No. _____

In the

Supreme Court of the United States

_____

Modesto Balderas,

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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QUESTION PRESENTED

Whether the Texas offense of Simple Robbery, Tex. Penal Code §29.02(a) constitutes a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. §924(e)(2)(B), where the sentencing court has before it no records of the prior conviction?

PARTIES TO THE PROCEEDING

Petitioner is Modesto Balderas, 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 Modesto Balderas 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The unpublished opinion of the Court of Appeals is available at *United States v. Balderas*, 847 Fed. Appx. 264 (5th Cir. May 14, 2021)(unpublished).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 14, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES

Texas 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.

Section 924(e)(2)(B) provides:

> (B) 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

STATEMENT OF THE CASE

A. Proceedings in District Court

Petitioner Modesto Balderas pleaded guilty to one count of possessing a firearm after having sustained a felony conviction, and one count of possessing a firearm with an obliterated serial number. *See* (Record in the Court of Appeals, 51-54). A Presentence Report (PSR) applied a mandatory minimum of 15 years under 18 U.S.C. §924(e), the Armed Career Criminal Act (ACCA). *See* (Record in the Court of Appeals, 148, 159). It referenced three felony convictions, which it treated as "violent felonies," all of which were committed when the defendant was 17 and 18 years old. *See* (Record in the Court of Appeals, 148, 150-152). These included a Texas conviction for Simple Robbery, a Texas conviction for Aggravated Robbery, and a Texas conviction for Aggravated Assault. *See* (Record in the Court of Appeals, 148, 150-152).

The defense filed a written objection, challenging the use of Simple Robbery and aggravated assault as ACCA predicates, but conceding that the challenges were foreclosed. *See* (Record in the Court of Appeals, 162-168). In spite of the objection, neither Probation nor the government made any effort to bring records of these convictions before the court below. *See* (Record in the Court of Appeals, 123). The court overruled the objections and imposed a sentence of 186 months imprisonment on the ACCA count, to run concurrently to a 60 month sentence on the obliterated serial number count.

B. Proceedings in the Court of Appeals

Petitioner appealed, contending, *inter alia*, that his Texas convictions for Simple Robbery and Aggravated Assault did not constitute a "violent felony" under 18 U.S.C. 924(e)(2)(B). As regards the Simple Robbery conviction, he argued that it could be committed recklessly, could be committed in a way that did not conform to the elements of common law robbery, and could be committed by inflicting injury without force. He conceded that the claims were foreclosed by *United States v. Reyes-Contreras*, 910 F.3d 169, 183 (5th Cir. 2018)(en banc); *United States v. Burris*, 920 F.3d 942 (5th Cir. 2019), but noted the pendency of *Borden v. United States*, No. 19-5410, 140 S.Ct. 1262 (March 2, 2020)(granting cert.).

The court of appeals agreed that the claims were foreclosed, and affirmed. As regards the Simple Robbery conviction, it said the following:

> With respect to the robbery conviction, Balderas argues that the offense is not a violent felony because it may be based on reckless conduct or forceless injury and does not conform to the elements of common law robbery. As Balderas concedes, his arguments are foreclosed. *See United States v. Reyes-Contreras*, 910 F.3d 169, 183 (5th Cir. 2018) (en banc); *United States v. Burris*, 920 F.3d 942, 945 (5th Cir. 2019), petition for cert. filed (U.S. Oct. 3, 2019) (No. 19-6186); and *United States v. Griffin*, 946 F.3d 759, 761-62 (5th Cir.), cert. denied, —— U.S. ——, 141 S. Ct. 306, 208 L.Ed.2d 55 (2020).

[Appx. A]; *United States v. Balderas*, 847 F. App'x 264 (5th Cir. 2021)(unpublished).

REASONS FOR GRANTING THE PETITION

***Borden v. United States*, 141 S.Ct 1817 (June 10, 2021), represents intervening development revealing a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and it appears that such a redetermination may determine the ultimate outcome of the litigation.**

The district court in this case applied the Armed Career Criminal Act, 18 U.S.C. §924(e) (ACCA), on the basis of three predicate crimes, one of which was the Texas offense of simple robbery. The court of appeals affirmed the judgment against Petitioner's claim, *inter alia*, that Texas simple robbery does not constitute a "violent felony" within the meaning of 18 U.S.C. §924(e)(2)(B). [Appx. A]; *United States v. Balderas*, 847 F. App'x 264 (5th Cir. 2021). In doing so, it cited *United States v. Reyes-Contreras*, 910 F.3d 169, 183 (5th Cir. 2018) (en banc), *United States v. Burris*, 920 F.3d 942, 945 (5th Cir. 2019), vacated and remanded 141 S.Ct. 2781 (June 21, 2021), *on remand* 856 Fed. Appx. 547 (5th Cir. August 19, 2021)(unpublished), and *United States v. Griffin*, 946 F.3d 759, 761-62 (5th Cir. 2020). *Id.*

After the decision below, this Court decided *Borden v. United States*, 141 S.Ct 1817 (June 10, 2021). *Borden* held that ACCA's elements clause, which captures offenses that have as an element "the use, attempted use, or threatened use of physical force against the person of another," does not capture offenses that require only the reckless infliction of injury. *See Borden*, 141 S. Ct. at 1824 (plurality op.). It reasoned that the phrase "against the person of another" implies an intentional targeting, and implies a higher standard of intent than simple recklessness. *See id.*

at 1825 (plurality op.); *id.* at 1835 (Thomas, J, concurring). Notably, it cited the conduct of a defendant prosecuted under the Texas Robbery statute as exemplary of the kind of offense that ought not count under ACCA. See id. at 1831 (plurality op.)(citing Craver v. State, 2015 WL 3918057, *2 (Tex. App., June 25, 2015)). And this Court vacated and remanded *United States v. Burris*, the Fifth Circuit case cited below for the proposition that Texas simple robbery satisfies ACCA's "elements clause." *See Burris v. United States*, 141 S.Ct. 2781 (June 21, 2021). The court below ultimately granted Mr. Burris relief. *See United States v. Burris,* 856 Fed. Appx. 547 (5th Cir. August 19, 2021)(unpublished).

Petitioner's prior robbery offense was penalized by Texas Penal Code §29.02, which says that 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.

Tex. Penal Code §29.02(a). For at least three reasons, *Borden* makes it very unlikely that Petitioner's simple robbery conviction still qualifies as a "violent felony." As such, this Court should vacate the judgment below and remand.

First, nothing in the record excludes Tex. Penal Code §29.02(a)(1) – the injury provision -- as the basis for the prior conviction. The government introduced no documents tending to narrow the statute of conviction, such as a judgment, indictment, or judicial confession from the prior case. *See* (Record in the Court of

Appeals, 123). The Presentence Report, which is in any case not cognizable, *see Shepard v. United States*, 544 U.S. 13, 16 (2005)(plurality op.), says that:

> Dallas Court records reflected, on July 16, 1996, the defendant unlawfully and knowingly committed theft with intent to obtain and maintain control of property of the victim, Juan Ramirez, the said property being an automobile.

(Record in the Court of Appeals, at 150-151).

This recitation does not establish the elements of either Subsection of the Texas Robbery statute, and certainly does not narrow it. A sentencing court applying ACCA must consider the least culpable means of violating the defendant's prior statute of conviction, barring cognizable documents invoking a different part of the statute. *See Borden*, 141 S. Ct. at 1822 (plurality op.). Because there were no cognizable documents introduced tending to show the relevant portion of the statute, the sentencing court must assume conviction under Texas Penal Code §29.02(a)(1), reckless causation of injury. Indeed, the court below has held that a comparable Texas statute – Tex. Penal Code §22.01, assault – is not divisible as between the mental states of intentional, knowing, and reckless causation of injury. *See United States v. Howell*, 838 F.3d 489, 499 (5th Cir. 2016)("Accordingly, the modified categorical approach cannot be employed to 'narrow' the statute of conviction, and Howell's admission of guilt does not establish that he was convicted of a distinct offense of intentionally causing the specified bodily injury as distinguished from recklessly causing the injury."). As such, Tex. Penal Code §29.02(a)(1) may be violated by recklessly causing injury, bringing it squarely within the holding of *Borden*. The court below has already held as much. *See United*

States v. Burris, 856 F. App'x 547 (5th Cir. 2021)(unpublished); *United States v. Ybarra*, __ F. App'x __, 2021 WL 3276471, at *1 (5th Cir. 2021) ("That provision criminalizes the reckless use of force, so it does not satisfy ACCA's elements clause after Borden.").

Second, even if there were a judicial record referencing only the portion of the statute dealing with threats and fear as opposed to injury, the sentencing court would be required to disregard it. This is because the Texas Robbery statute is not divisible as between injuries and threats/fear. *In Mathis v. United States*, 136 S. Ct. 2243 (2016), this Court held that a statute of conviction may only be narrowed when it defines multiple crimes by listing multiple, alternative elements. *See Mathis*, 136 S. Ct. at 2245–47. A statute may not be subdivided into the various ways or means of committing the offense. *See id.* at 2257. Thus, if the "alternatives" provided in a statute constitute true alternative elements requiring jury unanimity, courts may consult the approved documents to narrow the statute. *See id*. But if two statutory alternatives represent alternative means of committing a single offense—that is, if a jury may unanimously convict a defendant while disagreeing about which alternative was proven—then the conviction may not be narrowed. *See id.* at 2251.

The "first task for a sentencing court faced with an alternatively phrased statute is [ ] to determine whether its listed items are elements or means." *Id*. at 2256. This Court gave clear guidelines on how to determine whether an alternatively phrased statute is divisible: (1) look to state court decisions on jury unanimity; (2) look to the statute itself to see if the alternatives carry different

punishments or if a statutory list offers mere "illustrative examples;" and (3) look to whether the statute itself identifies which alternatives must be charged. *See id.* Only if those methods fail should the court look to the record of the prior conviction itself and consider whether the record documents speak to the elements-versus-means question. *See id.* at 2256–57.

This Court indicated that this "means versus elements" task would be "easy" in many cases because state court decisions will often provide a definite answer. *See id*. at 2256. If state courts require jury unanimity on a particular statutory alternative, then those alternatives are true elements defining separate crimes and the statue is divisible. *See id.* But if the jury may disagree about which alternative was proven and still convict, then the alternatives are mere means and the statute is indivisible. *See id.* Where state law answers the unanimity question, federal courts can easily determine whether the statute is divisible. *See id.*

The court below has not yet decided whether Texas robbery may be divided into robbery-by-threats/fear and robbery-by-injury. *See United States v. Burris*, 920 F.3d 942, 948 (5th Cir. 2019), *vacated and remanded* 141 S.Ct. 2781 (June 21, 2021), *on remand* 856 Fed. Appx. 547 (5th Cir. August 19, 2021)(unpublished) ("We need not decide whether § 29.02(a) is divisible here."). But just as in *Mathis*, the answer is "easy" because Texas law is clear—the two forms of Texas robbery are alternative means of committing a single offense. *See Mathis*, 136 S. Ct. at 2256.

The Texas Court of Criminal Appeals has held that a defendant may not be convicted of both robbery-by-fear/threats and robbery-by-injury where the same

victim suffered the fear or the injury. *See Cooper v. State*, 430 S.W.3d 426, 427 (Tex. Crim. App. 2014). In *Cooper*, the defendant was convicted of five counts of Aggravated Robbery. *See id*. at 427. Aggravated Robbery incorporates the elements of the lesser offense of robbery, meaning it still requires proof of either robbery-by-fear/threats or robbery-by-injury. *See* Tex. Penal Code § 29.03(a). The court held that the defendant's convictions for both forms of Robbery against the same victim and during a single theft violated the double-jeopardy clause. *See Cooper*, 430 S.W.3d at 427.

Four judges who joined the majority opinion in *Cooper* concluded that the two forms of Robbery are not separate crimes. *See id*. at 434 (Keller, P.J., concurring) ("But this discussion leads me to conclude that the 'threat' and 'bodily injury' elements of robbery are simply alternative methods of committing a robbery."); *id.* at 439 (Cochran, J., concurring) ("I agree with Presiding Judge Keller that 'the "threat" and "bodily injury" elements of [assault and] robbery are simply alternative methods of committing [an assault] or robbery.'"). Notably, these judges were not using "manner and means" in some unique way; they relied on Texas court decisions addressing the very heart of divisibility, according to *Mathis*—whether statutory alternatives represent truly separate elements, about which a jury must unanimously agree, or means, about which a jury may disagree. *See id.* at 434, 439.

Applying *Cooper*, Texas appellate courts have repeatedly held that because the two forms of Robbery—threats/fear and bodily injury—are alternative means, a jury need not be unanimous as to which a defendant committed in order to convict.

See Burton v. State, 510 S.W.3d 232, 237 (Tex. App.—Fort Worth 2017, no pet.). In *Burton*, the defendant was charged with one count of Aggravated Robbery and the indictment alleged both that he caused bodily injury and threatened or placed the victim in fear of bodily injury. *See id.* at 236. The jury was charged in the disjunctive, advised it could convict if it found either robbery-by-injury or robbery-by-fear/threats. *See id.* at 236. Relying on *Cooper*, the court of appeals held that the jury did not have to unanimously find either bodily-injury- or fear/threats-robbery because "causing bodily injury or threatening the victim are different methods of committing the same offense." *Id.* at 237.

Burton is not the only such case. *See Alexander v. State*, No. 02-15-00406-CR, 2017 WL 1738011, at *7 (Tex. App.—Fort Worth May 4, 2017, pet. ref'd) (explaining that the disjunctive jury charge on both robbery-by-fear/threats and robbery-by-injury "al-low[ed] the jury to return a general verdict on the two alternative manner and means of robbery") (citing *Burton*, 510 S.W.3d at 237 and *Cooper*, 430 S.W.3d at 427); *Martin v. State*, No. 03-16-00198-CR, 2017 WL 5988059, at *3 (Tex. App.—Austin Dec. 1, 2017, no pet.) (analyzing sufficiency of the evidence when one-count indictment allowed jury to convict on either robbery-by-threat/fear or robbery-by-injury). [1]

[1] In *United States v. Lerma*, 877 F.3d 628 (5th Cir. 2017), the court below held that aggravating facts that transform Simple Robbery into Aggravated Robbery – the presence of a deadly weapon, the causation of serious bodily injury, or

In sum, the threshold means-versus-elements analysis is straightforward. "[S]tate court decision[s] definitively answer[] the question[.]" *Mathis*, 136 S. Ct. at 2256. Texas's highest criminal court has held that robbery-by-fear/threats and robbery-by-injury are the same offense for double jeopardy purposes. *See Cooper*, 430 S.W.3d at 427. Four of the eight judges who joined that decision explained, relying on unanimity precedent and the "gravamen" of Robbery, that the two theories were alternative means, not alternative elements. *See id*. at 434 (Keller, P.J., concurring); *id.* at 439 (Cochran, J., concurring). Intermediate courts of appeals interpreted and applied *Cooper* to make explicit what the majority decision implied—that a jury need not be unanimous as to whether a defendant committed robbery-by-fear/threats or robbery-by-injury. *See Burton*, 510 S.W.3d at 237; *Alexander*, 2017 WL 1738011, at *7; *see also Martin*, 2017 WL 5988059, at *3. The statute is indivisible. Because the indivisible robbery offense may be committed recklessly, it does not contain an element of force and does not qualify as a violent

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the presence of a senior or disabled victim -- do constitute elements of distinct offenses. *See Lerma*, 877 F.3d at 634. Assuming *dubitante* that *Lerma* remains good law, *but see United States v. Herrold*, 883 F.3d 517, 527 (5th Cir. 2018) (en banc), *vacated*, 139 S. Ct. 2712 (June 17, 2019), *reinstated in relevant part by* 941 F.3d 173, 177 (5th Cir. October 18, 2019)(en banc), it did not purport to address the divisibility of *Simple* Robbery as between threats and injuries. As noted, the court below has repeatedly described this as an open question.

felony. *See Borden*, 141 S. Ct. at 1822 (plurality op.); *id.* at 1835 (Thomas, J., concurring).

Third, even if the Texas Robbery statute is divisible between threats/fear and injuries, the threat/fear portion does not survive as an elements-clause analysis after *Borden*. As noted, *Borden* held that an offense requiring only the reckless infliction of injury does not have "as an element" the "use of physical force against the person of another." Critically, this Court reasoned that the restrictive phrase "against the person of another" implied a "targeting" of the victim. *See id.* at 1825 (plurality op.) ("The phrase 'against another,' when modifying the "use of force," demands that the perpetrator direct his action at, or target, another individual."). This is because the word "against" in the ACCA "modifies volitional conduct (*i.e.,* the use of force). So that phrase, too, refers to the conduct's conscious object." *Id.* at 1826 (plurality op.).

This Court offered as an example a Texas Robbery case where a shoplifter jumped from a balcony while fleeing mall security only to land on and injure a customer. *See id.* at 1831 (plurality op.)(citing *Craver v. State*, No. 02-14-00076-CR, 2015 WL 3918057, at *2 (Tex. App.—Fort Worth June 25, 2015, pet. ref'd)). The Texas Robbery in *Craver* did not "target" the victim upon whom he landed—indeed, he was likely unaware of the victim's existence until just before their unlucky collision. Such a conviction does not involve the type of targeting behavior necessary to meet the elements clause. *See id.* (plurality op.). Texas robbery under subsection

(a)(2) – its threat provision -- likewise does not require the defendant to target another person.

Subsection (a)(2) of the Texas Robbery statute criminalizes the actions of a person who, in the course of committing theft, "intentionally or knowingly threatens *or* places another in fear of imminent bodily injury or death." Tex. Penal Code § 29.02(a)(2) (emphasis added). Texas courts have made clear that "threaten[ing]" and "plac[ing] another in fear" of imminent bodily injury or death have two distinct meanings. *See, e.g., Williams v. State*, 827 S.W.2d 614, 616 (Tex. App.—Houston [1st Dist. 1992, pet. ref'd) ("The general, passive requirement that another be 'placed in fear' cannot be equated with the specific, active requirement that the actor 'threaten another with imminent bodily injury.'"); *Jackson v. State*, No. 05-15-00414-CR, 2016 WL 4010067, at *4 (Tex. App.—Dallas July 22, 2016, no pet.) ("This is a passive element when compared to the dissimilar, active element of threatening another."). Placing another in fear does not require a threat at all. *See Williams*, 827 S.W.2d at 616 ("The factfinder may conclude that an individual perceived fear or was 'placed in fear,' in circumstances where no actual threats were conveyed by the accused"); *see also Cooper*, 430 S.W.3d at 433−34 & n.47 (Keller, P.J. concurring) (citing the unanimous view of the courts of appeals that "a threat is not actually required to establish robbery" because the statute allows conviction for placing another in fear).

The Texas Court of Criminal Appeals has interpreted the passive "places another in fear" aspect in very broad terms. In *Howard v. State*, 333 S.W.3d 137

(Tex. Crim. App. 2011), there was no evidence that the defendant interacted with the purported victim, or even knew of his existence. The victim, a convenience store clerk, hid in a back office and watched the theft on a video screen. *See Howard*, 333 S.W.3d at 137–38. There was "no evidence in the record showing that [Howard] was aware of" the victim. *Id.* Yet the court affirmed his conviction. The court reasoned that the term "knowingly" in the phrase "knowingly . . . places another in fear" does not "refer to the defendant's knowledge of the actual results of his actions, but knowledge of what results his actions are reasonably certain to cause." Thus, "robbery-by-placing-in-fear does not require that a defendant know that he actually places someone in fear, or know whom he actually places in fear." *Id.* at 140. This application of Texas Robbery shows that a defendant can commit "fear" Robbery without any requirement that the defendant target or threaten another with use of force.

Similarly, the facts of *Burgess v. State*, 448 S.W.3d 589 (Tex. App.—Houston [14th Dist.] 2014, no pet.), demonstrate that targeting or threatening is not required. There, the defendant entered a car parked outside of a post office and stole a purse. *See Burgess*, 448 S.W.3d at 595. A child was seated in the car and ran away screaming when the defendant entered the vehicle. *See id.* The court held that this conduct qualified as Robbery under subsection (a)(2) because, even if the defendant did not know a child was in the car as he approached, he learned of her presence when he entered the vehicle and took the purse. *See id.* at 601. The defendant did not *target* the child, nor did he *threaten* the child. But that didn't

matter. Nor did it matter whether he learned of the child's existence and presence only after entering the vehicle and grabbing the purse. The child's fear resulting from his presence in the vehicle was enough for conviction. *See id.* But he did not threaten to use physical force against her.

Thus, Texas Robbery under subsection (a)(2) does not require as an element the use, attempted use, or threatened use of physical force. There is no need to prove threatening, targeting, or even interaction with the victim. In fact, a defendant can be guilty of Robbery in Texas without ever knowing the victim exists. The statute simply does not require proof that the defendant used or threatened force to complete a theft. *See* Tex. Penal Code § 29.02(a). Therefore, Texas Robbery under subsection (a)(2) does not qualify as a violent felony under the ACCA's elements clause. *See Borden*, 141 S. Ct. at 1825.

For these three reasons, it is extremely likely that *Borden* would change the outcome of the decision below. At any rate, it certainly destroys the authority of the precedents cited in the decision below. As noted, the opinion below rejects Petitioner's challenge to the use of his Robbery conviction by citation to three cases: *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018)(en banc), *United States v. Burris*, 920 F.3d 942 (5th Cir. 2019), *vacated and remanded* 141 S.Ct. 2781 (June 21, 2021), *on remand* 856 Fed. Appx. 547 (5th Cir. August 19, 2021)(unpublished), and *United States v. Griffin*, 946 F.3d 759 (5th Cir. 2020). *See* [Appx. A]; *United States v. Balderas*, 847 F. App'x 264 (5th Cir. 2021)(unpublished).

The portion of *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018)(en banc), cited below holds that reckless offenses may nonetheless have as an element the "use of physical force against the person of another." *See Balderas,* at 847 Fed. At 264 (citing *Reyes-Contreras*, 910 F.3d at 183); *Reyes-Contreras*, 910 F.3d at 183 ("For these purposes, the 'use of force' does not require intent because it can include knowing or reckless conduct."). That is directly contradicted by *Borden*.

United States v. Burris, 920 F.3d 942 (5th Cir. 2019), *vacated and remanded* 141 S.Ct. 2781 (June 21, 2021), *on remand* 856 Fed. Appx. 547 (5th Cir. August 19, 2021)(unpublished), cited below, was vacated by this Court. The defendant in that case then received relief from the court below following that remand. Obviously, that authority no longer supports the decision below.

Finally, *Griffin* holds that a Mississippi aggravated assault statute qualifies as a "violent felony." *See Griffin*, 946 F.3d at 761-762. It rejected the defendant's effort to distinguish between the use of force and the infliction of bodily injury. *See id*. Petitioner argued below, alternative to his challenge to the use of a reckless offenses, that the Texas Robbery statute lacked the use of force as an element because it could be committed by the infliction of forceless injury, as by poison or deceit. This is alternative to the rationale of *Borden*, and would not justify affirmance after that intervening authority.

It follows then that *Borden* represents "intervening development … reveal(ing) a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration,

and where it appears that such a redetermination may determine the ultimate outcome of the litigation…" *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996). The proper course in such a case is to grant certiorari, vacate the judgment below and remand for reconsideration in light of *Borden*.

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 12th day of October, 2021.

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