals, at 219-220).

The district court imposed concurrent terms of 60 months, adjusted 54 days to account for pre-trial custody. *See* (Record in the Court of Appeals, at 102, 112).

B. Appellate Proceedings

On appeal, Petitioner argued that the district court erred in treating his Texas aggravated assault conviction as a "crime of violence" under USSG §§2K2.1 and 4B1.2. But he conceded that the arguments were foreclosed by circuit precedent, and that they were subject to plain error review.

The court of appeals affirmed on the sole ground that Texas aggravated assault constitutes the generic offense of "aggravated assault," enumerated as qualifying by USSG §4B1.2. *See* [Appx. A, at 2].

REASONS FOR GRANTING THE PETITION

This Court should hold the instant petition and consider a remand after *Borden v. United States*, No. 19-5410, __U.S.__, 140 S.Ct. 1262 (March 2, 2020)(granting cert.).

Guideline 2K2.1 provides for an enhanced base offense level when the defendant has sustained a prior conviction for a felony "crime of violence." USSG §2K2.1(a). USSG §2K2.1 uses the definition of "crime of violence" found at USSG §4B1.2. *See* USSG §2K2.1, comment. (n.1). That definition reads as follows:

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

USSG §4B1.2(a).

Thus, an offense may be a "crime of violence" under §4B1.2 because it either: a) has force (including attempted and threatened force) as an element, or b) is one of the enumerated offenses, among them "aggravated assault." The opinion below held that the Texas offense of "aggravated assault by threat" qualifies as the enumerated offense of "aggravated assault." [Appx. A, at 2].

In *Borden v. United States*, No. 19-5410, __U.S.__, 140 S.Ct. 1262 (March 2, 2020)(granting cert.), this Court will decide whether a Tennessee aggravated assault offense qualifies as a "violent felony" under 18 U.S.C. §924(e). The parties in that case have each asked the Court to determine how many states' aggravated assault statutes would qualify as "violent felonies" under the rules the defendant proposes.

See Brief for Petitioner in Borden v. United States, No. 19-5410, 2020 WL 4455238, at *38 (Filed April 27, 2020).; Brief for the United States in *Borden v. United States*, No. 19-5410, 2020 WL 4455245, at *32 (Filed June 8, 2020); Reply Brief for the Petitioner in *Borden v. United States*, No. 19-5410, 2020 WL 4455247, at *16-17 (Filed July 8, 2020).

If the Court resolves this aspect of the dispute, the result will be an authoritative opinion regarding the commonalities held by the various state statutes denominated "aggravated assault." Indeed, this is a common feature of this Court's opinions applying the categorical approach. *See Stokeling v. United States*, __U.S.__, 139 S.Ct. 544, 552 (2019); *United States v. Stitt*, __U.S.__, 139 S.Ct. 399, 406 (2018); *Esquivel–Quintana v. Sessions*, ___U.S. ___, 137 S.Ct. 1562, 1571 (2017). The enumerated offense of "aggravated assault" is defined by the elements present in a majority of contemporary state codes. *See Taylor v. United States*, 495 U.S. 575, 598 (1991); *United States v. Rodriguez*, 711 F.3d 541, 552, n.17 (citing *United States v. Esparza–Perez*, 681 F.3d 228, 229–30 (5th Cir.2012), *abrogated on other grounds by Esquivel–Quintana v. Sessions*, ___U.S. ___, 137 S.Ct. 1562, 1568 (2017). As such, *Borden* may become higher, superseding authority on the sole ground for the decision below: the generic definition of "aggravated assault."

And there are good reasons to doubt that the Texas offense denominated "aggravated assault" matches the majority of state codes bearing this name. Petitioner's Texas offense may be committed by threatening rather than inflicting injury. *See* Tex. Penal Code §22.02. The Model Penal Code, for example, does not

permit an aggravated assault conviction for a mere threat. *See* Model Penal Code §211.1. Further, the Ninth Circuit has observed that "…the threat or use of violence is not an element of the Model Penal Code's definition of aggravated assault, *or a majority of state statutes*." *United States v. Gomez-Hernandez*, 680 F.3d 1171, 1178 (9th Cir. 2012)(emphasis added)(internal citation omitted).

The court below has also held that the offense of aggravated assault by threat involves the threatened use of force against the person of another. *See United States v. Torres*, 923 F.3d 420 (5th Cir. 2019). This would qualify it as a "crime of violence" under USSG §4A1.2(a)(1), that Guideline's "force clause." But that conclusion may also be affected by *Borden*.

This "force clause," §4A1.2(a)(1), is very similar in wording to a number of other statutory and Guideline provisions used to classify offenses as violent. These include 18 U.S.C. §16(a), 18 U.S.C. §924(c)(3)(A), 18 U.S.C. §924(e)(2)(B)(i), and the version of USSG §2L1.2, comment. (n. 1), operative from the years 2001 through 2015. Before this Court's decisions *in Castleman v. United States*, 572 U.S. 157 (2014), and *United States v. Voisine*, __U.S.__, 136 S.Ct. 2272 (2016), these provisions were given a narrow reading by the federal courts of appeals.

In particular, many courts of appeals distinguished between inflicting injury and using physical force. These courts held that the mere causation of injury did not necessarily satisfy any force clause, absent some specification in the statute as to the mechanism by which injury was inflicted. *See Chrzanoski v. Ashcroft*, 327 F.3d 188, 195-196 (2d Cir.2003), *questioned by United States v. Hill*, 890 F.3d 51, 60 (2d Cir.

2018); *United States v. Torres-Miguel*, 701 F.3d 165, 168-69 (4th Cir. 2012), *held abrogated in In re Irby*, 858 F.3d 231, 238 (4th Cir. 2017); *United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006), *overruled by United States v. Reyes-Contreras*, 910 F.3d 169, 181-182 (5th Cir. 2018) (*en banc*); *United States v. Rodriguez-Enriquez*, 518 F.3d 1191, 1193-1196 (10th Cir. 2008), *held abrogated in United States v. Ontiveros*, 875 F.3d 533, 546 (10th Cir. 2017).

Further, most courts of appeals held that crimes lacking an intent requirement – strict liability crimes, or those requiring negligence or recklessness– fell outside this classification. *See Castleman*, 572 U.S. at 159, n.8 ("Although *Leoca*l reserved the question whether a reckless application of force could constitute a 'use' of force, the Courts of Appeals have almost uniformly held that recklessness is not sufficient.")(internal citation omitted)(collecting cases).

Many courts responded to *Castleman* and *Voisine* by broadening their interpretations of the force clauses. *See United States v. Ellison*, 866 F.3d 32, 37 (1st Cir. 2017); *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2018); *In re Irby*, 858 F.3d 231, 238 (4th Cir. 2017); *United States v. Reyes-Contreras*, 910 F.3d 169, 181-182 (5th Cir. 2018) (*en banc*); *United States v. Ontiveros*, 875 F.3d 533, 546 (10th Cir. 2017); *United States v. Bettcher*, 911 F.3d 1040, 1046 (10th Cir. 2018); *United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018). The question before the Court in both *Borden v. United States*, No. 19-5410, __U.S.__, 140 S.Ct. 1262 (March 2, 2020)(granting cert.), and the case at bar is whether they may have jumped the gun,

overlooking important differences between the force clause at issue in *Castleman* and *Voisine*, and the one at issue in provisions like USSG §4B1.2(a)(1).

Castleman involved a defendant convicted under 18 U.S.C. §922(g)(9), which forbids possession of firearms by persons convicted of a "misdemeanor crime of domestic violence." *Castleman*, 572 U.S. at 159. The term "misdemeanor crime of domestic violence" receives its definition in 18 U.S.C §921(a)(33), and includes misdemeanors that:

> ha[ve], as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim…

18 U.S.C §921(a)(33)(emphasis added).

Castleman held that even acts of non-injurious touching – force in the "common law" sentence – may qualify as "the use of physical force" for the purposes of this definition. *See Castleman*, 572 U.S. at 162-163. It held as much in spite of *Johnson v. United States*, 559 U.S. 133 (2010), which had held that the "use of physical force" described in 18 U.S.C. §924(e)'s "force clause" referred to great, violent, or injurious force, not common law force. *See Johnson*, 559 U.S. at 139, 145.

Distinguishing *Johnson*, the *Castleman* court stressed that the definition of a "misdemeanor crime of violence" was broader than the definition of "violent felony" found in 18 U.S.C. §924(e). *See Castleman*, 572 U.S. at 164-168. It reasoned that a broader concept of "physical force" would be appropriate to a provision like §922(g)(9), which expressly targets domestic violence. *See id.* at 64-166. Domestic violence, this

Court noted, often manifests as a pattern of non-injurious physical domination. *See id*. Further, this Court observed that §922(g) and §921(a)(33) expressly targets a less legally serious class of crimes than §924(e). *See id*. at 166-167. Whereas §922(g) and §921(a)(33) include only "misdemeanors," §924(e) includes only "felonies," indeed "violent felonies" that render the defendant an "armed career criminal." *See id*. It was therefore logical to believe that the force clause in §921(a)(33) might be much easier to satisfy than the one in §924(e). *See id*. at 164-168.

Castleman also argued that his offense fell outside the force clause in §921(a)(33) because it could be violated by indirect acts of force, such as injurious deception or poisoning. The Court rejected the argument with the following commentary:

> Castleman is correct that under *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004), the word "use" "conveys the idea that the thing used (here, 'physical force') has been made the user's instrument." Brief for Respondent 37. But he errs in arguing that although " [p]oison may have 'forceful physical properties' as a matter of organic chemistry, ... no one would say that a poisoner 'employs' force or 'carries out a purpose by means of force' when he or she sprinkles poison in a victim's drink," *ibid.* The "use of force" in Castleman's example is not the act of "sprinkl[ing]" the poison; it is the act of employing poison knowingly as a device to cause physical harm. That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter. Under Castleman's logic, after all, one could say that pulling the trigger on a gun is not a "use of force" because it is the bullet, not the trigger, that actually strikes the victim. *Leocal* held that the "use" of force must entail "a higher degree of intent than negligent or merely accidental conduct," 543 U.S., at 9, 125 S.Ct. 377; it did not hold that the word "use" somehow alters the meaning of " force."

Id. at 170–71. Yet, the Court explicitly stressed that it was not deciding "[w]hether or not the causation of bodily injury necessarily entails violent force." *Id*. at 167. Accordingly, and given its extensive efforts to distinguish the force clause in §924(e),

Castleman would seem to be of limited value in deciding whether injury necessarily entails "the use of physical force against the person of another" for purposes other than §921(a)(33).

But this is not how many courts of appeals saw the matter. Rather, those courts thought that *Castleman* wholly abrogated the distinction between force and injury, even in the context of force clauses that demanded violent force. *See Ellison*, 866 F.3d at 37; *Irby*, 858 F.3d at 236; *Reyes-Contreras*, 910 F.3d at 180-181; *Ontiveros*, 875 F.3d at 546. An exception was the First Circuit, which has issued inconsistent opinions. *Compare Whyte v. Lynch*, 807 F.3d 463, 470-72 (1st Cir. 2015), *with Ellison*, 866 F.3d at 37.

A similar course of events happened after *Voisine. Voisine*, like *Castleman*, pertained to §921(a)(33), the definition of a "misdemeanor crime of domestic violence." *See Voisine*, 136 S.Ct. at 2276. In *Voisine*, the defense argued that this definition excluded reckless offenses because such offenses lack the "use" of force. *See id.* This Court disagreed, and explained:

> …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.

Id. at 2278–79.

Yet the *Voisine* court expressly reserved the question of whether reckless assaults would qualify under other force clauses, here 18 U.S.C. §16(a). *See id.* at 2240, n.4 ("Like *Leocal*, our decision today concerning § 921(a)(33)(A)'s scope does not

resolve whether § 16 includes reckless behavior. Courts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes, and we do not foreclose that possibility with respect to their required mental states."). In spite of this reservation, some courts of appeals broadened their interpretation of force clauses outside the context of §921(a)(33), concluding now that they did indeed reach reckless conduct. *See Reyes-Contreras*, 910 F.3d at 183; *Bettcher*, 911 F.3d at 1046; *Haight*, 892 F.3d at 1281.

Now *Borden* will decide whether the "force clause" in 18 U.S.C. §924(e) encompasses reckless conduct. *See Borden v. United States*, No. 19-5410, __U.S.__, 140 S.Ct. 1262 (March 2, 2020)(granting cert.). In that case, the defense has noted an important textual difference between the force clause in §924(e) and that at issue in §921(a)(33). *See Brief for Petitioner in Borden v. United States*, No. 19-5410, 2020 WL 4455238, at *14-17 (Filed April 27, 2020). While §921(a)(33) encompasses all offenses that have as an element "the use … of physical force," §924(e) catches only those that have as an element "the use …of physical force against the person of another." *See id*., at *16 ("In its text and context, the provision at issue in Voisine differs in significant respects from the ACCA's force clause. Most importantly, that provision lacks the critical restriction that force be used "against the person of another."). As this Court explained in *Leocal v. United States*, 543 U.S. 1 (2004), this additional restrictive phrase changes considerably the natural meaning of the term "use":

> While one may, in theory, actively employ something in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident. Thus, a person would "use ... physical force against" another when pushing him; however, we

> would not ordinarily say a person "use[s] ... physical force against" another by stumbling and falling into him. When interpreting a statute, we must give words their "ordinary or natural" meaning. The key phrase in § 16(a)—the "use ... of physical force against the person or property of another"—most naturally suggests a higher degree of intent than negligent or merely accidental conduct.

Leocal, 543 U.S. at 9 (internal citation omitted, citing *Smith v. United States*, 508 U.S. 223, 228 (1993)).

The Petitioner in *Borden* has thus argued that the use of force "against the person of another" does not in ordinary parlance refer to unintentional conduct. *See Brief for Petitioner in Borden v. United States*, No. 19-5410, 2020 WL 4455238, at **21-22 (Filed April 27, 2020). This distinguishes *Voisine*, which construed a provision lacking this phrase. If this clause is significant to the intent question, and *Leocal* suggests that it is, *see Leocal*, 543 U.S. at 9, it is surely also significant to the required mechanism of injury. The use of force "against the person" calls to mind a particular kind of violent injury: one requiring direct bodily contact, and not an indirect mechanism involving deceit.

In the event that this Court embraces this argument in *Borden*, the result may cause the court below to reevaluate its holding that USSG §4B1.2(a)(1) encompasses all intentional causation of injury, irrespective of the mechanism. And if that is so, then Texas aggravated assault may become vulnerable to challenge on the basis that it permits conviction for causing or threatening injury by indirect means. It has been violated by placing harmful chemicals in an intravenous drip. *Saenz v. State*, 451 S.W.3d 388 (Tex. Crim. App. 2014).

Further, a finding that Texas aggravated assault falls outside of ACCA's definition of a "violent felony" would probably remove it from §4B1.2's definition of "crime of violence." The Sentencing Commission has said in a Reason for Amendment that the "crime of violence" definition found in §4B1.2 was "derived from 18 U.S.C. §924(e)." *See* USSG Manual, App. C, Amendment 268, Reason for Amendment (Nov. 1, 1989)("The definition of crime of violence used in this amendment is derived from 18 U.S.C. §924(e)"). This is clearly reflected in the structure of §4B1.2, which contains the same "force clause," and which was amended to strike its "residual clause" precisely when this Court declared ACCA's residual clause unconstitutional in *Johnson v. United States*, 135 S.Ct. 2551 (2016). *Compare* USSG §4B1.2(a)(1) *with* 18 U.S.C. §924(e)(2)(B)(i); *compare Johnson*, *supra* (striking the residual clause from ACCA), *with* USSG Manual, Appx. C, Amendment 798 (August 1, 2016)(striking identically worded residual clause from §4B1.2). To the extent that *Borden* takes Petitioner's offense outside of ACCA, it is reasonably probable that he – or another petitioner with a prior Texas aggravated assault conviction -- could prevail in a challenge to Fifth Circuit precedent equating his offense to the offense of "aggravated assault" enumerated in §4B1.2.

Given the reasonable probability that the court below may reconsider its decision in light of *Borden*, it is appropriate to hold the case until *Borden* is decided and, in the event that Borden prevails on the grounds advanced in his brief, grant certiorari, vacate the judgment below, and remand for reconsideration (GVR). *See Lawrence v. Chater*, 516 U.S. 163, 168 (1996). Such GVR orders are especially favored

in criminal cases because "our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated." *Stutson v. United States*, 516 U.S. 193, 196 (1996).

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.

Respectfully submitted this 2nd day of October, 2020.

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