No. _____

In the

Supreme Court of the United States

_____

Desmond Howard Greer,

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 an offense has as an element the use of force against the person of another if it may be committed by recklessly inflicting injury?

PARTIES TO THE PROCEEDING

Petitioner is Desmond Howard Greer, 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 Desmond Howard Greer seeks 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The unpublished opinion of the Court of Appeals is reported at *United States v. Greer*, 806 Fed. Appx. 334 (5th Cir. May 27, 2020)(unpublished).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 27, 2020. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTORY AND GUIDELINE PROVISIONS

Section 22.01 of the Texas Penal Code reads in relevant part:

> Sec. 22.01. ASSAULT. (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.
>
> (b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:

***

(2) a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, if:

(A) it is shown on the trial of the offense that the defendant has been previously convicted of an offense under this chapter, Chapter 19, or Section 20.03, 20.04, 21.11, or 25.11 against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code; or

(B) the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth…

Section 924(e)(2)(B) of Title 18 of the United States Code reads:

…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…

United States Sentencing Guideline 4B1.2 reads:

(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).

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

Petitioner Desmond Howard Greer pleaded guilty to one count of possessing a firearm after having sustained a felony conviction, a violation of 18 U.S.C. §922(g). *See* (Record in the Court of Appeals, at 30). A Presentence Report (PSR) identified a recommended sentence under the Guidelines of 120 months, the statutory maximum, the result of a final offense level of 29 and a criminal history category of IV. *See* (Record in the Court of Appeals, at 170-171). This flowed from its conclusion that two of Petitioner's prior convictions constituted "crimes of violence" under USSG §§2K2.1 and 4B1.2. *See* (Record in the Court of Appeals, at 161). Specifically, the PSR concluded that the defendant's prior convictions for felony family violence assault, and felony family violence assault by impeding breathing. *See* (Record in the Court of Appeals, at 161).

Appellant objected to these characterizations in a written pleading, but the district court overruled the objection. *See* (Record in the Court of Appeals, at 97-98, 175-177) The court then imposed the recommended sentence of 120 months. *See* (Record in the Court of Appeals, at 117). It did not say, neither orally, nor in the Statement of Reasons, that the sentence would have been the same under different Guidelines. *See* (Record in the Court of Appeals, at 112-118, 219)

B. Appellate Proceedings

Petitioner appealed, contending that the district court erred in treating his prior convictions as "crimes of violence" because they could be committed by reckless

conduct. He conceded that Fifth Circuit precedent foreclosed the claim. But, citing *Leocal v. Ashcroft*, 543 U.S. 1 (2004), he contended that the "use of physical force *against the person of another*" requires intentional conduct. The court below applied its circuit precedent and rejected the claim. *See* [Appendix A, at p.2][citing *United States v. Reyes-Contreras*, 910 F.3d 169, 173-74, 183 (5th Cir. 2018) (*en banc*); *United States v. Howell*, 838 F.3d 489, 490-92, 501-03 (5th Cir. 2016)].

REASONS FOR GRANTING THE PETITION

There is a reasonable probability of a different result and a lesser sentence if this Court decides *Borden v. United States*, No. 19-5410, 140 S.Ct. 1262 (March 2, 2020) favorably to the Petitioner in that case.

Guideline 2K2.1 provides for a base offense level of 26 when the defendant possesses a semi-automatic weapon capable of a large capacity magazine and has sustained two crimes of violence. *See* USSG §2K2.1(b)(1). It provides a base offense level of 22 if a defendant with such a firearm has sustained one crime of violence and a level 20 if he has sustained no such convictions. *See* USSG §2K2.1(b)(3,4). And it incorporates the definition of "crime of violence" found in USSG §4B1.2. *See* USSG §2K2.1, comment (n. 1).

Guideline 4B1.2 defines a "crime of violence" to include, *inter alia*, those offenses that have as an element the use, attempted use, or threatened use of physical force against the person of another. *See* USSG §4B1.2(a). The district court and the court below concluded that Petitioner's prior Texas convictions for family violence satisfied these definitions. *See* [Appendix A, at 2].

Petitioner incurred one of his putatively qualifying convictions under Texas Penal Code §22.01(b)(2)(A), which forbids, *inter alia*, the reckless infliction of injury against a family member or intimate partner, after having sustained another such conviction. He incurred another putative "crime of violence" under Texas Penal Code §22.01(b)(2)(B), which forbids, *inter alia*, the reckless infliction of bodily injury against a family member or intimate partner by impeding the victim's breathing.

The court below has held that Texas Penal Code §22.01(b)(2)(B) possesses the use of force against the person of another as an element. *See Howell*, 838 F.3d at 499–503. More broadly, it has held that reckless injury involves such use of force. *See United States v. Reyes-Contreras*, 910 F.3d 169, 183 (5th Cir. 2018)(*en banc*). Importantly, it has held that the Texas Penal Code §22.01 is not divisible by mental state, and that reckless, knowing, and intentional assault are merely different alternative means of committing the same offense. *See Howell*, 838 F.3d at 498–499. As such, the validity of the sentence depends entirely on the conclusion of the court below that reckless offenses may have as an element the use of physical force against the person of another. *See id.*

That question is before this Court in *Borden v. United States*, No. 19-5410, 140 S.Ct. 1262 (March 2, 2020)(granting certiorari). Specifically, *Borden* will decide whether "the 'use of force' clause in the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e)(2)(B)(i) encompass[es] crimes with a *mens rea* of mere recklessness." Petition for Certiorari in *Borden v. United States*, No. 19-5410, 2019 WL 9543574, at *ii (Filed July 24, 2019); *Borden v. United States*, No. 19-5410, 140 S.Ct. 1262 (March 2, 2020)(granting certiorari on this question).

Notably, the force clause in the ACCA is worded identically to that found in USSG §4B1.2, which governs this case. *Compare* 18 U.S.C. §924(e)(2)(B) *with* USSG §4B1.2(a)(1). The court below has accordingly treated these provisions interchangeably. *United States v. Burris*, 920 F.3d 942, 948, n.33 (5th Cir. 2019)(observing 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.'")(quoting *United States v. Moore*, 635 F.3d 774, 776 (5th Cir. 2011) (further citation omitted)(brackets added by *Burris*).

There is no reasonable claim of harmless error available to the government on the record. If the district court had concluded that Petitioner lacked any "crimes of violence," his final offense level would have been six levels lower. *See* USSG §2K2.1(a)(4). His Guideline range would then be a product of level 23 and criminal history category IV: just 70-87 months imprisonment. *See* USSG Ch. 5A. If it had excluded just one of these convictions, the base offense level would have been four levels lower, and the ultimate range just 84-105 months imprisonment. *See* USSG §2K2.1(a)(3); USSG Ch. 5A.

The government cannot show that these substantial differences in the Guidelines would be harmless, as it must because the error is fully preserved by objection in the district court. To show harmless error in the court below, the government must show that the judge had a sentence in mind and would have imposed it irrespective of the Guideline range. *See United States v. Ibarra-Luna*, 628 F.3d 712, 718 (5th Cir. 2010). The district court said no such thing. *See* (Record in the Court of Appeals, at 112-118). Certainly, nothing it said supports such a finding "convincingly" as the precedent of the court below requires. *See Ibarra-Luna*, 628 F.3d at 718.

There is accordingly well more than a "reasonable probability" that the court below would reach a different outcome if the defendant prevails in *Borden*. The appropriate course in such a case is to hold the instant Petition pending *Borden*, and, if the petitioner prevails in that case, grant certiorari, vacate the judgment below, and remand for reconsideration in light of *Borden*. *See Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167-168 (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 21st day of October, 2020.

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