

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Adam Eugene Martin — PETITIONER
(Your Name)

VS.
United States of America — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

U.S. Court of Appeals - Ninth Circuit

Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

The appointment was made under the following provision of law: _____, or _____

a copy of the order of appointment is appended.



(Signature)

**AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, Adam Eugene Martin, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ <u>0</u>	\$ <u>N/A</u>	\$ <u>0</u>	\$ <u>N/A</u>
Self-employment	\$ <u>0</u>	\$ <u> </u>	\$ <u>0</u>	\$ <u> </u>
Income from real property (such as rental income)	\$ <u>0</u>	\$ <u> </u>	\$ <u>0</u>	\$ <u> </u>
Interest and dividends	\$ <u>0</u>	\$ <u> </u>	\$ <u>0</u>	\$ <u> </u>
Gifts	\$ <u>0</u>	\$ <u> </u>	\$ <u>0</u>	\$ <u> </u>
Alimony	\$ <u>0</u>	\$ <u> </u>	\$ <u>0</u>	\$ <u> </u>
Child Support	\$ <u>0</u>	\$ <u> </u>	\$ <u>0</u>	\$ <u> </u>
Retirement (such as social security, pensions, annuities, insurance)	\$ <u>0</u>	\$ <u> </u>	\$ <u>0</u>	\$ <u> </u>
Disability (such as social security, insurance payments)	\$ <u>0</u>	\$ <u> </u>	\$ <u>0</u>	\$ <u> </u>
Unemployment payments	\$ <u>0</u>	\$ <u> </u>	\$ <u>0</u>	\$ <u> </u>
Public-assistance (such as welfare)	\$ <u>0</u>	\$ <u> </u>	\$ <u>0</u>	\$ <u> </u>
Other (specify): _____	\$ <u>0</u>	\$ <u> </u>	\$ <u>0</u>	\$ <u> </u>
Total monthly income:	\$ <u>0</u>	\$ <u> </u>	\$ <u>0</u>	\$ <u> </u>

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Unemployed			\$ <u>0</u>
Unemployed			\$ <u>0</u>
Unemployed			\$ <u>0</u>

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			\$ <u>0</u>
			\$ <u>0</u>
			\$ <u>0</u>

4. How much cash do you and your spouse have? \$ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
	\$ <u>0</u>	\$ <u>0</u>
	\$ <u>0</u>	\$ <u>0</u>
	\$ <u>0</u>	\$ <u>0</u>

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings. ND Assets

Home

Value _____

Other real estate

Value _____

Motor Vehicle #1

Year, make & model _____

Value _____

Motor Vehicle #2

Year, make & model _____

Value _____

Other assets

Description _____

Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

**Person owing you or
your spouse money**

No One

Amount owed to you

\$ 0

\$ 0

\$ 0

Amount owed to your spouse

\$ 0

\$ 0

\$ 0

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name

No One

Relationship

Age

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

You

Your spouse

Rent or home-mortgage payment
(include lot rented for mobile home)

\$ 0

\$ 0

Are real estate taxes included? Yes No

Is property insurance included? Yes No

Utilities (electricity, heating fuel,
water, sewer, and telephone)

\$ 0

\$ 0

Home maintenance (repairs and upkeep)

\$ 0

\$ 0

Food

\$ 0

\$ 0

Clothing

\$ 0

\$ 0

Laundry and dry-cleaning

\$ 0

\$ 0

Medical and dental expenses

\$ 0

\$ 0

	You	Your spouse
Transportation (not including motor vehicle payments)	\$ <u>0</u>	\$ <u>NA</u>
Recreation, entertainment, newspapers, magazines, etc.	\$ <u>0</u>	\$ _____
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ <u>0</u>	\$ _____
Life	\$ <u>0</u>	\$ _____
Health	\$ <u>0</u>	\$ _____
Motor Vehicle	\$ <u>0</u>	\$ _____
Other: _____	\$ <u>0</u>	\$ _____
Taxes (not deducted from wages or included in mortgage payments) (specify): _____	\$ <u>0</u>	\$ _____
Installment payments		
Motor Vehicle	\$ <u>0</u>	\$ _____
Credit card(s)	\$ <u>0</u>	\$ _____
Department store(s)	\$ <u>0</u>	\$ _____
Other: _____	\$ <u>0</u>	\$ _____
Alimony, maintenance, and support paid to others	\$ <u>0</u>	\$ _____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ <u>0</u>	\$ _____
Other (specify): _____	\$ <u>0</u>	\$ _____
Total monthly expenses:	\$ <u>0</u>	\$ _____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? Yes No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

Yes No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I'm incarcerated & in the SHU.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: MAY 16, 2022



(Signature)

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Adam Eugene Martin — PETITIONER
(Your Name)

vs.
United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals-Ninth Circuit Case No. 19-15605
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Adam Martin #39706-180
(Your Name)

USP-Allenwood, P.O. Box 3000
(Address)

White Deer, PA, 17887
(City, State, Zip Code)

N/A

(Phone Number)

* Borden v. United States 141 S.Ct 1817 (2021) *

ISSUE

QUESTION(S) PRESENTED

Texas Penal Code 29.02 Robbery can be committed by reckless conduct, and the State of Texas case law clearly finds the statute indivisible. Nonetheless the Ninth Circuit made its own interpretation of the clearly established substantive law of Texas, contrary to Erie Co. v. Thompkins 304 U.S. 64 (1934), in finding the Texas robbery statute was divisible and Martin was of the threats portion of the statute, relying on an infirm Texas felony information.

- ①. Did the Ninth Circuit err in its interpretation of the substantive law of the State of Texas, circumventing established Supreme Court precedent of Erie Co. v. Thompkins 304 U.S. 64 (1934), when the Ninth Circuit independently decided that the State of Texas Robbery statute 29.02 was divisible, contrary to Texas statutory and case law that shows its indivisible?
- ②. Did the Ninth Circuit err when it failed to apply Moncrieffe v. Holder 569 U.S. 184 (2013) to Martin's Texas robbery conviction which has a mens rea of recklessness, and is indivisible?
- ③ Did the Ninth Circuit err when they chose ignore the substantive State of Texas law in Ex parte Santellana 606 S.W.2d 331 (Tx Crim App, 1980 (en banc)), which supported Ex parte County 577 S.W.2d 260 (Tx Crim App. 1979) in their review of Martin's infirm felony information?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

App 1A-5a - U.S. Court of Appeals - Ninth Circuit Case No. 19-15605

App 6A-15a + U.S. District Court - District of Arizona - Tucson - Case No. 4:17-CV-00371-JGZ

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix 1a-5a to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix 6a-15a to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 12-22-21.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Constitution Amendment V - No person shall be deprived of life, liberty, or property, without due process of law.
2. U.S. Constitution Amendment X - The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively.
3. 18 USC 3559(c)(1)(A)(i);(2)(F)(i) "Three Strikes"
4. Texas Penal Code 1.07(a)(8) - Definitions - (8) "Bodily Injury" means physical pain, illness, or any impairment of the physical condition.
5. Texas Penal Code 29.02 - Robbery - (a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 (Theft) and with ~~the~~ 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.

Statement of the Case

"CR" refers to the Clerks Record in 4:17-CV-00371-JGZ, followed by document number(s); "App" refers to Petitioners Appendix, followed by the page number(s).

On July 31, 2017, Martin filed a Petition for Writ of Habeas Corpus pursuant to 28 USC 2241, in the U.S. District Court-District of Arizona-Tucson raising a single issue of actual and

STATEMENT OF THE CASE (cont.)

factual innocence of 18 USC 3559 (c)(2) life sentence, stating that his prior state convictions in Texas for Robbery (App ¹⁶ a-19a) and Arizona for Aggravated Assault do not meet the requirements and the two (2) 1988 bank robberies were consolidated, and the Government had all the paperwork in their care and custody. (CR 1). Specifically stating that Martin is actually and factually innocent of having two or more serious violent felony convictions because his Texas Robbery and Arizona Agg. Assault were not serious violent felonies; thus he only has one prior violent felony, which renders him actually and factually innocent of the 18 USC 3559(c) Life sentence. On October 5, 2017 the govt. responded to the 2241 petition claiming the court lacked jurisdiction (CR 15). On August 13, 2018, Martin filed for Declaratory Judgment (CR 27). On August 30, 2018 the Govt. filed its response conceding that Martin's two 1988 bank robberies were consolidated and count for one predicate felony. (CR 21, CR 22, CR 30, p. 13; CR 32 p. 3; CR 43, p. 4, fn 1). The Government also conceded Martin's Arizona Agg. Assault is not a crime of violence by failing to dispute it. See, United States v. Esparza-Herrera 557 F3d 1019 (9th Cir 2009).

The district held that it lacked jurisdiction and that the Texas Robbery statute was indivisible under Taylor v. United States 495 U.S. 575, 577-78 (1990) (CR ~~30~~ 43 pgt. 6; and CR 43 p. 10) determining that when analyzed under the categorical approach Martin's Texas Robbery conviction was a violent offense.

The ~~Re~~ district decision was appeal to the Ninth Circuit

In Case No. 19-15605, The Ninth Circuit filed its memorandum decision on December 22, 2021. Contrary to the district court, the Ninth Circuit determined that Texas Penal Code 29.02 was divisible under the modified categorical approach. And should be analyzed under the modified categorical approach and not the categorical approach. (App. 1a). Mandate followed on February 14, 2022.

It is case No. 19-15605, The Ninth Circuit filed its memorandum decision on December 22, 2021. Contrary to the district court, the Ninth Circuit determined that Texas Penal Code 29.02 was divisible under the modified categorical approach and not the categorical approach. (App. 1a). Mandate followed on February 14, 2022.

), The Ninth Circuit declined to accept the substantive law 304 U.S. 64 (1938), reinterpreting the substantive law of Texas of the State of Texas, which clearly establishes that the Texas Penal Code 29.02 is "indefensible", circumventing Erie Co. v. Thompson of the State of Texas, which clearly establishes that the Texas Penal Code 29.02 was divisible under the modified categorical approach.

Ninth Circuit's analysis under the modified categorical approach to find that the Texas Penal Code 29.02 was divisible to allow the directly speaks to the State of Texas' interpretation of their own statute of robbery under Texas Penal Code 29.02. (Tex. Crim. App. 2014)

Copper v. State of Texas 130 S.W.3d 426, 427 (Tex. Crim. App. 2014)

Ninth Circuit's analysis under the modified categorical approach to find that the Texas Penal Code 29.02 was divisible to allow the directly speaks to the State of Texas' interpretation of their own statute of robbery under Texas Penal Code 29.02. (Tex. Crim. App. 2014)

the highest state court on criminal matters).

In Cooper the prosecutor believed that the Robbery statute guilty of both parts of the Texas statute. Texas, high court overruled the convictions under double jeopardy. And Cooper at 435 determined that "we should accord determinative weight to the legislature's decision to place these differences in the statute".

Reasns for Granting Petition

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Status of Case (cont.)

REASONS FOR GRANTING THE PETITION (CONT.)

Robbery in the same statutory section and hold that they are alternative means of committing the same offense" and thus the double jeopardy clause was violated. The second concurring opinion, joined by an additional justice, applied a slightly different analysis in determining that the "threat" and bodily injury elements of... robbery are simply alternative methods of committing a robbery. *Id.* at 434. Even though there are two different concurring opinions, both opinions reached the same conclusion that double jeopardy was violated. Thus, Texas Penal Code 29.02 is indivisible.

Burton v. State of Texas 510 S.W.3d 232 (Tex. Crim. App. 2017)

again addressed Texas Penal Code 29.02 as to causing bodily injury and threatening bodily injury. The court's jury instruction presented the elements to the jury in the disjunctive that if they found either allegation to be true beyond a reasonable doubt, then their vote should be guilty. *Id.* at 236-37. Here the defendant raised the statute was divisible. *Id.* The Texas Court of Appeals held, "Reading Rangel", and Cooper together leads us to conclude that it was not error for the charge of aggravated robbery to be

1. In Rangel v. State of Texas 199 SW3d 523, 540 (Tex. App. Ft. Worth 2006)

the Court held, "a trial court may submit a disjunctive jury charge and obtain a general verdict where alternative theories involve the commission of the same offense!"

2-17-04, and the probation paper certified copy of 2-17-04 Texas Robbery guilty plea of which was a certified copy on presented to the Sentencing Court at sentencing, which were the District Court and Ninth Circuit can only look at the documents admit to any elements of anything but Robbery. And since the elements of a "generic offense" Martin's guilty plea does not is not crime of violence if the defendant did not admit to

2). Under the categorical approach of an indivisible statute

Final Code 29.02 is indivisible.
 clear establish the substantive law of the State of Texas. The Texas 2243, 2256 (2016)). A plain and fair reading of Cooper and Burton if the statute is divisible. (IMA+3 quoting U.S.A. Maths 136 S.C. allow them to take a "peak" at the record documents to determine these reasons, " (App/1a at p3, 91). Using that announcement to see Cooper and Burton, we conclude the statute is divisible for as to whether these two subsections are alternative means of elements, "While we acknowledge that the Texas state courts have been ambiguous of the Texas Court in both Cooper and Burton in a single sentence, The Ninth Circuit Memorandum decision dismissed the decisions indivisible statute. Id at 237.

each of the two ways of committing robbery, as it is a single at 237. Hence, the jury need not identify how many verdict for the victim are different methods of committing the same offense. Id submitted in the distinctive causing bodily injury or threatening

Reasns for Granting Petition (cont.)

Reasons For Granting Petition (cont.)

(App.17a, and 18a) which were the only certified copies presented to the sentencing court, both simply stating Robbery, with no statutory cited, the habeas district court is bound by Moncrieffe v. Holder 569 U.S. 184 (2013) to apply the "least of the acts criminalized"; not go above and beyond what the sentencing court perused in determining Martin's guilt in the Texas Robbery, which has a mens rea of recklessness, which under Borden v. United States 141 S.Ct. 1817 (2021) is a non-violent felony.

3). The Ninth Circuit erred when they used an infirm felony information to determine Martin threatened injury; violating the substantive law of the State of Texas as set forth by Ex parte Santellana 606 S.W.2d 331 (Tex.Crim.App.1980(en banc)), which supported Ex parte County 577 S.W.2d 260 (Tex.Crim.App.1979) which touches on "all fours" with Martin's felony information being infirm for not properly following legislative intended statutory law that specifically requires a 4(a) or 4(b) before the word "threaten". Lack of the 4(a) or 4(b) mens rea being in the proper legislatively intended statutory verbiage makes Martin's felony information for Aggravated Robbery infirm and unusable, which is why only App.17a and 18a are the documents presented to the sentencing court, showing that Martin only plead guilty to Robbery. (Texas Penal Code 29.02)

Texas Robbery under 29.02 requires a theft and an assault. The mens rea in Martin's felony information (App.16a) states, "intentionally and knowingly committed theft...," which is part (1) of the information, setting the mens rea for theft. The (4a) or (4b) mens rea required by Texas legislative statute, and Texas case law in Ex parte County, affirmed en banc under Ex parte Santellana is missing in Martin's information. The mens rea cited for the theft portion, does not reach the assault portion, as per Ex parte Santellana, quoting Ex parte County. So, Martin's felony information is an infirm document and cannot be used in the "categorical or modified categorical approach" of Taylor or Mathis. Martin's Judgement (App.17a) states "Robbery Lesser Included Offense Count One", no statutory cite, and since Count One of the felony information fails to state an Agg. Robbery under 29.03, or Robbery under 29.02, Count One offers no guidance, nor does the Probation document (App.18a), so the Rule of Lenity goes to Martin, and he is actually and factually innocent of the 18 USC 3559(c) Life sentence, since no reasonable fact finder can find Martin has more than one (1) predicate violent felony. The Ninth Circuit erred in light of Borden which states a "reckless" mens rea is NOT violent.

(8)A

Therefore Martin meets both actual and factual innocence of the 18 USC 3559(c) Life sentence, because he lacks the predicate offenses for the 3559(c) Life sentence, as no reasonable fact finder can find he has two predicate offenses. This is not legal insufficiency, it material fact. See, Bousley v. United States 523 U.S. 614, 623 (1998).

CONCLUSION

Based upon the material facts herein Martin request that the Ninth Circuits decision be reversed and declare him actually innocent of the 3559(c) Life sentence since he does not have two or more predicate crimes of violence. The petition for a writ of certiorari should be granted.

Respectfully submitted,

Adam M.

Date: 5-16-2022

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Adam Eugene Martin — PETITIONER
(Your Name)

VS.
United States of America — RESPONDENT(S)

PROOF OF SERVICE

I, Adam Eugene Martin, do swear or declare that on this date, _____, 20____, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Solicitor General 950 Pennsylvania Ave. NW, Washington, D.C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 16th of May, 2022



(Signature)

TABLE OF APPENDICES

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FILED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEC 22 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ADAM EUGENE MARTIN,

Petitioner-Appellant,

v.

KRIS KLINE, Warden,

Defendant-Appellee.

No. 19-15605

D.C. No. 4:17-cv-00371-JGZ

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Jennifer Zipts, District Judge, Presiding

Argued and Submitted December 7, 2021
San Francisco, California

Before: WARDLAW, BRESS, and BUMATAY, Circuit Judges.

Adam Martin, a federal prisoner, petitioned the district court for habeas relief under 28 U.S.C. § 2241. The district court denied Martin's petition, holding that it lacked jurisdiction to consider a petition brought under § 2241 because Martin did not meet the requirements set out in § 2255(e), known as the escape hatch provision.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Martin appeals the dismissal of his petition. We review the district court's decision de novo, *Stephens v. Herrera*, 464 F.3d 895, 897 (9th Cir. 2006), and affirm.

The district court correctly determined that Martin is not “actual[ly] innocent[t]” of his sentencing enhancement, and is thus ineligible for the escape hatch, because his Texas robbery conviction was a “serious violent felony” under § 3559(c), and therefore was a valid predicate offense. *Id.* at 898.

1. The Texas robbery statute Martin was convicted under is divisible, so we analyze whether it counts as a predicate offense under the modified categorical approach. *See Rendon v. Holder*, 764 F.3d 1077, 1084 (9th Cir. 2014); *Syed v. Barr*, 969 F.3d 1012, 1017 (9th Cir. 2020).

The “critical distinction” between indivisible and divisible statutes is that “while indivisible statutes may contain multiple, alternative *means* of committing the crime, only divisible statutes contain multiple, alternative *elements* of functionally separate crimes.” *Rendon*, 764 F.3d at 1084–85 (emphasis original). With an element of a crime, a jury “must unanimously agree,” while with the means of committing a crime a jury “may disagree yet still convict.” *Id.* at 1086; *see also Richardson v. United States*, 526 U.S. 813, 818 (1999).

Here, the Texas robbery statute Martin was convicted under has two subsections: robbery by bodily injury, Tex. Penal Code § 29.02(a)(1), and robbery by threat, *id.* § 29.02(a)(2). While we acknowledge that Texas state courts have been

ambiguous as to whether these two subsections are alternative means or elements, *see Cooper v. State*, 430 S.W.3d 426, 427 (Tex. Crim. App. 2014); *Burton v. State*, 510 S.W.3d 232, 237 (Tex. App. 2017), we conclude that the statute is divisible for three reasons.

First, the statute sets forth different sets of mens rea elements for each version of robbery—“intentionally, knowingly, or recklessly” for robbery by bodily injury and “intentionally and knowingly” for robbery by threat. A mens rea requirement is an element of a crime—not a means of committing a given crime. Indeed, “the general rule is that a guilty mind is a necessary *element* in the indictment and proof of every crime.” *Elonis v. United States*, 575 U.S. 723, 734 (2015) (simplified) (emphasis added). The inclusion of different sets of mens rea elements is strong evidence that the Texas robbery statute is divisible.

Second, Texas provides different sample jury instructions for robbery by threat and robbery by bodily injury. *Compare* Texas Crim. Jury Charges § 8:380, Robbery (Threats), *with* Texas Crim. Jury Charges § 8:370, Robbery (Bodily Injury). This suggests that robbery by threat and robbery by bodily injury are separate crimes within one statute. *See Almanza-Arenas v. Lynch*, 815 F.3d 469, 482 (9th Cir. 2016) (looking to state jury instructions to determine if a statute is divisible).

Finally, “if state law fails to provide clear answers,” courts may take a “peek” at the record documents to determine if a statute is divisible. *U.S. v. Mathis*, 136 S.

Ct. 2243, 2256 (2016). Here, Martin’s information suggests that robbery by threat is a separate crime because it tracks § 29.02(a)(2) with no mention of the elements in § 29.02(a)(1).

Taken together, the Texas robbery statute’s differing mens rea elements, differing jury instructions, and the charging documents establish that the statute is divisible and subject to analysis under the modified categorical approach.

2. Applying the modified categorical approach, we conclude that Martin was convicted of robbery by threat—not robbery by bodily injury. Counts 1 and 2 of Martin’s felony information stated that Martin, “intentionally and knowingly, while in the course of committing theft of property and with intent to obtain and maintain control of said property, threaten and place [the victims] in fear of imminent bodily injury and death, and [Martin] did then and there use and exhibit a deadly weapon, to-wit [a] firearm.” Thus, according to the plain terms of the information, Martin was charged with “threaten[ing]” his victims—not causing them bodily injury. Moreover, as the government notes, the relevant documents do not indicate that any victim actually suffered physical injuries. As a result, the record demonstrates that Martin was convicted of robbery by threat.

3. Robbery by threat is a valid predicate offense under 18 U.S.C. § 3559(c) because it tracks the generic federal robbery crime. *Compare Tex. Penal Code § 29.02(a)(2), with 18 U.S.C. §§ 2111, 2113, 2118.* Martin’s conviction was thus a

serious violent felony for purposes of § 3559(c)'s mandatory sentencing enhancement and his actual innocence claim fails.¹

AFFIRMED.

¹ Because Martin's actual innocence argument fails, we do not reach whether Martin had an unobstructed procedural shot to make his argument. *Stephens*, 464 F.3d at 898.

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Adam Eugene Martin,

10 Petitioner,

11 v.

12 Unknown Party,

13 Respondent.

14
15 No. CV-17-00371-TUC-JGZ

16
17 **ORDER**

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22
23 Petitioner Adam E. Martin has filed a Petition for Writ of Habeas Corpus pursuant
24 to 28 U.S.C. § 2241 challenging the sentence imposed by the United States District Court
25 for the Western District of Texas. (Doc. 1.) At the time of filing, Petitioner was
26 incarcerated at USP-Tucson, Arizona. (*Id.*) Respondent filed a Return and Answer and a
27 Motion to Dismiss for Lack of Jurisdiction. (Doc. 15.) Martin filed a reply (Doc. 21) and
28 an addendum to the reply. (Doc. 22.) Also pending before the Court is Petitioner's
Motion for Clarification and Motion for Declaratory Judgment. (Docs. 26 & 27.)
Respondent filed a Response to the Motion for Declaratory Judgment on August 30,
2018. (Doc. 30.)

29
30 This matter was referred to Magistrate Judge Jacqueline M. Rateau for a report
31 and recommendation. (Doc. 3.) On August 30, 2018, Judge Rateau issued her Report,
32 recommending that the Court grant Respondent's motion to dismiss, deny Petitioner's
33 outstanding motions as moot, and dismiss the action without prejudice. (Doc. 31.)
34 Petitioner filed objections to the Report on September 14, 2018 (Doc. 32), and the

1 Respondent filed a response to Petitioner's objections on September 20, 2018. (Doc. 33.)
2 Since the filing of the Magistrate Judge's Report, Petitioner has filed a motion to expedite
3 (Doc. 34), a second motion to expedite (Doc. 41), and a motion to add as respondent the
4 warden of Petitioner's most recent housing assignment. (Doc. 35.) Upon independent
5 review of the record, the Court will adopt the Report and Recommendation, as modified
6 by this Order, dismiss the Petition for lack of jurisdiction, and dismiss the remaining
7 motions as moot.

8 **I. LEGAL STANDARD**

9 This Court "may accept, reject, or modify, in whole or in part, the findings or
10 recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). "[T]he district judge
11 must review the magistrate judge's findings and recommendations *de novo if objection is*
12 *made, but not otherwise.*" *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.
13 2003) (en banc) (emphasis in original). District courts are not required to conduct "any
14 review at all . . . of any issue that is not the subject of an objection." *Thomas v. Arn*, 474
15 U.S. 140, 149 (1985). *See also* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; *Reyna-Tapia*,
16 328 F.3d at 1121; *Schmidt v. Johnstone*, 263 F.Supp. 2d 1219, 1226 (D. Ariz. 2003).

17 **II. FACTUAL AND PROCEDURAL BACKGROUND**

18 On August 18, 2004, Martin was convicted, following a jury trial, of eight counts
19 of bank robbery, and subsequently sentenced to eight concurrent life sentences. *United*
20 *States v. Martin*, 431 F.3d 846, 850 (5th Cir. 2005). Petitioner was sentenced subject to a
21 mandatory enhancement under the "Three Strikes" statute, 18 U.S.C. § 3559, which
22 states that a person convicted of a serious violent felony "shall be sentenced to life
23 imprisonment if . . . the person has been convicted . . . on separate prior occasions . . .
24 of . . . 2 or more serious violent felonies." 18 U.S.C. § 3559(c)(1)(A)(i). At the time of
25 sentencing, Petitioner had four prior felony convictions: two federal bank robbery
26 convictions in violation of 18 U.S.C. § 2113(a); a Texas state robbery conviction, in
27 violation of Tex. Penal Code § 29.02; and an Arizona state Aggravated Assault
28

1 conviction in violation of Ariz. Rev. Stat. §§ 13-1203, 13-1204(A)(1), 13-701, 13-801.
 2 (Doc. 30 at 2; Doc. 30-2, Exs. 2-5; Doc. 32 at 4, 5.)

3 On December 2, 2005, the United States Court of Appeals for the Fifth Circuit
 4 affirmed Martin's convictions and sentences, addressing, among other things, Petitioner's
 5 argument that his mandatory life sentence, based on the three strikes law, did not violate
 6 the Eighth Amendment. *Martin*, 431 F.3d at 850. The Supreme Court denied a petition
 7 for a writ of certiorari. *Martin v. United States*, 547 U.S. 1059 (2006).

8 Petitioner's first collateral attack of his conviction and sentence was made on
 9 January 31, 2006, when Petitioner filed a § 2255 motion in the sentencing court, which
 10 was denied. *See* Criminal Docket for Case No. 1:03-CR-250 Western District of Texas,
 11 docket entry #215 (Order denying relief). The Fifth Circuit denied Martin's motion for a
 12 certificate of appealability and also dismissed his appeal of the trial court's order denying
 13 relief on his section 2255 motion. *See United States v. Martin*, 1:06-CV-57 (W.D. Tex.
 14 May 24, 2006), *certificate of appealability denied*, No. 06-50962 (5th Cir. Jan. 5, 2007).
 15 Petitioner has made several additional efforts to obtain collateral relief on various
 16 grounds, all of which were unsuccessful. (See Doc. 30 and attachments thereto.)

17 On July 31, 2017, Petitioner filed the pending Petition pursuant to 28 U.S.C. §
 18 2241, asserting that his sentence was illegal and that he is factually innocent of the
 19 sentence enhancement imposed by the United States District Court for the Western
 20 District of Texas under the Three Strikes statute, 18 U.S.C. § 3559(c). He seeks an order
 21 vacating his illegal sentence and the issuance of a "certificate of innocence."

22 The Respondent moved to dismiss the Petition, arguing that the Petition challenges
 23 the validity of Petitioner's conviction and sentence and, therefore, must be brought as a
 24 motion pursuant to 28 U.S.C. § 2255 in the sentencing court, and not as a § 2241 habeas
 25 petition. *See Harrison v. Ollison*, 519 F.3d 952, 954 (9th Cir. 2008). The Magistrate
 26 Judge agreed and recommends dismissing the Petition. (Doc. 31.)

27 Petitioner filed objections to the Report and Recommendation, asserting that he is
 28 eligible for relief under 28 U.S.C. § 2241. Petitioner argues that he is factually innocent

1 of the sentencing enhancement because he does not have two prior serious felony
 2 convictions as that term is defined by 18 U.S.C. § 3559(c). Petitioner objects to the
 3 Magistrate Judge's finding that his federal felony bank robbery convictions in the
 4 Western District of Oklahoma count as two prior serious violent felonies sufficient to
 5 support the sentencing enhancement. Petitioner argues that the convictions did not
 6 become final on separate prior occasions and thus count only as a single predicate felony
 7 for the purposes of 18 U.S.C. § 3559(c). (Doc. 32 at 4.)¹ Petitioner further asserts that his
 8 convictions for Arizona aggravated assault and Texas robbery are divisible and therefore
 9 are "not deemed violent" for the purposes of sentencing enhancement. (Doc. 1 at 4.)²
 10 Finally, Petitioner argues that relief under 28 U.S.C. § 2241 is proper because he did not
 11 have an unobstructed procedural shot at presenting his claims. Petitioner states that he
 12 did not have a crystal ball to foresee the argument that the state statutes were divisible
 13 (Doc. 21 at 4–5), and therefore "not deemed violent." (Doc. 1 at 4.)

14 III. DISCUSSION

15 A. The Court Lacks Jurisdiction over Petitioner's Successive § 2255 Petition

16 Although the Petition references 28 U.S.C. § 2241, the Petition is properly
 17 brought under § 2255, not § 2241. "A federal prisoner who seeks to challenge the
 18 legality of confinement must generally rely on a § 2255 motion to do so." *Marrero v.*
 19 *Ives*, 682 F.3d 1190, 1192 (9th Cir. 2012); *see also Stephens v. Herrera*, 464 F.3d 895,
 20 897 (9th Cir. 2006) ("The general rule is that a motion under 28 U.S.C. § 2255 is the
 21 exclusive means by which a federal prisoner may test the legality of his
 22 detention, . . . and that restrictions on the availability of a § 2255 motion cannot be
 23 avoided through a petition under 28 U.S.C. § 2241."). An exception to this general rule

24 ¹ In its Response, the Government agrees that Petitioner's two bank robbery convictions
 25 from the Western District of Oklahoma count as only one predicate felony. (Doc. 30 at
 26 13.) The Magistrate Judge did not have the benefit of the Government's Response before
 27 concluding that the two federal convictions counted as separate serious violent felonies;
 28 the Report and Recommendation was filed the same date as the Government's Response.

29 ² Having concluded that Petitioner's federal bank robbery convictions counted as two
 30 separate serious violent felonies, the Magistrate Judge did not address whether the
 31 Arizona assault or the Texas robbery conviction qualified as a serious violent felony. (See
 32 Doc. 31.)

1 is created by § 2255(e), which is also known as the “escape hatch.” The escape hatch
 2 permits a habeas petition under § 2241 to challenge the legality of a sentence when the
 3 prisoner’s remedy under § 2255 is “inadequate or ineffective to test the legality of his
 4 detention.” 28 U.S.C. § 2255(e).

5 The escape hatch is a limited exception. *Ivy v. Pontesso*, 328 F.3d 1057, 1059 (9th
 6 Cir. 2003); *Tripathi v. Hennan*, 843 F.2d 1160, 1162-63 (9th Cir. 1988). A prisoner may
 7 file a § 2241 petition under the escape hatch only when the prisoner “(1) makes a claim
 8 of actual innocence, and (2) has not had an unobstructed procedural shot at presenting
 9 that claim.” *Herrera*, 464 F.3d at 898 (internal quotation marks and citation omitted). A
 10 prisoner must satisfy both requirements to get through section 2255’s escape hatch. *Muth*
 11 *v. Fondren*, 676 F.3d 815, 819 (9th Cir. 2012). The burden of coming forward with
 12 evidence affirmatively showing the inadequacy or ineffectiveness of the § 2255 remedy
 13 rests with the petitioner. *Redfield v. United States*, 315 F.2d 76, 83 (9th Cir. 1963).
 14 Here, Petitioner has failed to establish either of the escape hatch requirements.

15 1. Unobstructed Procedural Shot

16 When determining whether a petitioner has been denied an “unobstructed
 17 procedural shot,” the Court must consider “(1) whether the legal basis for petitioner’s
 18 claim did not arise until after he had exhausted his direct appeal and first § 2255 motion;
 19 and (2) whether the law changed in any way relevant to petitioner’s claim after that first §
 20 2255 motion.” *Harrison*, 519 F.3d at 960 (internal quotation marks and citation omitted).
 21 To establish that he has not had an unobstructed procedural shot, “it is not enough that
 22 the petitioner is presently barred from raising his claim of innocence by motion under §
 23 2255. He must never have had the opportunity to raise it by motion.” *Ivy*, 328 F.3d at
 24 1060.

25 Petitioner fails to demonstrate that he has not had an unobstructed procedural shot
 26 to present his claim. The record reflects that Petitioner has filed for authorization, or had
 27 the opportunity to seek authorization to file a successive § 2255 motion attacking his
 28 sentence, and that he has specifically previously challenged the use of his prior

1 convictions as qualifying serious violent felonies pursuant to the enhanced sentencing
 2 provisions of 18 U.S.C. § 3559(c)(2). This history is set out in Respondent's Response to
 3 Petitioner's Request for Declaratory Judgment. *See e.g.*, Doc. 30, Exs. 1 & 13 (2007
 4 motion claiming federal bank robberies should be counted as one offense, and state
 5 convictions were non-dangerous lesser included offenses); Doc. 30, Ex. 17 (2016
 6 application for leave to file successive § 2255 motion claiming material change in law
 7 meant that prior felony convictions were no longer crimes of violence); and Doc. 30, Ex.
 8 19 (2017 application for leave to file a successive § 2255 motion arguing material change
 9 in the law meant that prior conviction were no longer crimes of violence).

10 Petitioner does not dispute his history of filings as described by the Government.
 11 Rather, he argues that "divisibility of a state statute did not become available as a legal
 12 basis of a claim until 2013, well past petitioner's direct appeal and initial 2255
 13 [petition]." (Doc 32, p. 2.) The Court disagrees. Petitioner's procedural shot at bringing
 14 his first claim was not obstructed by any adverse law that subsequently underwent a
 15 material change relevant to his claims. The legal analysis employed to evaluate
 16 Petitioner's challenge to the applicability of the sentencing enhancement was in place at
 17 the time of Petitioner's sentencing. In *Taylor v. United States*, 495 U.S. 575, 577–78
 18 (1990), the Supreme Court established the rule for determining when a defendant's prior
 19 conviction counts as a predicate offense under a sentencing enhancement statute—there,
 20 the Armed Career Criminals Act (ACCA).³

21 *Taylor* adopted a "formal categorical approach": Sentencing courts may
 22 "look only to the statutory definitions"—i.e., the elements—of a
 23 defendant's prior offenses, and *not* "to the particular facts underlying those
 24 convictions." If the relevant statute has the same elements as the "generic"
 25 ACCA crime, then the prior conviction can serve as an ACCA predicate; so
 26 too if the statute defines the crime more narrowly, because anyone
 27 convicted under that law is "necessarily ... guilty of all the [generic crime's]
 28 elements." But if the statute sweeps more broadly than the generic crime, a
 conviction under that law cannot count as an ACCA predicate, even if the
 defendant actually committed the offense in its generic form. The key, we
 emphasized, is elements, not facts.

³ That Act provided for a sentence enhancement where a defendant who is convicted under 18 U.S.C. § 922(g) (unlawful possession of a firearm) has three prior convictions for specified types of offenses.

Descamps v. United States, 570 U.S. 254, 260–61 (2013) (internal citations omitted). *Taylor* also “recognized a ‘narrow range of cases’ in which sentencing courts—applying what [the Court] would later dub the ‘modified categorical approach’—may look beyond the statutory elements to ‘the charging paper and jury instructions’ used in a case.” *Id.* at 261. Moreover, although the Supreme Court further clarified its divisibility analysis in later cases, its clarification does not benefit Petitioner. As discussed in section III.A.2. below, under the divisibility analysis, Petitioner’s conviction for robbery in Texas qualifies as a serious violent felony.

In sum, Petitioner cannot demonstrate that he has not had an unobstructed procedural shot at presenting his claim. Petitioner had the opportunity to present the same arguments in prior petitions and Petitioner's procedural shot at bringing his claims was not obstructed by any adverse law that subsequently underwent a material change relevant to his claims. Petitioner's failure to demonstrate that he lacked an unobstructed procedural shot at presenting his claims is dispositive of this action and provides a basis for dismissal.

2. Actual Innocence

In addition, Petitioner cannot demonstrate actual innocence.⁴ To show factual innocence of the sentencing enhancement, Petitioner must demonstrate that at least two of his prior felony convictions do not qualify as violent felonies for the purposes of sentencing enhancement under § 3559(c). The Three Strikes Statute expressly identifies as a serious violent felony, “a Federal or State offense, by whatever designation and wherever committed, consisting of . . . robbery (as described in section 2111, 2113, or 2118).” 18 U.S.C. § 3559(c)(2)(F)(i). Petitioner concedes in his Objection that his consolidated Western District of Oklahoma bank robbery convictions, in violation of 18

⁴ This Court acknowledges a claim of actual innocence of a noncapital sentencing enhancement has not been recognized in this context. See *Marrero*, 682 F.3d at 1193, 1195 (expressly declining to decide whether a petitioner may bring a claim of statutory ineligibility for a non-capital sentence using the § 2255(e) escape hatch). It is not necessary for the Court to reach this issue, however, in light of the Court's other holdings.

1 U.S.C. § 2113, count as one predicate violent felony. (Doc. 32 at 3.) *See also United*
 2 *States v. Watson*, 881 F.3d 782, 786 (9th Cir. 2018) (armed bank robbery under § 2113(a)
 3 and (d) categorically qualifies as a crime of violence under § 924(c)). Petitioner's Texas
 4 conviction for robbery counts as a second violent felony.

5 Applying the categorical approach, the Court concludes that the elements of Texas
 6 Robbery, Tex. Penal Code, § 29.02(a)(2), correspond in substantial part to the elements
 7 of the generic offense of robbery. Generic robbery as commonly understood is
 8 “aggravated larceny, containing at least the elements of misappropriation of property
 9 under circumstances involving immediate danger to the person.” *United States v. Molinar*
 10 881 F.3d 1064, 1071 (9th Cir. 2017) (internal quotation marks and citation omitted). In
 11 order “for a state crime to be equivalent to generic robbery, it must require property to be
 12 taken from a person or a person’s presence by means of force or putting in fear.” *Id.* at
 13 1072 (citing *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380-81 (5th Cir.
 14 2006), abrogated on other grounds by *United States v. Rodriguez*, 711 F.3d 541 (5th Cir.
 15 2013) (en banc)).

16 Petitioner was charged in a Felony Information with Aggravated Robbery –
 17 Deadly Weapon and pled guilty to “the lesser included offense of Count One.” (Doc. 30-
 18 2, Ex. 4.) The language of that Count tracks the Texas offense for Aggravated Robbery.⁵
 19 In Texas, an Aggravated Robbery is committed when “a person . . . commits robbery as
 20 defined in Section 29.02, and he . . . uses or exhibits a deadly weapon.” Texas Penal
 21 Code § 29.03. Texas Penal Code § 29.02(a)(2), defines the offense Robbery as follows:

22 (a) A person commits an offense if, in the course of committing theft . . .
 23 and with intent to obtain or maintain control of the property, he:

24 (1) intentionally, knowingly, or recklessly causes bodily injury to
 another, or
 25 (2) intentionally or knowingly threatens or places another in fear of

26
 27 ⁵Count One alleged Petitioner “intentionally and knowingly, while in the course of
 committing theft of property and with intent to obtain and maintain control of said
 property, [did] threaten and place Sandy Jardelins in fear of imminent bodily injury and
 death, and the Defendant did then and there use and exhibit a deadly weapon of to wit:
 firearm.” (Doc. 30-2, Ex. 4 at 39.)

imminent bodily injury or death.

Texas Penal Code § 29.02(a)(2). The “lesser included offense of Count One” is robbery. (Doc. 30-2, Ex. 4 at 34.)

Under Texas law, robbery occurs when, “in the course of committing theft ... and with intent to obtain or maintain control of the property, [a person]: ... (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.”⁶ *United States v. Davis*, 487 F.3d 282, 286 (5th Cir. 2007); *Nelson v. State*, 848 S.W.2d 126, 131 (Tex. Crim. App. 1992). The defining feature of a conviction under the Texas statute is the actual or threatened assaultive conduct. *Davis*, 487 F.3d at 286. To commit robbery, an individual must interact with the victim in order to cause bodily injury or place the victim in fear of it. *Davis*, 487 F.3d at 286; *see Nelson*, 848 S.W.2d at 131. Petitioner’s robbery conviction under Tex. Penal Code § 29.02(a)(2) categorically qualifies as an enumerated predicate offense under section 3559(c)(2)(F)(i). *See Santiesteban-Hernandez*, 469 F.3d at 380-81 (holding that Texas robbery qualifies as a crime of violence for purposes of applying U.S.S.G § 2L1.2 enhancement because the statute substantially corresponds to the basic elements of the generic offense of robbery in that they both involve theft and threat of immediate danger to a person); *United States v. Nunez-Medrano*, No. 17-206445, 2018 WL 5095809 at *4 (5th Cir. Oct. 17, 2018) (unpublished) (“reaffirm[ing] that Texas robbery is no broader than generic robbery” and thus qualifies as a serious violent felony for purposes of applying U.S.S.G § 2L1.2).

In sum, assuming the section 2255(e) escape hatch is available for a sentencing enhancement, Petitioner cannot demonstrate that he is actually innocent of his sentence. Petitioner's consolidated federal robbery felony conviction from the Western District of Oklahoma and his Texas robbery conviction each constitute a serious violent felony for the purposes of 18 U.S.C. § 3559(c). Thus, the sentencing enhancement under 18 U.S.C. § 3559(c) was properly applied.

⁶ The Texas Robbery statute also includes the mens rea of “recklessly” placing another in fear of imminent bodily injury or death. Texas Penal Code § 29.02(a)(1). Petitioner, however, was not charged with robbery under this section.

1 **B. The Court Lacks Jurisdiction to Consider the Petition**

2 Because Petitioner does not qualify for the escape hatch, this Court lacks
3 jurisdiction to consider his Petition. See *Ivy*, 328 F.3d at 1061

4 THEREFORE, IT IS ORDERED that the Report and Recommendation (Doc. 31)
5 is ACCEPTED and ADOPTED as modified by this Order. Petitioner's Objection (Doc.
6 32) is OVERRULED.

7 IT IS FURTHER ORDERED that Petitioner's Petition for Writ of Habeas Corpus
8 (Doc. 1) is DIMISSED for lack of jurisdiction.

9 IT IS FURTHER ORDERED that Petitioner's Motion for Declaratory Judgment is
10 DENIED. (Doc. 27.)

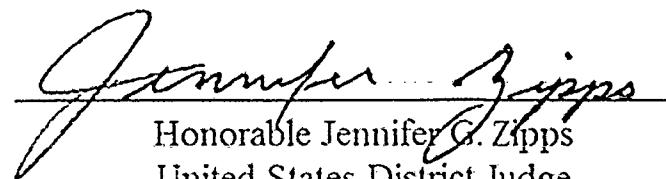
11 IT IS FURTHER ORDERED that Petitioner's Request for Clarification (Doc. 26)
12 and Motions to Expedite (Docs. 34, 41) are DENIED.

13 IT IS FURTHER ORDERED that Petitioner's Motion to add Respondent (Doc.
14 35) is DENIED as moot.

15 Although Petitioner has brought his claims in a § 2241 petition, a certificate of
16 appealability is required where a § 2241 petition attacks the petitioner's conviction or
17 sentence. *See Porter v. Adams*, 244 F.3d 1006, 1007 (9th. Cir. 2001). Pursuant to Rule
18 11(a) of the Rules Governing Section 2255 Cases, in the event Movant files an appeal,
19 the Court declines to issue a certificate of appealability because reasonable jurists would
20 not find the Court's procedural ruling debatable. *See Slack v. McDaniel*, 529 U.S. 473,
21 484 (2000).

22 The Clerk of Court shall enter judgment accordingly and close its file in this case.

23 Dated this 25th day of January, 2019.

24
25
26 
27 Honorable Jennifer G. Ziggs
28 United States District Judge

NAME	ADAM EUGENE MARTIN		OFFENSE	AGO 8000-DEADLY WPN	
ADDRESS	60310 LILLY BLVD.		DATE	01-26-83 J.P. NO.	
PHONE	EX		I.P.	HENRY BARDELINE	
RACE	SEX	AGE 26 DOB 08-29-66	C.G.		
CASE NO. 6286955 FILED: (DATE) 02-14-83			AGENCY	RIVER OAKS PD	
TRANSFER:	COURT	DATE	OFFENSE NO.	PRELIM	COURT
			# 806955 CO		
			INDICTMENT NO. 6286955		

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

Comes now the undersigned Assistant District Attorney of Tarrant County,

Texas, in behalf of the State of Texas, and presents in and to the * * * * * of Tarrant County, Texas that * * * * *

213TH District Court

ADAM EUGENE MARTIN hereinafter called Defendant, in the County of Tarrant and State aforesaid, on or about the 26TH day of JANUARY 1983, did

THEN AND THERE INTENTIONALLY AND KNOWINGLY WHILE IN THE COURSE OF COMMITTING THEFT OF PROPERTY AND WITH INTENT TO OBTAIN AND MAINTAIN CONTROL OF SAID PROPERTY, THREATEN AND PLACE SANDY BARDELINE IN FEAR OF IMMINENT BODILY INJURY AND DEATH, AND THE DEFENDANT DID THEN AND THERE USE AND EXHIBIT A DEADLY WEAPON, TO-WIT: FIREARM.

COUNT TWO: AND IT IS FURTHER PRESENTED IN AND TO SAID COURT THAT THE SAID ADAM EUGENE MARTIN, IN THE COUNTY OF TARRANT AND STATE AFORESAID, ON OR ABOUT THE 26TH DAY OF JANUARY, 1983, DID THEN AND THERE INTENTIONALLY AND KNOWINGLY WHILE IN THE COURSE OF COMMITTING THEFT OF PROPERTY AND WITH INTENT TO OBTAIN AND MAINTAIN CONTROL OF SAID PROPERTY, THREATEN AND PLACE JAMES DOOLEY IN FEAR OF IMMINENT BODILY INJURY AND DEATH, AND THE DEFENDANT DID THEN AND THERE USE AND EXHIBIT A DEADLY WEAPON, TO-WIT: A FIREARM.

COUNT THREE: AND IT IS FURTHER PRESENTED IN AND TO SAID COURT THAT THE SAID ADAM EUGENE MARTIN, IN THE COUNTY OF TARRANT AND STATE AFORESAID, ON OR ABOUT THE 26TH DAY OF JANUARY, 1983, DID THEN AND THERE INTENTIONALLY, WITH THE SPECIFIC INTENT TO COMMIT THE OFFENSE OF MURDER OF DOUG COLLINS, DO AN ACT, TO-WIT: SHOOT AT THE SAID DOUG COLLINS WITH A FIREARM, AND SAID ACT AMOUNTED TO MORE THAN MERE PREPARATION AND TENDED TO EFFECT THE COMMISSION OF SAID MURDER.

File (Clerk's use only)

41374 FILED
TARRANT COUNTY, TEXAS

APR 14 1983

J. W. BOORMAN
DISTRICT CLERK

By hm Deputy

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Reynolds Joseph Jr.
Assistant District Attorney

DC-323R GPC-1835

THE STATE OF TEXAS

VS.

ADAM EUGENE MARTIN

NO. 206955W

IN THE 215TH DISTRICT

COURT NO. OF

TARRANT COUNTY, TEXAS

JUDGMENT ON PLEA OF GUILTY OR NOLO CONTENDERE BEFORE COURT

WAIVER OF JURY TRIAL

Date of Entry	APRIL 14, 1983	Indictment Date:	WAIVED
Defendant	ADAM EUGENE MARTIN		
Judge Presiding	HON. TOBY GOLDSMITH		
Attorney for State Criminal District Attorney	TIM CURRY	Assistant District Attorney:	ALEJANDRO GONZALES
Attorney for Defendant	ALLEN BUTCHER		
Offense	ROBBERY		
Date JANUARY 26, 1983 Onset:			
Charging Instrument	FELONY INFORMATION	Count and/or LESSER INCLUDED OFFENSE OF Paragraph(s) COUNT ONE	
Date of Arraignment	WAIVED	Plea: GUILTY	
Enhancement Paragraph(s)	NONE		
Punishment and Place of Confinement	FIVE (5) YEARS IN THE TEXAS DEPARTMENT OF CORRECTIONS		
Date of Sentence	APRIL 14, 1983	Code: \$85.00	
Sentence and Place of Confinement	FIVE (5) YEARS IN THE TEXAS DEPARTMENT OF CORRECTIONS		
Credit on Sentence	FROM 2-11-83 TO DATE OF SENTENCE		
Cumulation	NONE		

On this day, set forth above, this cause came for trial and came The State of Texas, by its above-named attorney, and the Defendant appeared in person and by the above-named attorney for the Defendant, or, where a Defendant is not represented by counsel, that the Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel; and announced ready for trial, the Defendant having been heretofore arraigned, as shown above, and having agreed that the testimony may be admitted in this cause and the Defendant his counsel, and the State's attorney having agreed in writing in open court to waive a jury in the trial of this cause and to submit this cause to the Court, and the Court having agreed to the same, the said attorney for the State read the instrument charging the offense as shown, and the Defendant entered the above shown plea thereto; and is appearing to the Court that the Defendant is mentally competent and the plea is free and voluntary, and the Court having duly admonished the Defendant as to the consequences of such plea, including the range of punishment attached to the offense and the fact that any recommendation of the prosecuting attorney as to punishment is not binding on the Court, yet the Defendant persisted in entering such plea, and plea is by the Court received and now entered of record upon the minutes of the Court as the plea made of said Defendant. And the Court, after having heard all the evidence submitted for the State and the Defendant and argument of counsel, is of the opinion and so finds that the said Defendant is guilty of the offense as charged and set forth above.

And when above shown, that the charging instrument contains enhancement paragraph(s), which were not waived, and alleged Defendant to have been convicted previously of any felony or offense for the purpose of enhancement of punishment, then the Court asked Defendant if such allegations were true or false and Defendant answered "True". Thereupon, the Court, after having heard all of the evidence as to such alleged prior convictions, is of the opinion and so finds Defendant has been heretofore convicted as alleged in said enhancement paragraph(s) as may be shown above.

IT IS, THEREFORE, CONSIDERED AND ORDERED by the Court, in the presence of the Defendant, that said judgment be, and the same is hereby in all things approved and confirmed, and that said Defendant be adjudged guilty of the offense set forth above, by the Court (a jury having been waived in accordance with law) and that said Defendant be punished in accordance with terms set forth above, and the Defendant is sentenced to a term of imprisonment of one or both as set forth above, and be delivered by the Sheriff to the Director of the Department of Corrections of the State of Texas, or other person legally authorized to receive such convict for the punishment and execution may issue as necessary.

And, if shown above that Defendant has been duly and legally convicted of a prior offense by showing the Court, Court Number and Offense together with his punishment for such offense and date Defendant was sentenced for such offense in accordance with such conviction, then it is further ORDERED AND ADJUDGED that the punishment herein adjudged against the said Defendant shall begin when the judgment and sentence in such prior offense, when shown above, shall have ceased to operate.

And the said Defendant is remanded to jail until said Sheriff can obey the direction of this judgment.

FED:

ACW:

Notice of Appeal:
Appeal Withdrawn:
Mandate Received:

PRESIDING JUDGE

APRIL 15, 1983

DATE SIGNED

A CERTIFIED COPY
ATTESTED: 2274
THOMAS A. WILDER
DISTRICT CLERK
TARRANT COUNTY, TEXAS
BY: *[Signature]*

gf

17a

9 CPC 1533

STATE OF TEXAS

NO. 206955W

Adam Eugene Martin

IN THE 213th DISTRICT
COURT OF
TARRANT COUNTY, TEXAS

ORDER PLACING DEFENDANT ON PROBATION
UNDER ARTICLE 42.12, SECTION 3E (A-B)

On this the 6th day of September 1983, came on to be heard the Defendant, Adam Eugene Martin, Motion for Suspension of Sentence, pursuant to Article 42.12, Section 3E (A-B) of the Texas Code of Criminal Procedure.

BE IT REMEMBERED that on the 14th day of April 1983 sentence was imposed on the Defendant subsequent to conviction for the felony offense of Robbery. Pursuant to said imposition of sentence Defendant is presently confined in the Texas Department of Corrections serving a term of 100 months (5) years. Defendant arrived at the Texas Department of Correction and actually began serving his sentence on April 23, 1983.

BE IT REMEMBERED that more than sixty (60) days since the actual beginning of execution of said sentence has now elapsed and that the Defendant's Motion for Suspension of Sentence was filed prior to the expiration of 180 days from said date. Said Defendant having timely filed his application for probation herein is eligible for probation under Article 42.12, having never been convicted of any felony offense before, and is also eligible hereunder for probation in that the sentence imposed herein was not for the offense of criminal homicide, rape, or robbery. And that the Court has plenary jurisdiction herein for a period of 180 days subsequent to the actual beginning of the execution of defendant's sentence, and said defendant's record while incarcerated in the Texas Department of Corrections has been reviewed by the Court and the Court being of the opinion the defendant would not benefit from further incarceration in a penitentiary.

The Court is of the opinion that further execution of sentence should be suspended and Defendant placed on Probation in accordance with the authority conferred by the Adult Probation and Parole Law of the State of Texas, and that defendant be released from the Texas Department of Corrections.

It is therefore ORDERED, ADJUDGED AND DECREED by the Court that further execution of sentence imposed in the above-styled and numbered cause be suspended and defendant Adam Eugene Martin be placed on (5) years probation under Article 42.12 Section 3E (A-B) of the Texas Code of Criminal Procedure, and also that defendant be released from the Texas Department of Corrections. And, in accordance with the authority conferred by the Adult Probation and Parole Law of The State of Texas, it is further ORDERED that the defendant, Adam Eugene Martin shall comply with the following terms and conditions of Probation, to commence on September 6, 1983.

- a. Commit no offense against the laws of this State or any other State or the United States;
- b. Avoid badges or vicious habits;
- c. Avoid persons and places of disreputable or harmful character;
- d. Report to the Adult Probation Officer of Tarrant County, Texas, on the 3rd day of October 1983, and on the 3rd day of each month thereafter during Probation;
- e. Permit the Probation Officer to enter at your home or elsewhere;
- f. Work faithfully at suitable employment as far as possible;
- g. Remain within the limits of Tarrant County, Texas, unless given permission by the Tarrant County Adult Probation Officer to leave therefrom;
- h. Support your dependents;
- i. Notify the Adult Probation Officer of Tarrant County, Texas, if your address or employment is changed within five (5) days from date of change;
- j. Pay to and through the Adult Probation Officer of Tarrant County, Texas, the following:
- k. Submit to a period of dentention in the Tarrant County jail or other institution;
- l. Crime victim's compensation.

1. COURT COST in the amount of 95.00 at the rate of 10.00 per month; The first payment to be made on the 3rd day of October 1983, and a like payment on the 3rd day of each month thereafter until full payment is made;

2. PROBATION FEE in the amount of 15.00 on the 3rd day of October 1983, and on the 3rd day of each month thereafter during Probation;

L. Crime Victims compensation Act.

M. Participate fully in and comply with the Tarrant County Adult Probation Department's Intensive Mental Health Mental Retardation Program to include Mental Health Mental Retardation Counseling and/or treatment, pay for service in accordance with program requirements and continue to participate and comply until released by the court.

The Clerk of this Court will furnish the Defendant a copy of the above terms and conditions and note the date of delivery of such copy on the docket and the Clerk of this Court is hereby further ordered to furnish the officials at the Texas Department of Corrections with certified copy of this order.

* or comparable program. Art. 42.12 CCP Sec 3 (A) & (B) Hock

A CERTIFIED COPY
TESTIMONY
TARRANT COUNTY TEXAS
DISTRICT CLERK
DEPUTY

SIGNED DATE
31-3-84 DISTRICT COURT
TARRANT COUNTY, TEXAS

JP

100

DC-660R GPC-1616

THE STATE OF TEXAS

VS.

Adam Eugene Martin

NO. 206955W

IN THE 213th DISTRICT COURT OF
TARRANT COUNTY, TEXAS

JUDGMENT REVOKING PROBATION

Date of Entry of this Order	: September 5, 1984
Defendant	: Adam Eugene Martin
Judge Presiding	: Hon. John Bradshaw
Attorney for State	
Criminal District Attorney	: Tim Curry
Attorney for Defendant	: Hon. Allan Butcher
Offense	: Robbery

Date of Offense: January 26, 198

Date of Probation Order	: September 6, 1983	Date of Violation: December 3, 1
Paragraph Violated and Grounds for Revocation	Para #1 -Failed To Report To The Adult Probation Officer Tarrant County, Texas; #2-Failed To Work at Suitable Employment; #3 - Failed To Notify Adult Probation Officer Of Address Change; #4 - Failed To Pay Court Cost and Probation Fee To The Adult Probation Officer Of Tarrant County, Texas; #5 - Failed To Comply With Tarrant County Adult Probation Departments Intensive Mental Health Mental Retardation Program	

As set out in State's	Original	Petition to Revoke Probation
Original Term of Imprisonment Assessed	: Five (5) Years	Reduction Allowed by Court: One (1) Year
Sentences and Place of Confinement	Four (4) Years In The Texas Department of Corrections	
Date of Sentence	: September 5, 1984	Restitution/or Reparation: \$308.70 Costs: \$70.00
Time Credited	From 1-26-83 to 4-22-83; From 8-26-83 to 9-6-83	
Cumulation	From 7-24-84 To Date Of Sentence	

On this day, set forth above, the Motion of the State to Revoke Probation in this cause came on for hearing; came the State of Texas, by its above named attorney, and the Defendant appeared in person and by the above named attorney for Defendant, or, where a Defendant is not represented by counsel, that the Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel; and announced ready for hearing, the Defendant having been heretofore served with a copy of the Motion to Revoke Probation alleging violations of paragraphs of the probation order of the Court as set forth above and filed herein; and the Court after considering the pleadings, and hearing the evidence offered by both the State and the Defendant and the arguments of counsel, being of the opinion and finding that since the time Defendant was placed on probation herein and within the term of the probationary period set by the Court, Defendant has violated the terms and conditions of such probation in the manner set forth above as Grounds for Revocation, and that said probation should be revoked;

And, when shown above that a reduction of imprisonment has been allowed by the Court, the Court determined that the best interests of society and the probationer would be served by such shorter term of imprisonment and so reduced the term of imprisonment originally assessed;

It is therefore CONSIDERED by the Court that the Defendant be, and is hereby, adjudged to have violated the terms and conditions of probation in this cause in the manner set forth above, and that the Order Suspending the Imposition of Sentence and Placing Defendant on Probation heretofore entered in this cause be, and the same is hereby, REVOKED, and it is hereby ORDERED by the Court that the Defendant be now sentenced herein, in accordance with the Judgment heretofore entered in this cause and in compliance with this order.

IT IS, THEREFORE, CONSIDERED AND ORDERED BY THE COURT, in the presence of said Defendant, that the Judgment and Order of the Court Revoking Probation entered herein be in all things approved and confirmed, and the Defendant, who has been adjudged guilty of the above named offense, by the verdict of the jury or by the Court's Finding, as shown in the Judgment heretofore entered, together with all reductions and credits in accordance with law and the discretion of the Court in the Judgment Revoking Probation as set forth above, after the Imposition of Sentence was Suspended and the Defendant placed on probation and said probation having been thereafter Revoked, as shown above, and that the Defendant is sentenced to a term of imprisonment or fine or both, as set forth above, and Defendant is to be delivered by the Sheriff to the Director of the Department of Corrections of the State of Texas or other person legally authorized to receive such convicts for the punishment assessed herein, and the said Defendant shall be confined for the above named term in accordance with the provisions of law governing such punishment and execution may issue as necessary.

And, if shown above that Defendant has been duly and legally convicted of a prior offense by showing the Court, cause number and offense together with the punishment for such offense and date Defendant was sentenced for such offense in accordance with such conviction, then it is ORDERED AND ADJUDGED that the punishment herein adjudged against the said Defendant shall begin when the judgment and sentence in such prior offense, when shown above, shall have ceased to operate.

And the Defendant is remanded to jail until said Sheriff can obey the directions of this Judgment.


PRESIDING JUDGE

Notice of Appeal: _____
Appeal Withdrawn: _____
Mandate Received: _____

September 6, 1984
DATE SIGNED

JP