

No. 20-6225

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL DAVID LISTER, 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

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1. Petitioner contends (Pet. 5-13) that his prior conviction for aggravated assault, in violation of Texas Penal Code Ann. § 22.02(a)(2) (West Supp. 2009), does not qualify as a violent felony under the Armed Career Criminal Act, 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). The Court's resolution of that

question could potentially affect the court of appeals' disposition of this case. The petition for a writ of certiorari should therefore be held pending the decision in Borden and then disposed of as appropriate in light of that decision.

2. Petitioner separately contends (Pet. 13-20) that the court of appeals erred in determining that his two prior Texas convictions for burglary of a habitation or building, in violation of Tex. Penal Code Ann. § 30.02(a) (West 2003), are "burglar[ies]" 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, 141 S. Ct. 273 (2020) (No. 19-7731), those contentions lack merit and do not warrant this Court's review.<sup>1</sup> This Court recently denied petitions for writs of certiorari in Herrold, supra (No. 19-7731) (Oct. 5, 2020), and another case raising the same issue, Wallace v. United States, No. 20-5588 (Dec. 7, 2020). The same result is warranted here as to this issue.<sup>2</sup>

Respectfully submitted.

JEFFREY B. WALL  
Acting Solicitor General

JANUARY 2021

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<sup>1</sup> A copy of the government's brief in Herrold is being served on petitioner.

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