

No. 20-5537

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IN THE SUPREME COURT OF THE UNITED STATES

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ANDERSON ALEXANDER, 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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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner contends (Pet. 15-19) that his prior conviction for aggravated assault, in violation of Mississippi law, does not qualify as a violent felony under the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). That contention lacks merit and does not warrant this Court's review. This Court has denied review of petitions for writs of certiorari presenting similar issues. See Griffin v. United States, No. 19-8646 (Oct. 5, 2020); Liddell v. United States, No. 19-6858 (June 15, 2020). The same result is warranted here.

The court of appeals found, and petitioner does not dispute, that "Mississippi's aggravated-assault statute is divisible."

Pet. App. 3, at 5. The relevant state-court indictment charged petitioner with "'caus[ing] bodily injury to [the victim] by use of a pistol.'" Id. at 6; see Presentence Investigation Report ¶ 24. Contrary to petitioner's contention (Pet. 16), the record thus establishes that he was convicted of violating the subsection of Mississippi's aggravated-assault statute that prohibits "purposely or knowingly caus[ing] bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm." Pet. App. 3, at 5 (citation omitted). Because that offense requires force that actually causes bodily injury, it necessarily requires "force capable of causing physical pain or injury" under Curtis Johnson v. United States, 559 U.S. 133, 140 (2010) (emphasis added). For the reasons stated on page 11 of the government's brief in opposition to the petition for a writ of certiorari in Liddell, supra (No. 19-6858), petitioner's argument (Pet. 16-18) that Mississippi aggravated assault can be satisfied by the indirect application of force -- and that an indirect application of force does not qualify as "physical force" under the elements clause -- is unsound.<sup>1</sup>

2. In any event, this case would be an unsuitable vehicle for reviewing petitioner's contention that his prior conviction for Mississippi aggravated assault does not qualify as a violent felony under the ACCA's elements clause. A statutory-interpretation

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<sup>1</sup> We have served petitioner with a copy of the government's brief in opposition in Liddell.

claim is not a valid basis for a second or successive motion under 28 U.S.C. 2255. See 28 U.S.C. 2244(b)(2), 2255(h). Rather, to be entitled to relief on his successive Section 2255 motion, petitioner must show that his challenge to his ACCA sentence relies on a new retroactive rule of constitutional law. See 28 U.S.C. 2244(b)(4), 2255(h)(2). And the court of appeals correctly determined that petitioner failed to make that showing here, because he failed to show that his ACCA sentence more likely than not was based on the residual clause that Samuel Johnson v. United States, 576 U.S. 591 (2015), invalidated. See Pet. App. 3, at 5-7. Although some circuits apply a more lenient standard to determining whether a collateral attack on an ACCA sentence is cognizable, see Br. in Opp. at 12-13, McKenzie v. United States, No. 19-8597 (Nov. 6, 2020), petitioner has not challenged the court of appeals' approach here. And its resolution of his claim on that threshold ground means that it did not address the question presented in the first instance. See Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) (explaining that this Court is "a court of review, not of first view").

Moreover, even if petitioner prevailed in this Court and was ultimately resentenced, such a resentencing is unlikely to provide him with any practical benefit. Petitioner completed his term of imprisonment and was released in October 2018. See Gov't C.A. Mot. to Dismiss 2 (Oct. 2, 2019). The only portion of petitioner's sentence to which he is still subject is his term of three years

of supervised release, Pet. App. 1, at 3, which would be a lawful term even if the ACCA did not apply, and thus could be fully reimposed. See 18 U.S.C. 3559(a)(3), 3583(b)(2) (authorizing a supervised-release term of three years, even if petitioner were not subject to the ACCA). And petitioner would already have nearly completed it by the time any resentencing would occur.

3. Contrary to petitioner's suggestion (Pet. 10, 19), this case does not implicate the question whether a crime committed with the mens rea of recklessness can involve the "use of physical force" under the ACCA's elements clause. That question is currently before this Court in Borden v. United States, No. 19-5410 (argued Nov. 3, 2020). But even if this Court were to hold in Borden that such a crime does not involve the "use of physical force," that would not entitle petitioner to any relief. That is because, as explained above, petitioner was convicted of violating the subsection of Mississippi's aggravated-assault statute that prohibits "purposely or knowingly caus[ing] bodily injury." Pet. App. 3, at 5 (emphasis added; citation omitted). Furthermore, the resolution of Borden would not affect the actual reasoning of the decision below -- that he failed to show that his sentence was based on the now-invalid residual clause -- because that is a matter of "historical fact," to which developments in statutory-interpretation case law years after his sentencing are not relevant. Beeman v. United States, 871 F.3d 1215, 1224 n.5 (11th Cir. 2017), cert. denied, 139 S. Ct. 1168 (2019).

Accordingly, there is no need to hold the petition for a writ of certiorari in this case pending the resolution of Borden.

The petition for a writ of certiorari should be denied.<sup>2</sup>

Respectfully submitted.

JEFFREY B. WALL  
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NOVEMBER 2020

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<sup>2</sup> The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.