No. 20-5733

In The

Supreme Court of the United States

CLINTON RUMLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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The government's brief in opposition responds to only one of the three questions presented in Mr. Rumley's petition – whether Virginia unlawful wounding is a violent felony because it can be committed recklessly. The issue of whether conviction under a statute requiring no more than an omission is sufficient to constitute a violent felony predicate under the ACCA continues to merit review. As does the question of whether *Almendarez-Torres v. United States*, 523 U.S. 224

(1998) must be overturned because the Sixth Amendment requires the fact of a defendant's prior conviction to be proven beyond a reasonable doubt to a jury. In any event, the government has failed to refute the cases that demonstrate that Virginia courts consider reckless action sufficient for unlawful wounding. At a minimum, then, this case should be held for *Borden v. United States*, No. 19-5410 (argued Nov. 3, 2020).

In an effort to distinguish the Virginia Court of Appeals cases that found reckless conduct was sufficient for unlawful wounding, the government suggests these cases do not count because the courts were merely considering whether evidence was sufficient to prove the intent required by the statute. Brief in Opposition at pp. 2-3. And that intent must often be inferred from the facts and circumstances of a particular case. *Id.* This argument misses the mark. If the intent can be proven through reckless conduct, then the applicable *mens rea* is recklessness.

It is not uncommon for a state statute to specify that the offense requires an "intent to kill" or an "intent to injury," but this does not resolve the issue of what *mens rea* is required. For example, the Fourth Circuit considered whether the North Carolina offense of assault with a deadly weapon with a deadly weapon with intent to kill inflicting serious injury required a *mens rea* greater than negligence or recklessness, although the statute specified that the offense required an "intent to kill." *United States v. Townsend*, 886 F.3d 441, 444-45 (4th Cir. 2018). To find that the offense did in fact require a specific intent to kill that could not be proved

through negligent or reckless conduct, the court looked to state applications of the offense. *Id.*

The Armed Career Criminal Act fundamentally requires that predicate offenses have "as an element, the use, attempted use, or threatened use of physical force *against the person* of another." In this instance, Mr. Rumley received this significant sentencing enhancement for a prior offense that the Virginia Court of Appeals has held may be committed by force that was not even directed at a person in the first place – by shooting into an apartment floor, by shooting into a cement driveway, and by throwing a glass bottle at a storm door. *See* Petition at 27-30 discussing *Shimhue v. Comm.*, No. 1736-97-2, 1998 WL 345519, at *2 (Va. Ct. App. June 30, 1998); *Waller v. Comm.*, No. 1696-89-3, 1990 WL 746761, at *1 (Va. Ct. App. Nov. 20, 1990); *David v. Comm.*, 340 S.E.2d 576, 577 (Va. Ct. App. 1986). This sort of reckless conduct is insufficient to qualify as a violent felony.

CONCLUSION

The petition for a writ of certiorari should be granted, or alternatively, the Court should hold this case for the result in *Borden*, No. 19-5410.

Respectfully submitted,

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