

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

APPENDIX

/s/ Kevin Joel Page

JASON HAWKINS
Federal Public Defender
Northern District of Texas
TX State Bar No. 00759763
525 Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
(214) 767-2886 Fax

KEVIN J. PAGE **
Assistant Federal Public Defender
Northern District of Texas
TX State Bar No. 24042691
525 Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
(214) 767-2886

INDEX TO APPENDICES

Appendix A Judgment and Opinion of Fifth Circuit, CA No. 20-10992, dated May 14, 2021, *United States v. Balderas*, 847 Fed. Appx. 264. (unpublished)

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas, entered September 25, 2020. *United States v. Balderas*, Dist. Court 3:19-CR-66-1.

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 20-10992
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

May 14, 2021

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MODESTO BALDERAS,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CR-66-1

Before DAVIS, STEWART, and DENNIS, *Circuit Judges.*

PER CURIAM:*

Modesto Balderas appeals his guilty plea conviction and sentence for being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), and for possessing a firearm with an obliterated serial number, 18 U.S.C. § 922(k). According to Balderas, the district court erred in treating two of three prior

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

No. 20-10992

Texas convictions, one for robbery and one for aggravated assault, as predicate violent felonies under 18 U.S.C. § 924(e)(2)(B) and subjecting him to enhanced penalties.

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*, 141 S. Ct. 306 (2020). Balderas's challenge to the treatment of his Texas aggravated assault conviction as a violent felony under § 924(e)(2)(B) based on the same forceless-injury argument is likewise foreclosed, as he also concedes. *See Griffin*, 946 F.3d at 761; *Reyes-Contreras*, 910 F.3d at 183; *see also United States v. Torres*, 923 F.3d 420, 426 (5th Cir. 2019).

The Government has filed an unopposed motion for summary affirmance, which is proper if “the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case.” *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). Because Balderas correctly concedes that his claims are foreclosed by *Reyes-Contreras*, 910 F.3d 169; *Burris*, 920 F.3d 942; and *Griffin*, 946 F.3d 759, the motion for summary affirmance is GRANTED and the Government’s alternative motion for an extension of time to file a brief is DENIED as moot. The judgment of the district court is AFFIRMED.

United States Court of Appeals for the Fifth Circuit

No. 20-10992
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
May 14, 2021

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MODESTO BALDERAS,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CR-66-1

Before DAVIS, STEWART, and DENNIS, *Circuit Judges.*

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

MODESTO BALDERAS

Case Number: 3:19-CR-00066-S-1

USM Number: 58680-177

Marti Rachel Morgan

Defendant's Attorney

THE DEFENDANT:

<input type="checkbox"/>	pleaded guilty to count(s)	
<input checked="" type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the Court.	Count 1s and 2s of the Superseding Information, filed 9/3/2019
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the Court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The Defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 922(g)(1): Possession of a Firearm by a Convicted Felon	01/16/2019	1s
18 U.S.C. §§ 922(k): Possession of a Firearm with an Obliterated Serial Number	01/16/2019	2s

The Defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The Defendant has been found not guilty on count(s)

The Indictment is are dismissed on the motion of the United States as to this Defendant only.

It is ordered that the Defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the Defendant must notify the Court and United States attorney of material changes in economic circumstances.

September 24, 2020

Date of Imposition of Judgment



Signature of Judge

KAREN GREN SCHOLER
UNITED STATES DISTRICT JUDGE

Name and Title of Judge



Date

DEFENDANT: MODESTO BALDERAS
CASE NUMBER: 3:19-CR-00066-S-1

IMPRISONMENT

The Defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 186 months as to Count 1s and 60 months as to Count 2s to run concurrently with all counts for an aggregate sentence of 186 months. This sentence shall be served concurrently with any sentence imposed in his pending cases of Possession of Controlled Substance, Case No. F-1932798, and Theft of Property, Case No. F-1932799, pending in the 204th Judicial District Court; and Resisting Arrest Search or Transport, Case No. MA1932990, as they are relevant conduct to the instant offense. This sentence shall be served consecutively to any sentence imposed in his pending case of Fail to Identify Giving False or Fictitious Information, Case No. MB1970268, pending in Dallas County Criminal Court 6, in Dallas, Texas.

The Court makes the following recommendations to the Bureau of Prisons:
The Defendant be allowed to serve his term of imprisonment at FCI Seagoville, Seagoville, Texas, or as close to Dallas/Fort Worth, Texas as possible. The Defendant be assigned to a facility where he can participate in the Institutional Residential Drug Abuse Program, if he is eligible.

The Defendant is remanded to the custody of the United States Marshal.
 The Defendant shall surrender to the United States Marshal for this district:

at a.m. p.m. on

as notified by the United States Marshal.

The Defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- before 2 p.m. on
- as notified by the United States Marshal.
- as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this Judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MODESTO BALDERAS
CASE NUMBER: 3:19-CR-00066-S-1

SUPERVISED RELEASE

Upon release from imprisonment, the Defendant shall be on supervised release for a term of three (3) years per count, for Counts 1s and 2s, to run concurrently with each other.

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.
 The above drug testing condition is suspended, based on the Court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this Court as well as with any additional conditions on the attached page.

DEFENDANT: MODESTO BALDERAS
CASE NUMBER: 3:19-CR-00066-S-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the Court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the Court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the Court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the Court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the Court and has provided me with a written copy of this Judgment containing these conditions. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: MODESTO BALDERAS
CASE NUMBER: 3:19-CR-00066-S-1

SPECIAL CONDITIONS OF SUPERVISION

The Defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. If the Defendant is receiving treatment, the Defendant may not use alcohol and/or all other intoxicants at any time. The Defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$20 per month.

DEFENDANT: MODESTO BALDERAS
 CASE NUMBER: 3:19-CR-00066-S-1

CRIMINAL MONETARY PENALTIES

The Defendant must pay the total criminal monetary penalties under the Schedule of Payments page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	\$200.00	\$0.00	\$0.00	\$0.00	\$0.00

The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C) will be entered after such determination.*
 The Defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the Defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Restitution amount ordered pursuant to plea agreement \$

The Defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the Judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The Court determined that the Defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution
 the interest requirement for the fine restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: MODESTO BALDERAS
 CASE NUMBER: 3:19-CR-00066-S-1

SCHEDULE OF PAYMENTS

Having assessed the Defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A Lump sum payments of \$ _____ due immediately, balance due
 - not later than _____, or
 - in accordance C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this Judgment; or
- D Payment in equal 20 (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Restitution shall be payable immediately and any unpaid balance shall be payable during incarceration. If upon commencement of the term of supervised release any part of the restitution remains unpaid, the Defendant shall make payments on such unpaid balance in monthly installments of not less than 10 percent of the Defendant's gross monthly income, or at a rate of not less than \$50 per month, whichever is greater. Payment shall begin no later than 60 days after the Defendant's release from confinement and shall continue each month thereafter until the balance is paid in full; or
- F Special instructions regarding the payment of criminal monetary penalties:
 It is ordered that the Defendant shall pay to the United States a special assessment of \$100.00 each for Counts 1s and 2s, for a total of \$200.00 which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the Court has expressly ordered otherwise, if this Judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The Defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- Joint and Several
 See above for Defendant and Co-Defendant Names and Case Numbers (*including Defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- The Defendant shall pay the cost of prosecution.
- The Defendant shall pay the following court cost(s):
- The Defendant shall forfeit the Defendant's interest in the following property to the United States:
 Ruger, Model 9e, 9-millimeter pistol with obliterated serial number.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.