

No. 20-6754

In the
Supreme Court of the United States

Alford Donta Tarpley,
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

**REPLY IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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PARTIES TO THE PROCEEDING

Petitioner is Alford Donta Tarpley, 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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ARGUMENT

The government accepts that a victory for the Petitioner in *Borden v. United States*, 19-5410 (Argued November 3, 2020), may establish that Texas robbery lacks as an element the use, attempted use, or threatened use of physical force against the person of another. *See* (BIO, at 2-3); *see also* USSG §4B1.2(a)(1). Yet it opposes certiorari in that event because USSG §4B1.2 enumerates “robbery” as a qualifying offense in its definition of “crime of violence.” *See* (BIO, at 2-3); *see also* USSG §4B1.2(a)(2). It cites *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 381 (2006), *overruled in part on other grounds by* *United States v. Rodriguez*, 711 F.3d 541 (5th Cir.) (en banc), cert. denied, 571 U.S. 989 (2013) (*abrogated in part by* *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017)), for the proposition that Texas robbery is equivalent to the “generic” enumerated version of “robbery.” *See* (BIO, at 3).

The court below should have an opportunity to reconsider the validity of *Santiesteban-Hernandez* if the defendant prevails in *Borden*. Since *Santiesteban-Hernandez*, this Court noted in *Stokeling v. United States*, 139 S.Ct. 544 (2019), that the majority of contemporary state codes use the common-law definition of “robbery”: theft committed “by force and violence.” *See Stokeling*, 139 S.Ct. at 551. The Texas version of robbery is quite a bit broader than this formulation. It may be committed by the reckless infliction of injury. *See Tex. Penal Coe* §29.02(a)(1). Indeed, Texas robbery convictions have been affirmed on this theory. *See Craver v. State*, Crim. No. 02-14-76, 2015 WL 3918057, at *3 (Tex. Ct. App. June 25, 2015). Further, the

defendant need not acquire property “by” force and violence. Rather, he need only inflict injury “in the course of” a theft. See Tex. Penal Coe §29.02(a). Thus, a defendant may be convicted of robbery where he inflicts injury only after he has discarded the stolen property, as he tried to flee. *See Smith v. State*, 2013 Tex. App. LEXIS 1146, at *6-8 (Tex. App. Houston 14th Dist. Feb. 7 2013)(unpublished). Certainly, in this circumstance, he cannot be said to have acquired property “by force and violence.”

Santiesteban-Hernandez should be reconsidered in light of this conflict with *Stokeling*. It has been insulated from serious review after *Stokeling* because the court below held that Texas robbery has force as an element. If it becomes clear that offenses of reckless injury like Texas robbery lack force as an element, the court below should have a chance to decide whether *Santiesteban-Hernandez* is consistent with *Stokeling*. As the government itself notes, *Santiesteban-Hernandez* is hardly an unblemished authority – the government recognizes its abrogation by *United States v. Rodriguez*, 711 F.3d 541 (5th Cir.) (*en banc*), cert. denied, 571 U.S. 989 (2013) (*abrogated in part by Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017)). *See* (BIO, at 3).

Notably, 28 U.S.C. §2255 is not available to correct Guideline errors. *See United States v. Williamson*, 183 F.3d 458, 462 (5th Cir.1999). If *Santiesteban-Hernandez* is wrongly decided, and *Borden* demonstrates that the “force clause” of USSG §4B1.2 does not make the issue irrelevant, Petitioner should have one good chance to raise the issue.

In any case, the court below cited only one case -- *United States v. Burris*, 920 F.3d 942, 948-52 (5th Cir. 2019), *petition for cert. filed* (U.S. Oct. 3, 2019) (No. 19-6186) – in rejecting the claim pressed here. *See United State v. Tarpely*, 813 Fed. Appx. 976, 977 (5th Cir. 2020)(unpublished). A petition for certiorari is pending in *Burris*. If the court’s opinion in *Burris* is vacated, the sole rationale for the decision below (as respects this claim) will be nullified. The court of appeals should state a valid reason for disposing of the claim.

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 23rd day of March, 2021.

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