No. 20-5643

IN THE SUPREME COURT OF THE UNITED STATES

LOUIS GENE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner contends (Pet. 3-12) that his prior convictions for aggravated assault, in violation of Tex. Penal Code Ann. § 22.02(a)(2) (West 1989), and aggravated robbery with a deadly weapon, in violation of Tex. Penal Code Ann. § 29.03(a)(2) (West 1974), do not qualify as violent felonies under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i), 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." This Court granted review to decide whether a state

offense with a mens rea of recklessness may qualify as an ACCA predicate in Borden v. United States, No. 19-5410 (argued Nov. 3, 2020). It would not be appropriate, however, to hold the petition for a writ of certiorari here pending the outcome of Borden because petitioner has three prior convictions that were not for such offenses, and he therefore cannot benefit from this Court's decision in Borden.

If this Court interprets the ACCA's elements clause to exclude state offenses that can be committed through the reckless use of force, petitioner's prior conviction for aggravated assault may no longer qualify as a violent felony under the ACCA. But petitioner would still have three qualifying convictions for violent felonies: a 1981 burglary conviction, a 1981 aggravated robbery conviction, and a 1987 attempted murder conviction. See Plea Agreement 12-14 (C.A. ROA 148-150); C.A. ROA 42-55.

Petitioner errs in contending (Pet. 6-7, 11-12) that his aggravated robbery conviction was for an offense that can be committed with a mens rea of recklessness. In United States v. Lerma, 877 F.3d 628, 634 (2017), cert. denied, 138 S. Ct. 2585 (2018), the Fifth Circuit determined that the Texas aggravated robbery statute is divisible into multiple offenses, including a deadly-weapon variant of aggravated robbery, which is defined as "intentionally or knowingly threaten[ing] or plac[ing] another in fear of imminent bodily injury or death" while "us[ing] or exhibit[ing] a deadly weapon" in "the course of committing theft

* * * with intent to obtain or maintain control of the property." Tex. Penal Code Ann. §§ 29.02(a)(2), 29.03(a)(2) (West 1974). As the government demonstrated below, petitioner was convicted of that deadly-weapon variant of aggravated robbery; he pleaded guilty to an indictment charging that, "by using and exhibiting a deadly weapon, to wit: a gun," he did "intentionally and knowingly threaten and place the said [victim] in fear of imminent bodily injury and death." C.A. ROA 51-53; see Gov't C.A. Br. 16-17 (citing Lerma). The Fifth Circuit has correctly recognized that such deadly-weapon robbery satisfies the ACCA's elements clause. Lerma, 877 F.3d at 634.

Although petitioner challenged Lerma's divisibility analysis in the court of appeals, Pet. C.A. Br. 21-22, he does not challenge it in this Court. Nor is there any reason to believe that the court of appeals might reconsider its divisibility analysis based on the outcome of Borden. And 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)(i). This Court has previously declined to hold similar petitions pending the decision in Borden, and it should follow the same course here. See Mitchell v. United States, cert. denied, No. 19-

6800 (Apr. 6, 2020); Lewis v. United States, cert. denied, No. 19-7472 (June 8, 2020).

2. Petitioner separately contends (Pet. 12-18) that the court of appeals erred in determining that his prior Texas conviction for burglary of a habitation or building, in violation of Tex. Penal Code Ann. § 30.02(a) (West 1974), is a "burglary" under the ACCA, 18 U.S.C. 924(e)(2)(B)(ii). For the reasons explained on pages 11 to 16 of the government's brief in opposition to the petition for a writ of certiorari in Herrold v. United States, No. 19-7731 (Apr. 24, 2020), those contentions lack merit and do not warrant this Court's review.[1] This Court recently denied petitions for writs of certiorari in Herrold and another case raising the same issue. See Wallace v. United States, No. 20-5588 (Dec. 7, 2020); Herrold, No. 19-7731 (Oct. 5, 2020). The same result is warranted here.[2]

Respectfully submitted.

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[1] A copy of the Herrold brief is being served on petitioner.

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