

No. 19-6800

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IN THE SUPREME COURT OF THE UNITED STATES

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RODNEY DEWAYNE MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Texas offense of aggravated robbery with a deadly weapon, in violation of Tex. Penal Code Ann. § 29.03(a)(2) (West 1994), is a “violent felony” under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

2. Whether this Court’s decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), should be overruled.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Mitchell, No. 15-cr-441 (Jan. 16, 2018)

United States Court of Appeals (5th Cir.):

United States v. Mitchell, No. 18-10047 (Aug. 28, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B3) is not published in the Federal Reporter but is reprinted at 776 Fed. Appx. 227.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 2019. The petition for a writ of certiorari was filed on November 26, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. A1. He was sentenced to 180 months of imprisonment, to be followed by two years of supervised release. Id. at A2-A3. The court of appeals affirmed. Id. at B1-B3.

1. In July 2015, Dallas police officers stopped a vehicle that petitioner was driving after a registration check revealed an active traffic warrant. Presentence Investigation Report (PSR) ¶ 13. The officers requested permission to search the vehicle, and petitioner gave his consent. Ibid. During the search, the officers located a handgun beneath the driver's seat, and petitioner admitted that the gun belonged to him. Ibid.

A federal grand jury returned an indictment charging petitioner with possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1. Under 18 U.S.C. 924(a)(2), the default term of imprisonment for possessing a firearm as a felon is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), however, prescribes a term of 15 years to life if the defendant had "three previous convictions" for "violent felon[ies]" committed on different occasions. 18 U.S.C. 924(e)(1). Under the ACCA's "elements clause," a "'violent felony'" is defined to include felony offenses that have "as an element the use, attempted use, or threatened use of

physical force against the person of another.” 18 U.S.C. 924(e)(2)(B). Petitioner pleaded guilty pursuant to a written plea agreement. Pet. App. A1.

The Probation Office’s presentence report determined that petitioner qualified as an armed career criminal under the ACCA based on three prior convictions for Texas aggravated robbery with a deadly weapon, in violation of Tex. Penal Code Ann. § 29.03(a)(2) (West 1994). PSR ¶¶ 27, 34-36. Petitioner objected to the classification of his aggravated-robbery convictions as violent felonies, but acknowledged that his objection was foreclosed by circuit precedent. C.A. ROA 221-222.

The district court determined that petitioner’s aggravated-robbery convictions qualified as violent felonies and that petitioner was therefore subject to the ACCA’s 15-year statutory-minimum sentence. C.A. ROA 147. The court sentenced petitioner to 180 months of imprisonment. Ibid.

2. The court of appeals affirmed. Pet. App. B1-B3. Texas defines aggravated robbery as a robbery in which the offender “(1) causes serious bodily injury to another; (2) uses or exhibits a deadly weapon; or (3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is” at least 65 years old or has a disability. Tex. Penal Code Ann. § 29.03(a) (West 1994). The court explained that it had previously determined that the Texas aggravated-robbery statute is “divisible” under Mathis v.

United States, 136 S. Ct. 2243 (2016), and that a conviction for aggravated robbery with a deadly weapon under Tex. Penal Code Ann. § 29.03(a)(2) “has as an element \* \* \* the threatened use of physical force against the person of another,” 18 U.S.C. 924(e)(2)(B)(i). See Pet. App. B2 (citing United States v. Lerma, 877 F.3d 628, 634-636 (5th Cir. 2017), cert. denied, 138 S. Ct. 2585 (2018)). The court observed that, in light of its precedent, “it is unnecessary to reach [petitioner’s] additional claims regarding” whether Texas robbery itself requires the use of physical force under the ACCA’s elements clause, although the court noted that circuit precedent foreclosed that argument as well. Pet. App. B2 (citing United States v. Burris, 920 F.3d 942, 945, 948 (5th Cir. 2019), petition for cert. pending, No. 19-6186 (filed Oct. 3, 2019)).

#### ARGUMENT

Petitioner does not seek plenary review of any issue in this case. Instead, he requests (Pet. 6-11) that his petition be held for any case granting review of the question whether an offense that can be committed with a mens rea of recklessness can qualify as a “violent felony” under the ACCA, 18 U.S.C. 924(e), or the question whether this Court should overrule its decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998). Both requests lack merit. Petitioner’s ACCA enhancement did not rest on the determination that an offense that can be committed with a mens rea of recklessness can qualify as a violent felony. And

this Court has not granted, and should not grant, certiorari to reconsider its decision in Almendarez-Torres.

1. Petitioner first contends (Pet. 6-9) that his prior Texas convictions for aggravated robbery with a deadly weapon, in violation of Tex. Penal Code Ann. § 29.03(a)(2) (West 1994), do not qualify as violent felonies on the theory that an offense that can be committed with a mens rea of recklessness does not include as an element the “use, attempted use, or threatened use of physical force against the person of another,” 18 U.S.C. 924(e)(2)(B)(i). This Court previously granted review of that question in Walker v. United States, No. 19-373 (cert. granted Nov. 15, 2019, and cert. dismissed Jan. 27, 2020), although it dismissed the case after the petitioner’s death. Recently, the Court again granted review of the question in Borden v. United States, No. 19-5410 (cert. granted Mar. 2, 2020).

It would not be appropriate, however, to hold this case for Borden. Contrary to petitioner’s contention (Pet. 6-8), the application of the ACCA’s elements clause to Texas simple robbery, which can include “recklessly caus[ing] bodily injury to another” in the course of a theft, Tex. Penal Code Ann. § 29.02(a)(1), was not the basis of the decision below. The court of appeals did not discuss whether Texas aggravated robbery with a deadly weapon can be committed recklessly or whether that would affect the court’s analysis under the ACCA. Pet. App. B1-B3. And it specifically

noted that it was “unnecessary to reach” any claims about the Texas simple robbery statute at issue in Walker. Id. at B2.

Instead, the court of appeals relied on a prior circuit decision, United States v. Lerma, 877 F.3d 628, 634–636 (5th Cir. 2017), cert. denied, 138 S. Ct. 2585 (2018). See Pet. App. B2. Lerma likewise did not analyze whether Texas aggravated robbery with a deadly weapon can be committed recklessly. Rather, it determined that “a crime under Texas Penal Code § 29.03(a)(2), that is, threatening someone with imminent bodily injury or death, or placing someone in fear of such, while using or exhibiting a deadly weapon in the course of committing theft with intent to obtain or maintain control of the property, has as an element the threatened use of physical force against the person of another.” 877 F.3d at 636. Petitioner offers no reason to conclude that a defendant can be convicted under Section 29.03(a)(2) for recklessly “us[ing] or exhibit[ing] a deadly weapon,” or that such use or exhibition of a deadly weapon in the course of a robbery fails to constitute at least the “threatened use of physical force” under the ACCA, 18 U.S.C. 924(e)(2)(B).

Petitioner also challenges (Pet. 8) Lerma’s divisibility analysis, suggesting that it was overruled by the Fifth Circuit’s subsequent decision in United States v. Herrold, 883 F.3d 517 (2018) (en banc), cert. granted, vacated, and remanded, 139 S. Ct. 2712, and cert. denied, 139 S. Ct. 2712 (2019). The portion of the Herrold en banc decision on which petitioner relies, however,

addresses Texas state court decisions interpreting the Texas burglary statute, not the aggravated-robbery statute at issue here. See id. at 521-529. And even if the decision below were in conflict with Herrold, such an intra-circuit conflict would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam); Sup. Ct. R. 10. That is particularly true where, as here, the intra-circuit conflict addresses the divisibility of a state statute, which is a question of state law. See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004) (observing that this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located"); Bowen v. Massachusetts, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law.").

2. Petitioner additionally contends (Pet. 9-11) that, if this Court were to grant certiorari in another case to reconsider its decision in Almendarez-Torres, and then were to overrule Almendarez-Torres, he would be entitled to plain-error relief. But the Court has not granted review of that question in any other case. As the government recently explained in its briefs in opposition in Castro-Lopez v. United States, No. 19-5829 (filed Dec. 2, 2019), Castaneda-Torres v. United States, No. 19-5907 (filed Dec. 30, 2019), and Suaste Balderas v. United States, No. 19-5865 (filed Jan. 2, 2020), the question whether to overrule

Almendarez-Torres does not warrant this Court's review. And this Court has recently and repeatedly denied review of similar issues in other cases.\* It should follow the same course here.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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\* See, e.g., Martinez-Mendoza v. United States, No. 19-6582 (Feb. 24, 2020); Pineda-Castellanos v. United States, No. 19-6290 (Feb. 24, 2020); Espino Ramirez v. United States, No. 19-6199 (Feb. 24, 2020); Arias-De Jesus v. United States, No. 19-6015 (Feb. 24, 2020); Castaneda-Torres v. United States, No. 19-5907 (Feb. 24, 2020); Gonzalez-Terrazas v. United States, No. 19-5875 (Feb. 24, 2020); Enriquez-Hernandez v. United States, No. 19-5869 (Feb. 24, 2020); Suaste Balderas v. United States, No. 19-5865 (Feb. 24, 2020); Castro-Lopez v. United States, No. 19-5829 (Feb. 24, 2020); Herrera-Segovia v. United States, No. 19-6094 (Jan. 27, 2020); Rios-Garza v. United States, 140 S. Ct. 278 (2019) (No. 19-5455); Collazo-Gonzalez v. United States, 140 S. Ct. 273 (2019) (No. 19-5358); Phillips v. United States, 140 S. Ct. 270 (2019) (No. 19-5150); Esparza-Salazar v. United States, 140 S. Ct. 264 (2019) (No. 19-5279); Capistran v. United States, 140 S. Ct. 237 (2019) (No. 18-9502); Riojas-Ordaz v. United States, 140 S. Ct. 120 (2019) (No. 18-9616); Dolmo-Alvarez v. United States, 140 S. Ct. 74 (2019) (No. 18-9321); Betancourt-Carrillo v. United States, 140 S. Ct. 59 (2019) (No. 18-9573).