No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2024

JOHN LEE BARLOW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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SUBMITTED: April 4, 2024

QUESTIONS PRESENTED

Did the Court of Appeals err when it categorically ruled that Mr. Barlow's two 2013 counts of conviction for Georgia aggravated assault constituted "crimes of violence" under Application Note 1 of U.S.S.G. § 2K2.1 and U.S.S.G. § 4B1.2, where both the Supreme Court of Georgia and the Eleventh Circuit have repeatedly held Georgia aggravated assault can be committed recklessly under Mr. Barlow's exact statute of conviction and where this Court has held "offenses with a mens rea of recklessness do not qualify as violent felonies". *Borden v. United States*, 593 U.S. 420, 445 (2021).

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John Lee Barlow ("Mr. Barlow") petitions for a Writ of Certiorari to review, or to grant, vacate, and remand, the judgment of the United States Court of Appeals for the Ninth Circuit.

This case presents the question:

> Did the Court of Appeals err when it categorically ruled that Mr. Barlow's two 2013 counts of conviction for Georgia aggravated assault constituted "crimes of violence" under Application Note 1 of U.S.S.G.

> § 2K2.1 and U.S.S.G. § 4B1.2, where both the Supreme Court of Georgia and the Eleventh Circuit have repeatedly held Georgia aggravated assault can be committed recklessly under Mr. Barlow's exact statute of conviction and where this Court has held "offenses with a mens rea of recklessness do not qualify as violent felonies". *Borden v. United States*, 593 U.S. 420, 445 (2021).

The Ninth Circuit's published opinion conflicts with the authoritative decisions of this Court, the Eleventh Circuit, and Georgia's Supreme Court.

JURISDICTION

The court of appeals published its opinion affirming the district court's judgment and denying Mr. Barlow's request for appellate relief on October 4, 2023. Appendix A. The court of appeals denied Mr. Barlow's petition for rehearing en banc on January 5, 2024. Appendix B. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the district court's judgment is reported at *United States v. Barlow*, 83 F.4th 773 (9th Cir. 2023). Appendix A.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States, U.S.S.G. § 4B1.2, and sections 16-5-20 and 16-5-21 of the Official Code of Georgia. Appendices C, D, E, F, and G.

STATEMENT OF THE CASE

Mr. Barlow appeals his judgment, challenging the court of appeals holding that Mr. Barlow's 2013 convictions for aggravated assault in the State of Georgia constituted "crimes of violence" pursuant to U.S.S.G. § 4B1.2(a).

Mr. Barlow requests this Court grant his petition for certiorari, vacate the judgment, and remand to apply this Court's holding in *Borden v. United States*, 593 U.S. 420 (2021), in conformity with the Eleventh Circuit opinions in *United States v. Moss*, 920 F.3d 1340 (11th Cir. 2019) (opinion reinstated by *United States v. Moss*, 4 F.4th 1292 (11th Cir. 2021)), and *United States v. Carter*, 7 F.4th 1039 (11th Cir. 2021), which correctly applied *Borden* and this Court's controlling opinions, or grant certiorari to review the case.

PRIOR PROCEEDINGS

On August 26, 2021, in the District of Montana, Mr. Barlow was indicted on a single count of being a prohibited person in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). *United States v. John Lee Barlow*, CR 21-41-M-DWM. An arrest warrant issued, and Mr. Barlow was arrested on September 3, 2021. He was arraigned on September 7, 2021, and detained pending trial.

On October 13, 2021, Mr. Barlow filed a motion to change his plea to guilty, without a plea agreement. The government filed its offer of proof on October 15, 2021.

On October 20, 2021, Mr. Barlow appeared before the district court and pled guilty to the Indictment.

On February 10, 2022, the district court provided notice to the parties that it was contemplating imposing an upward variance sentence from the PSR-recommended Sentencing Guidelines range.

On February 11, 2022, the district court imposed judgment. The district court sentenced Mr. Barlow to 77 months imprisonment, followed by three years supervised release.

Mr. Barlow appealed to the United States Court of Appeals for the Ninth Circuit on February 16, 2022. *United States v. John Lee Barlow*, CA 22-30030.

The government cross-appealed on March 16, 2022. On January 9, 2023, the government filed a motion to voluntarily dismiss its cross-appeal. The government's motion to dismiss its cross-appeal was granted on January 10, 2023.

Mr. Barlow's case was argued and submitted on June 6, 2023. The court of appeals issued its opinion affirming the district court on October 4, 2023. Mr. Barlow filed his petition for rehearing en banc on November 17, 2023.

On January 5, 2024, the court of appeals denied Mr. Barlow's petition for rehearing en banc.

This petition follows.

FACTUAL BACKGROUND

The draft presentence investigation report ("PSR") included the below Offense Level Computation:

> 18. Base Offense Level: The guideline for a violation of 18 U.S.C. § 922(g)(1) is U.S.S.G. § 2K2.1. Pursuant to U.S.S.G. § 2K2.1(a)(2), if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense, the base offense level is 24. The defendant has been convicted of Possession of a Controlled Dangerous Substance with Intent to Distribute on or near School Property - 3rd Degree, a felony and a controlled substance offense, in Mercer County Superior Court, cause number 03-09-0522; Distribution of a Controlled Dangerous Substance on or within 1,000 feet of School Property, a felony and controlled substance offense, in Mercer County Superior Court, cause number 06- 08-00842-I; and Aggravated Assault, a felony and crime of violence, in Cobb County Superior Court, cause number 13-9-0154. Therefore, the base offense level is 24. **24**
>
> 19. Specific Offense Characteristics: Pursuant to U.S.S.G. § 2K2.1(b)(6)(B), if the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels. Based on the information contained in the offense conduct section of the report, the defendant could have been charged with Assault with a Weapon, in violation of 45-5-213, Montana Code Annotated 2021, punishable up to 20 years imprisonment. **+4**

20. Victim Related Adjustment: None. **0**

21. Adjustment for Role in the Offense: None. **0**

22. Adjustment for Obstruction of Justice: None. **0**

23. Adjusted Offense Level (Subtotal): **28**

24. Chapter Four Enhancement: None. **0**

25. Acceptance of Responsibility: The defendant has clearly demonstrated acceptance of responsibility for the offense. Accordingly, the offense level is decreased by two levels. U.S.S.G. § 3E1.1(a). **-2**

26. Acceptance of Responsibility: The defendant has assisted authorities in the investigation or prosecution of the defendant's own misconduct by timely notifying authorities of the intention to enter a plea of guilty. Accordingly, the offense level is decreased by one additional level. U.S.S.G. § 3E1.1(b). **-1**

27. Total Offense Level: **25**

PSR ¶¶ 18-25.

Mr. Barlow objected to the PSR's calculation, arguing that the PSR-specified New Jersey convictions (PSR ¶¶ 35 and 37) did not constitute controlled substance offenses, and his Georgia aggravated assault conviction (PSR ¶ 40) did not constitute a crime of violence, thus the correct base offense level was 14. Mr. Barlow also

argued that the activity alleged in PSR ¶ 19 did not constitute "another felony offense," thus the enhancement in U.S.S.G. § 2K2.1(b)(6)(B) should not be applied.[1]

The district court upheld Mr. Barlow's objection that his New Jersey convictions were not controlled substance offenses, and denied his objection that the Georgia aggravated assault convictions were not crimes of violence and that he possessed the firearm in connection with another felony offense. Mr. Barlow was sentenced to 77 months imprisonment, within the Guidelines calculated by the Court.

Mr. Barlow appealed the district court's ruling as to the "crime of violence" issue and the "another felony offense" enhancement under U.S.S.G. § 2K2.1(b)(6)(B). The government cross-appealed the district court's ruling that Mr. Barlow's New Jersey convictions were not controlled substance offenses. Prior to filing its principal brief, the government voluntarily dismissed its cross-appeal.

Over a dissent, the court of appeals affirmed the district court's judgment. Mr. Barlow filed a petition for rehearing en banc; the petition was denied. This petition follows.

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[1] The district court denied Mr. Barlow's objection and imposed the enhancement. Mr. Barlow raised the issue on appeal. The court of appeals affirmed. *United States v. Barlow*, 83 F.4th 773 (9th Cir. 2023). Mr. Barlow did not pursue the issue in his petition for rehearing en banc and does not pursue it here.

REASONS FOR GRANTING THE PETITION

This Court has been clear: because they do not require "the active employment of force against another person", criminal "offenses with a mens rea of recklessness do not qualify as violent felonies" under ACCA's force clause, which is identical to the force clause in U.S.S.G. § 4B1.2(a) at issue here. *Borden v. United States*, 593 U.S. 420, 445 (2021). The district court and the court of appeals did not follow this law. Both of those courts admittedly employed a factual analysis, rather than the elemental analysis required by this Court, to justify the "crime of violence" enhancement. *Contrast Descamps v. United States*, 570 U.S. 254, 268 (2013) (courts cannot "discover what the defendant actually did" to create a categorical match).

The court of appeals' majority opinion mischaracterized the district court's ruling as "proper," when in reality the district court expressly based its decision on "common sense." According to the majority, "the district court properly used the modified categorical approach to determine that Barlow's prior conviction for aggravated assault qualified as a crime of violence." *Barlow*, 83 F.4th at 782. To the contrary, after considering the facts underlying Mr. Barlow's Georgia convictions, the district court ruled:

> And sometimes I think common sense is a predicate to what we do, and if that conduct is not an assault – aggravated assault with a deadly weapon, then I don't think any such situation under the statute, whether it is categorical or whether it is modified categorical or whether it is

> common sense. Under any of those, if that isn't aggravated assault, then nothing is.

The Court rejects this common-sense approach. *See, e.g.*, *United States v. Taylor*, 596 U.S. 845, 873 (2022) (Thomas, J., dissenting) (encouraging Court to revisit categorical approach).

The court of appeals went as far as to make up a Georgia criminal charge for Mr. Barlow, ruling Mr. Barlow was charged with attempted battery, when it is undisputed he was charged with, and convicted of, aggravated assault. 83 F.4th at 784 (Georgia indictment here charged "attempted battery form of simple assault"). *But see Woodson v. State*, 605 S.E. 2d 822 (Ga. App. 2004) (battery "distinct and separate" crime from aggravated assault with a deadly weapon).

Perhaps the Ninth Circuit made up that charge for Mr. Barlow, because the Georgia Supreme Court has ruled over and over that Mr. Barlow's aggravated assault conviction can be charged with an unspecified mens rea and committed recklessly. *See, e.g., Chase v. State*, 592 S.E.2d 656, 658 (Ga. 2004) (specific mens rea need not be alleged); *Patterson v. State*, 789 S.E.2d 173, 177 (Ga. 2016) (reckless mens rea).

It is undisputed that Mr. Barlow's aggravated assault conviction derived its mens rea from Georgia's simple assault statute, which has two methods of committing assaults with differing mens rea (one of which is recklessness). The

Georgia Supreme Court has repeatedly ruled that "by shooting him with a gun" alleged "both methods of committing simple assault." *Simpson v. State*, 589 S.E.2d 90, 93 (Ga. 2003). *See also*, *Johnson v. State*, 637 S.E.2d 393, 394 (Ga. 2006) ("by striking with a gun" alleges both types of simple assault); *Jordan v. State*, 744 S.E.2d 447, 451 (Ga. App. 2013) ("by shooting at" victim with a gun "could encompass either method of assault") (cited by *Barlow*, 83 F.4th at 784). Yet, the court of appeals ruled "Barlow's indictment confirms that he committed the assault 'by striking [the victim] with said handgun' and 'by shooting [the victim] with said handgun'" and those factual allegations precluded the reckless mens rea under Georgia's assault statute. *Barlow*, 83 F.4th at 784.

The Ninth Circuit's published decision conflicts with two published decisions of the Eleventh Circuit, which includes Georgia and the state statutes at issue. *United States v. Moss*, 920 F.3d 752 (11th Cir. 2019), opinion reinstated, 4 F.4th 1292 (11th Cir. 2021) (en banc), and *United States v. Carter*, 7 F.4th 1039 (11th Cir. 2021). The Ninth Circuit unconvincingly fails to distinguish the Eleventh Circuit opinions, as explained in Judge Bea's dissent, anchored in a long series of opinions from this Court, the Ninth Circuit, the Eleventh Circuit, and the Georgia Supreme Court. *Barlow*, 83 F.4th at 791-793 (Bea, J., dissenting in part).

To remedy the circuit split and bring the Ninth Circuit into conformance with this Court, the Eleventh Circuit, and Georgia statutory and caselaw, Mr. Barlow requests the Court grant the petition, vacate the judgment, and remand for further action in light of both the *Taylor* line of cases, the Eleventh Circuit decisions in *Moss* and *Carter*, this Court's decision in *Borden*, and controlling Georgia law. In the meantime, Mr. Barlow's liberty is sacrificed to defying the rule of law and the consequent enhanced prison sentence.

A. Mr. Barlow's Georgia aggravated assault convictions were not crimes of violence.

For firearm offenses, the Guidelines impose varying base offense levels dependent upon various offense and defendant factors, including criminal history. The district court set Mr. Barlow's base offense level pursuant to U.S.S.G. § 2K2.1(a)(4)(A).

> (A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense[.]

U.S.S.G. § 2K2.1(a)(4)(A). The related Commentary further instructs:

> 1. Definitions. – For purposes of this guideline:
>
> "Crime of violence" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

Application Note 1, U.S.S.G. § 2K2.1(a)(4)(A).

Section 4B1.2 defines "crime of violence":

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –
>
> > (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> >
> > (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. § 4B1.2(a).

In 2013, Mr. Barlow was convicted by the State of Georgia for two counts of aggravated assault. At that time, Georgia defined "aggravated assault", in pertinent part, as:

> (a) A person commits the offense of aggravated assault when he or she assaults:
>
> > (1) With intent to murder, to rape, or to rob;
> >
> > (2) With a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury; or
> >
> > (3) A person or persons without legal justification by discharging a firearm from within a motor vehicle toward a person or persons.

O.C.G.A. § 16-5-20(a) (2013).

"Aggravated assault has two elements: (1) commission of a simple assault as defined by OCGA § 16-5-20(a); and (2) the presence of one of three statutory

aggravators. *See* OCGA § 16-5-21(b)." *Patterson*, 789 S.E.2d at 176 (quotations and citations omitted). For this reason, "central to the offense of aggravated assault is that an assault as defined in OCGA § 16-5-20 be committed on the victim." *Brinson v. State*, 529 S.E.2d 129, 131 (Ga. 2000).

"Simple assault" in Georgia is defined, in pertinent part:

> (a) A person commits the offense of simple assault when he or she either:
>
> (1) Attempts to commit a violent injury to the person of another; or
> (2) Commits an act which places another in reasonable apprehension of immediately receiving a violent injury.

O.C.G.A. § 16-5-21(a) (2013).

Mr. Barlow's predicate indictment (underlines added) charged:

> COUNT ONE
>
> The Grand Jurors selected, chosen and sworn to the County of Cobb, […] in the name and behalf of the citizens of Georgia, charge and accuse JOHN LEE BARLOW with the offense of AGGRAVATED ASSAULT for that the said accused, in the County of Cobb and State of Georgia, on and about the 27th day of July, 2012, did unlawfully make an assault upon the person of Crushon Person, with a handgun, the same being a firearm, a deadly weapon and an object which, when used offensively against a person, is likely to and actually does result in serious bodily injury, by striking said Crushon Person with said handgun; contrary to the laws of said state, the good order, peace and dignity thereof.

COUNT TWO

> and the Grand Jurors, aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse JOHN LEE BARLOW with the offense of AGGRAVATED ASSAULT for that the said accused, in the County of Cobb and State of Georgia, on and about the 27th day of July, 2012, did unlawfully make an assault upon the person of Crushon Person, with a handgun, the same being a firearm, a deadly weapon and an object which, when used offensively against a person, is likely to and actually does result in serious bodily injury, by shooting said Crushon Person with said handgun; contrary to the laws of said state, the good order, peace and dignity thereof.

As explained above, to be convicted of aggravated assault in Georgia, the state must first prove simple assault, O.C.G.A. § 16-5-20, and then any one of three aggravating facts. O.C.G.A. § 16-5-21. Here, the indictment tracks subsection (2) of the aggravated assault statute, *see* O.C.G.A. § 16-5-21(a)(2) and underlines above, and the elemental mens rea derives from the simple assault charged. *See, e.g.*, *Soto v. State*, 813 S.E.2d 343, 348 (Ga. 2018).

The indictment here does not allege a specific subsection of O.C.G.A. § 16-5-21(a). Instead, it generically alleges Mr. Barlow "did unlawfully make an assault", *see* underlines above, thereby disjunctively charging both forms of Georgia simple assault, as permitted by Georgia law. *Knox v. State*, 404 S.E.2d 269, 270-71 (Ga. 1991).

Rather than an elemental analysis, the court of appeals admits it relied on the alleged facts of "by striking" and "by shooting." *Barlow*, 83 F.4th at 784. And, of

course, "by striking" and "by shooting" do not preclude recklessness. In fact, "by striking" and "by shooting" don't answer that elemental question, because those acts can be done recklessly.

Moreover, the majority decided Mr. Barlow's aggravated assault convictions must be for "an attempted battery form of simple assault" under O.C.G.A. § 16-5-20(a)(1) – that is, that Barlow 'attempt[ed] to commit a violent injury to the person of another.'" 83 F.4th at 784. Of course, Mr. Barlow was convicted of aggravated assault, not battery or even attempted battery, which isn't an element of aggravated assault.

> Indeed, as the majority sees it, it is "meaningful" that the "battery [was] completed." Maj. Op. at 784-85. But Barlow was not convicted of the crime of battery – he was convicted of the crime of aggravated assault. And in Georgia, completing a battery is not an element of aggravated assault. In relying on this observation, the majority thus ignores "the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime." *See Descamps*, 570 U.S. at 263, 133 S.Ct. 2276 (emphasis added); *Marcia-Acosta*, 780 F.3d at 1250 ("Consideration of only 'the elements of the crime of conviction' is the pivotal concept in applying the modified categorical analysis.").

Barlow, 83 F.4th at 791 (Bea, J., dissenting).

"By striking" and "by shooting" identify the aggravating factor under Georgia's aggravated assault statute. O.C.G.A. § 16-5-21(a)(2) (a person commits aggravated assault when they assault "with a deadly weapon or with any object,

device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury"). The indictment tracks that very statutory language. Those facts do not identify the mens rea.

In Georgia, aggravated assault can be committed recklessly, because Georgia simple assault can be committed recklessly. *Patterson*, 789 S.E.2d at 177 ("This Court has on multiple occasions noted that the crime of simple assault as set forth in OCGA § 16-5-20(a)(2), does not require proof of specific intent."). The majority confuses the simple assault mens rea with the aggravating element that makes the offense aggravated assault.

> It mistakenly "look[s] to the facts underlying the conviction" to give weight to an element – contact – that is not an element of Barlow's crime of conviction. *Tagatac*, 36 F.4th at 1004. Under the categorical approach, the shooting allegation in Barlow's indictment is relevant only because the use of a gun is an aggravating element of simple assault under Georgia law, and thus determines his crime of conviction. *Pereida*, 141 S. Ct. at 764–65.

Barlow, 83 F.4th at 791-92 (Bea, J., dissenting).

The indictment tracks subsection (2) of Georgia's aggravated assault statute, and does not specify either subsection of the Georgia simple assault statute. *Barlow*, 83 F.4th at 782; also at 788 (Bea, J., dissenting). All it says about simple assault is that Mr. Barlow made an unlawful assault. That ambiguous, generic allegation does not specify either subsection of O.C.G.A. § 16-5-20(a).

The indictment uses no language identifying the type of assault; in other words, it did not allege the specific simple assault element, which Georgia's Supreme Court repeatedly authorizes to allege both subsections. *See*, *e.g.*, *State v. Wyatt*, 759 S.E.2d 500, 505 (Ga. 2014). Under the categorical approach, both forms of simple assault, and their attendant mens rea, must be analyzed. And Georgia's Supreme Court has unequivocally and indisputably established that Georgia simple assault can be committed recklessly. *Patterson*, 789 S.E.2d at 177.

Eschewing this law and the categorical legal analysis, the court of appeals analysis is explicitly factual: "Barlow's indictment confirms that he committed the assault 'by striking [the victim] with said handgun' and 'by shooting [the victim] with said handgun,' not by placing the victim in reasonable apprehension of receiving a violent injury." *Barlow*, 83 F.4th at 784; *contrast Barlow*, 83 F.4th at 793 (Bea, J., dissenting) ("Under either the categorical approach or the modified categorical approach, we must always refrain from evaluating the facts and we must always presume that the conviction rested upon the least of the acts criminalized.").

B. The majority's decision misstates and conflicts with Georgia state law, and relies on intermediate, not repeated Georgia Supreme Court, decisions, and at least one of the intermediate court opinions refutes the majority's analysis.

"[F]ederal courts are bound by state courts' interpretation of state law, including any determination of a state offense's elements." *United States v. Arriaga-Pinon*, 852 F.3d 1195, 1201 (Thomas, C.J., concurring) (citing *Johnson v. United States*, 559 U.S. 133, 138–39 (2010)).

Judge Bea describes the majority's conflict with Georgia state law:

> The problem for the acceptance of the majority's reading is that the Georgia Supreme Court has expressly held otherwise – twice. And, after all, we are dealing with a Georgia state conviction.
>
> In *Simpson v. State*, the indictment alleged that Simpson "assaulted [the victim] by *shooting him with a gun* ...." 589 S.E.2d at 92 (emphasis added). Simpson argued that the trial court erroneously instructed the jury that it could convict him of either reasonable-apprehension assault or attempt-to-injure assault. *Id*. The Georgia Supreme Court disagreed, holding that an allegation of assaulting a victim "by shooting him with a gun" "defined *both methods* of committing simple assault ...." *Id*. at 93 (emphasis added). The court upheld the conviction because a defendant can "be convicted for aggravated assault if he committed a simple assault *in either manner contained in the simple assault statute*, so long as the State proved that he did so by use of a gun." *Id*. (emphasis added). And it made clear that the "indictment did not and need not ... specify the manner in which the defendant committed the simple assault." *Id*.
>
> * * *
>
> Similarly, in *Johnson v. State*, "[t]he indictment alleged that Johnson assaulted [the victim] by striking her with a gun, and that he assaulted

> [another victim] by shooting her with a gun." 281 Ga. 229, 637 S.E.2d 393, 394 (2006) (emphases added). Again, Johnson argued that the trial court erroneously instructed the jury that it could convict him of either attempt-to-injure assault or reasonable-apprehension assault. *Id*. And – again – the Georgia Supreme Court disagreed. It concluded that an indictment alleging assault "by striking [the victim] with a gun" adequately alleged both types of simple assault. *Id*. at 395.
>
> The "shooting" and "striking" "with a gun" allegations in *Simpson* and *Johnson* are identical to those in Barlow's indictment. We therefore must conclude that Barlow's "indictment did not ... specify the manner in which [Barlow] committed the simple assault." *Simpson*, 589 S.E.2d at 93. Because the indictment does not specify, we must assume Barlow's "conviction rested upon nothing more than the least of the acts criminalized," *Moncrieffe*, 569 U.S. at 190–91, 133 S.Ct. 1678 (cleaned up) (emphasis added), which here is reasonable-apprehension aggravated assault.

Barlow, 83 F.4th at 789-791 (Bea, J., dissenting).

Undermining its analysis, the majority cites *Jordan v. State*, 744 S.E.2d 447, 451 (Ga. App. 2013). *Barlow*, 83 F.4th at 784. *Jordan* expressly ruled that an indictment alleging "unlawfully making an assault upon the [victim] with a gun, a deadly weapon, by shooting at him" "could encompass either method of committing an assault – attempting to commit a violent injury to the person of another under OCGA § 16-5-20(a)(1), or committing an act that places another in reasonable apprehension of receiving a violent injury under OCGA § 16-5-20(a)(2)."

The indictment language here uses the same "did unlawfully make an assault" language. Ignoring that generic, ambiguous charge, as Judge Bea explains, 83 F.4th

at 791, the majority reasons that "by shooting at" can allege reasonable apprehension assault but "'by striking' and 'by shooting' cannot." 83 F.4th at 784 (citing *State v. Thomas*, 830 S.E.2d 296, 299-300 (Ga. App. 2019)). *Contrast Simpson*, 589 S.E.2d at 93 ("by shooting" alleged "both methods of committing simple assault"); *Johnson*, 637 S.E.2d at 394 ("by striking" alleges both types of simple assault).

The majority does not explain how Georgia intermediate cases overruled the Georgia Supreme Court's *Simpson* and *Johnson* decisions. *See also Chase*, 592 S.E.2d at 657 (citations omitted) ("It is not necessary that an indictment charging a defendant with aggravated assault specify the manner in which the simple assault was committed, but it must set forth the aggravating factor."); *Bates v. State*, 572 S.E.2d 550 (Ga. 2002) ("by shooting" indictment can be proven under reasonable apprehension assault jury instruction).

Under Georgia law, the Supreme Court opinions control. "The decisions of the Supreme Court shall bind all other courts as precedent." Ga. Const. of 1983, Art. VI, § VI, ¶ VI; *United States v. Moss*, 920 F.3d 752, 759 (11th Cir. 2019) ("state law is what the *state supreme court says it is*") (emphasis in original).

C. Mr. Barlow was convicted of aggravated assault, not attempted battery, but the Ninth Circuit factually analyzed his convictions as though he was convicted of attempted battery.

The majority cites another intermediate court opinion to support its proposition that "the attempted battery form of simple assault under O.C.G.A. § 16-5-20(a)(1) is properly charged, when, as here, the battery is completed (for example, the indictment confirms Barlow was charged with committing aggravated assault by 'shooting' and 'striking' the victim rather than merely 'shooting at' the victim). *See Scott v. State*, 234 S.E.2d 685, 686-87 (Ga. App. 1977)." *Barlow*, 83 F.4th at 784.

That sentence perplexes. First, battery in Georgia is a distinct offense from aggravated assault. *Woodson*, 605 S.E.2d at 822 (Ga. App. 2004) (battery "separate and distinct" crime from aggravated assault with deadly weapon).

Second, Georgia prosecuted Mr. Barlow for aggravated assault, not battery, or attempted battery.

Third, unlike Mr. Barlow's aggravated assault convictions, which encompass a recklessness mens rea, *Patterson*, 789 S.E.2d at 177, battery necessarily requires an intentional act. O.C.G.A. §§ 16-5-23(a), 16-5-23.1(a).

Fourth, *Scott* expressly held "[t]he indictment here properly charged the crime of aggravated assault with a deadly weapon and the proof authorized a conviction." 234 S.E.2d at 686. It thus rejected the defendant's contention "that the indictment

is fatally defective because the evidence shows a completed battery and was not merely an attempt or an assault." *Id*. at 686.

Scott does not support, and in fact, rejects the majority's proposition that the indictment here charged "the attempted battery form of simple assault". Instead, here the indictment charged aggravated assault, but did not specify the simple form of assault and the accompanying mens rea. *Barlow*, 83 F.4th at 789 (Bea, J., dissenting). And *Scott* confirms that aggravated assault is distinct from battery. *Scott*, 234 S.E.2d at 686.

The Ninth Circuit opinion conflicts with repeated opinions from Georgia courts, most importantly Georgia's Supreme Court. Georgia's Supreme Court repeatedly confirms Judge Bea's dissenting opinion. Use of a gun is the aggravating element of Mr. Barlow's Georgia aggravated assault conviction. The requisite mens rea under Georgia's simple assault is unspecified. The Georgia indictment here generically alleges Mr. Barlow "did unlawfully make an assault." "As charged, the State could secure a conviction on aggravated assault by proving that Soto committed an assault in either manner contained in the simple assault statute, so long as the State also proved that he did so through the use of a gun." *Soto*, 813 S.E.2d at 348 (citing *Simpson* and *Knox*); *see also Knox*, 404 S.E.2d at 270-271 (where

defendant shot victim, aggravated assault convictions permitted under either subsection of simple assault); *Guyse v. State*, 690 S.E.2d 406, 409 (Ga. 2010).

Georgia's permissive charging is central to the categorical analysis:

> Instead of analyzing whether the conduct alleged in the indictment might strike an observer as 'violent,' we must use the indictment to determine only what elements the State was required to prove – those that Barlow necessarily admitted – to obtain the predicate conviction. *See Pereida v. Wilkinson*, — U.S. — , 141 S. Ct. 754, 764–65, 209 L.Ed.2d 47 (2021); *Shepard*, 544 U.S. at 26, 125 S.Ct. 1254. And on that question, Barlow's indictment is silent. It does not clarify whether he was alleged to have committed attempt-to-injure or reasonable-apprehension assault. Because the indictment provides no clarity, we must assume Barlow's conviction rested upon the less-culpable conduct: reasonable-apprehension assault. *Borden*, 141 S. Ct. at 1822; *Moncrieffe*, 569 U.S. at 190–91, 133 S.Ct. 1678; *see Sahagun-Gallegos*, 782 F.3d at 1099-1100 (assuming the defendant was convicted of the lesser form of aggravated assault because the Shepard documents did not "cite[ ] a specific subsection" or "quote[ ] the elements of a specific subsection" of the simple assault statute).

Barlow, 83 F.4th at 789 (Bea, J., dissenting).

The Ninth Circuit's fact-based analysis and belief that Mr. Barlow was charged with attempted battery defies Georgia law, disregards the repeated rulings of Georgia's Supreme Court, conflicts with the opinions of this Court, and creates a circuit-split with the Eleventh Circuit, which faithfully applied Georgia law.

D. The Ninth Circuit's fact-based result creates a circuit split.

Two Eleventh Circuit cases, *Moss* and *Carter*, accurately apply Georgia statutory law, and the Supreme Court of Georgia's interpretation of those statutes, and authoritatively review Georgia's aggravated assault statute's mens rea. In *Moss*, the court began with its conclusion:

> When based on a simple assault under O.C.G.A. § 16-5-20(a)(2), Georgia's aggravated assault statute, O.C.G.A. § 16-5-21(a)(2), can be satisfied by a mens rea of recklessness. When this is the case, we hold that it does not qualify as a violent felony under the ACCA.

920 F.3d at 752.

In its analysis, *Moss* first noted both the simple assault and aggravated assault statutes are divisible. *Id*. at 757. In *Moss*, as here, the state court documents did not specify which subsection of the simple assault statute under which Moss was convicted. As required by this Court, the Eleventh Circuit thus analyzed the predicate conviction under the least act criminalized – § 16-5-20(a)(2). *Id*. at 758.

That same analysis applies here. Mr. Barlow was convicted under subsection 2 of the Georgia aggravated assault statute. That is the same conviction documented in *Moss*. 920 F.3d at 758. *See also Carter*, 7 F.4th at 1041 (same conviction). Because the simple assault subsection is not known, Mr. Barlow is presumed to have been convicted under § 16-5-20(a)(2) of the simple assault statute.

Moss framed the analysis here.

> Accordingly, our analysis is limited [to] an aggravated assault under O.C.G.A. § 16-5-21(a)(2), which was predicated upon a simple assault under O.C.G.A. § 16-5-20(a)(2).

Id. at 758.

Citing *Patterson*, the Eleventh Circuit readily concluded:

> Georgia law holds that recklessness is a sufficient mens rea for aggravated assault under O.C.G.A. § 16-5-21(a)(2), when based upon simple assault under O.C.G.A. § 16-5-20(a)(2). *See Patterson v. State*, 299 Ga. 491, 789 S.E.2d 175, 176–78 (2016). Therefore, a Georgia aggravated assault conviction cannot qualify as a violent felony under the elements clause of the ACCA when based on simple assault under O.C.G.A. § 16-5-20(a)(2).

Id. at 758.

The court continued:

> Nor does a Georgia conviction for aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), require an intent to injure or an intent to place the victim in reasonable apprehension of injury when the underlying simple assault was based on § 16-5-20(a)(2). *Patterson*, 789 S.E.2d at 178. Rather, a conviction under Georgia's aggravated assault statute can be predicated on a mens rea of recklessness.

Id. at 759.

Rather than following the categorical approach defined by this Court, the district court and the Ninth Circuit expressly engaged in an impermissible factual analysis of Mr. Barlow's predicate offense. *Barlow*, 83 F.4th at 784 ("[W]e need not decide whether a reasonable apprehension form of simple assault constitutes a 'crime of violence' because Barlow's indictment confirms that he committed the

assault 'by striking [the victim] with said handgun' and 'by shooting [the victim] with said handgun,' not by placing the victim in reasonable apprehension of receiving a violent injury"); *contrast Barlow*, 83 F.4th at 792, n. 10 ("The claim that the use of a gun implicates attempt-to-injure simple assault involves a factual determination –not compelled by the allegations in the indictment – that Barlow used the gun in an attempt to injure his victim. That factual inference is precisely what the categorical approach forbids.") (Bea, J., concurring in part).

E. This Court repeatedly holds the categorical approach analyzes elements, not facts.

The categorical approach requires courts to examine "elements, not facts." *Descamps*, 570 U.S. at 261. Courts must determine if the statute in question is divisible, as a "single statute may list elements in the alternative, and thereby define multiple crimes." *Mathis v. United States*, 579 U.S. 500, 505 (2016). Both Georgia statutes here are divisible: the assault statute at O.C.G.A. § 16-5-21(a) is divisible into two different crimes, and the aggravated assault statute, which relies upon the assault statute, is itself divisible, and in 2012-13, described three different crimes. O.C.G.A. § 16-5-20(a) (2013). *Moss*, 920 F.3d at 757-58 (interpreting same state statutes and recognizing both statutes are divisible).

With a "divisible" statute, a court may go beyond the categorical approach and apply the "modified categorical approach." Under the modified categorical

approach, a court may "examine a limited class of documents to determine which of a statute's alternative *elements* formed the basis of the defendant's prior conviction." *Descamps*, 570 U.S. at 262 (emphasis added). Only the elements are examined:

> How a given defendant actually perpetrated the crime – what we have referred to as the "underlying brute facts or means" of commission, *Richardson*, 526 U.S., at 817, 119 S.Ct. 1707 – makes no difference; even if his conduct fits within the generic offense, the mismatch of elements saves the defendant from an ACCA sentence. Those longstanding principles, and the reasoning that underlies them, apply regardless of whether a statute omits or instead specifies alternative possible means of commission. The itemized construction gives a sentencing court no special warrant to explore the facts of an offense, rather than to determine the crime's elements and compare them with the generic definition.

Mathis, 579 U.S. at 509.

Applying the modified categorical approach, the Georgia aggravated assault statute fails to meet the "crime of violence" definition in all regards: it does not include the use of force as an element of the offense as required by the force (or "elements" clause) at U.S.S.G. § 4B1.2(a)(1), and it is not generic "aggravated assault" as required by the enumerated offense clause at U.S.S.G. § 4B1.2(a)(2). Indeed, Georgia's Supreme Court has unequivocally ruled that "recklessness is a sufficient mens rea for aggravated assault." *Moss*, 920 F.3d at 758.

There is no indication as to which subsection of O.C.G.A. § 16-5-20(a) constituted the underlying simple assault. Again, all the indictment alleges is that

Mr. Barlow "did unlawfully make an assault." In such a situation, the Court "must presume 'that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized[.]" *Moncrieffe v. Holder*, 569 U.S. 184, 190-191 (2013); *see also*, *Moss*, 920 F.3d at 758; *Carter*, 7 F.4th at 1043. Here, the "least" version of simple assault is the offense described in O.C.G.A. § 16-5-20(a)(2): committing "an act which places another in reasonable apprehension of immediately receiving a violent injury." *Moss*, 920 F.3d at 758; *Carter*, 8 F.4th at 1043.

The Supreme Court of Georgia has ruled that such an assault may be committed with a mens rea of recklessness:

> This Court has on multiple occasions noted that the crime of simple assault as set forth in OCGA § 16–5–20 (a) (2), does not require proof of specific intent. "[T]he State need only prove that the defendant intended to do the act that placed another in reasonable apprehension of immediate violent injury…."

Patterson, 789 S.E.2d at 177 (quoting *Guyse*, 690 S.E.2d at 409).

F. Both lower courts expressly relied on facts, not elements.

1. <u>The district court expressly employed a fact-based "common sense" analysis</u>.

The district court based its "crime of violence" decision on the facts of the underlying convictions, rather than the elements of the offense.

> THE COURT: <u>[I]f I'm a layperson and somebody pistol-whips somebody and then shoots them, kind of sounds like aggravated assault to me</u>[.]

***

THE COURT: And even though Mr. Rhodes argues there's no crime of violence in a very – I won't say convoluted, but a very lengthy argument about whether or not the provision of the law – and I've got to get – which is under Georgia statute: "A person commits the offense of aggravated assault when he or she assaults with a deadly weapon, or with any object, device or instrument which, when used – offensively used against a person, is likely to or actually does result in bodily injury."

And in this case, as set forth in the criminal history, the Cobb County Superior Court Cause No. 13-9-0154 for which Mr. Barlow was convicted, he apparently came upon an altercation and injected himself by pistol-whipping one of the individuals, and then when that individual was on the ground, he shot him in the foot.

That satisfies aggravated assault under Georgia law when, "with a deadly weapon" – that's a pistol – "or with any object, device or instrument, when used offensively against a person" – that would be striking the person, I believe it was, in the head, with the pistol, and then "is likely to or actually does result in serious bodily injury," that obviously occurred. And then he shot the individual in the foot before running away.

And sometimes I think common sense is a predicate to what we do, and if that conduct is not an assault – aggravated assault with a deadly weapon, then I don't think any such situation under the statute, whether it is categorical or whether it is modified categorical or whether it is common sense. Under

> any of those, if that isn't aggravated assault, then nothing is.

Transcript of Sentencing (underlines added).

2. The Ninth Circuit expressly relied on facts, rather than analyze elements.

The Ninth Circuit applied a similar, equally inappropriate, legally-forbidden fact-based analysis in affirming the district court.

Eschewing Mr. Barlow's "logical" approach, the Ninth Circuit expressly found facts to reason:

> we need not decide whether a reasonable apprehension form of simple assault constitutes a "crime of violence" because Barlow's indictment confirms that he committed the assault "by striking [the victim] with said handgun" and "by shooting [the victim] with said handgun," not by placing the victim in reasonable apprehension of receiving a violent injury. The charges against Barlow could only aver an attempted battery form of simple assault under O.C.G.A. § 16-5-20(a)(1)—that is, that Barlow "attempt[ed] to commit a violent injury to the person of another."

Barlow, 83 F.4th at 784 (footnotes omitted)(underlines added).

The Georgia indictment does not "confirm" under what statute Mr. Barlow was convicted. The majority just makes up that fact. A Georgia jury could have convicted Mr. Barlow of aggravated assault either because he intentionally struck and/or shot the victim (committing a deliberate simple assault, aggravated by the use of a deadly weapon) or because he recklessly struck and/or shot the victim,

(committing simple assault if his reckless action put the victim in "reasonable apprehension of receiving a violent injury", aggravated by the use of a deadly weapon). *See, e.g.*, *Chambliss v. State*, 896 S.E.2d 469 (Ga. 2023) (Georgia Supreme Court specifically finds "[s]triking [the victim] with the loaded gun would not be merely misdemeanor reckless conduct. See OCGA § 16-5-60 (b). That specific act would amount to aggravated assault", citing OCGA § 16-5-21 (a)(2) and OCGA § 16-5-20(a)(2), the "reasonable apprehension of fear" form of simple assault, in a footnote).

Put another way, if the jury knew that Mr. Barlow had struck and shot the victim, it could have found Mr. Barlow guilty of aggravated assault if the jurors believed he did so intentionally, or if they believed he did so recklessly, because the indictment did not specify which subsection of the simple assault statute was alleged. These two methods of having committed Georgia aggravated assault are differentiated by their mens rea, and that mens rea is not identified in the indictment. Rather than honoring this law, the Ninth Circuit takes it upon itself to factually decide what happened.

Furthermore, the court of appeals does not provide any citation for its assertion that "the charges against Barlow could only aver an attempted battery form of simple assault[.]" *Barlow*, 83 F.4th at 784.

3. Judge Bea's dissent best illuminates the Ninth Circuit's error.

Judge Bea dissented from the majority's holding regarding Mr. Barlow's "crime of violence" conviction. Judge Bea began by noting that "a factual approach – rather than a categorical approach – to increase a sentence based on a prior guilty plea could very well violate a defendant's Sixth Amendment rights". 83 F.4th at 787. "Put in other terms, notwithstanding the actual facts underlying the conviction, the Sixth Amendment requires the sentencing judge to 'presume that the conviction rested upon nothing more than the least of the acts criminalized.'" *Id*., (quoting *Moncrieffe*, 569 U.S. at 190-191). That requirement extends to the *Shepard* "modified categorical" approach. "[R]eviewing the *Shepard* documents does 'not permit courts to substitute a facts-based inquiry for an elements-based one.'" *Id*. at 788, (quoting *United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1101 (9th Cir. 2015)).

With these precepts in mind, Judge Bea demonstrated how the *Barlow* majority had failed to follow this Court's precedents.

> With respect, I believe the majority today oversteps its role. It mistakenly asks whether Barlow "committed" attempt-to-injure assault, rather than whether he was "convicted" of attempt-to-injure assault. *See id*. at 1255. The only thing we can say for sure is that the form of simple assault underlying Barlow's conviction is uncertain. A faithful application of the categorical approach thus compels us to presume that Barlow's conviction constituted reasonable-apprehension

> assault. I would follow our Circuit and the Eleventh Circuit's precedent in so holding.

Id. at 794.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Dated this 4th day of April, 2024.

/s/ John Rhodes
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