No. 19-7504

IN THE SUPREME COURT OF THE UNITED STATES

VERDELL MARCEL BROOKS, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 6-15) that the court of appeals erred in denying his request for a certificate of appealability on the question whether his prior conviction for aggravated assault, in violation of Fla. Stat. § 784.021 (1989), was a conviction for a "violent felony" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). Specifically, he asserts (Pet. 15) that Florida aggravated assault may be committed with a mens rea of recklessness and that such assault does not include "as an element the use, attempted use, or threatened use of physical force against the person of another" under the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i). This Court has granted review in Borden v. United

States, No. 19-5410 (Mar. 2, 2020), to address whether an offense that can be committed with a mens rea of recklessness can satisfy the definition of a "violent felony" in the ACCA's elements clause. The question before the Court in Borden, however, is not presented in this case. The petition for a writ of certiorari should therefore be denied.

The court of appeals' decision in this case did not discuss whether Florida aggravated assault can be committed recklessly, or whether that would affect the court's analysis under the ACCA. See Pet. App. A2. Instead, the court relied on prior circuit decisions, including Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1337-1338 & n.6 (11th Cir.), cert. denied, 570 U.S. 925 (2013), abrogated on other grounds by Johnson v. United States, 135 S. Ct. 2551 (2015), to explain that Florida aggravated assault is a violent felony under the ACCA's elements clause. Pet. App. A2. And those prior circuit decisions do not rely on the proposition that petitioner disputes.

In Turner, the Eleventh Circuit relied on the plain language of Florida's assault statutes to determine that Florida aggravated assault requires proof of intent to threaten to do violence. 709 F.3d at 1337-1338. It observed that, under Florida law, an "assault" is defined as "an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent."

Ibid. (quoting Fla. Stat. § 784.011 (1981)). Turner thus did not need to consider, and did not consider, whether an offense committed with a mens rea of recklessness can satisfy the ACCA's elements clause. And as the decision below exemplifies, the court of appeals has regularly applied Turner as binding precedent without needing to address, or addressing, that ACCA issue. See, e.g., Pet. App. A2; United States v. Deshazior, 882 F.3d 1352, 1355 (11th Cir. 2018), cert. denied, 139 S. Ct. 1255 (2019); United States v. Golden, 854 F.3d 1256, 1256-1257 (11th Cir.) (per curiam), cert. denied, 138 S. Ct. 197 (2017); In re Hires, 825 F.3d 1297, 1301 (11th Cir. 2016).

Petitioner does not discuss Turner in his petition. He briefly asserts (Pet. 15), however, that "[r]ecklessness suffices for [aggravated assault] by state law." To the extent that assertion amounts to an argument that Turner was wrongly decided, this Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," and petitioner provides no reason to deviate from that practice in this case. Bowen v. Massachusetts, 487 U.S. 879, 908 (1988); see, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004). This Court has recently and repeatedly denied similar petitions for writs of certiorari involving Florida aggravated assault.[1] The same result is warranted here.

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[1] See Tinker v. United States, No. 19-6618 (Feb. 24, 2020); Brooks v. United States, 139 S. Ct. 1445 (2019) (No. 18-6547); Hylor v. United States, 139 S. Ct. 1375 (2019) (No. 18-7113); Lewis

The petition for a writ of certiorari should be denied.[2]

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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v. United States, 139 S. Ct. 1256 (2019) (No. 17-9097); Stewart v. United States, 139 S. Ct. 415 (2018) (No. 18-5298); Flowers v. United States, 139 S. Ct. 140 (2018) (No. 17-9250); Griffin v. United States, 139 S. Ct. 59 (2018) (No. 17-8260); Nedd v. United States, 138 S. Ct. 2649 (2018) (No. 17-7542); Jones v. United States, 138 S. Ct. 2622 (2018) (No. 17-7667). An additional petition raising the same question is pending. See Ponder v. United States, No. 19-7076 (filed Dec. 29, 2019).

[2] The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.