

No. 20-6356

IN THE SUPREME COURT OF THE UNITED STATES

RYAN DENNIS, 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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Petitioner contends (Pet. 11-20) that his multiple prior convictions for aggravated assault, in violation of Texas Penal Code Ann. § 22.02(a) (West 1994 & Supp. 2004), do not qualify as violent felonies under the Armed Career Criminal Act of 1984 (ACCA), because Texas aggravated assault may be committed recklessly and therefore does not include as an element the "use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e) (2) (B) (i). 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 to hold this petition pending the outcome of Borden, however, because the resolution of Borden would not affect the reasoning of the decision below.

The court of appeals did not reach petitioner's recklessness-based argument on the merits, and instead concluded that it lacked jurisdiction over petitioner's successive petition for collateral review. See Pet. App. 1a-6a. The court reached that conclusion because petitioner purported to rely on this Court's decision in Johnson v. United States, 576 U.S. 591 (2015), invalidating the ACCA's residual clause as unconstitutionally vague, but petitioner had "failed to show that it is 'more likely than not' that the sentencing court relied upon the residual clause" in his case. Pet. App. 4a. As a result, the court of appeals determined that petitioner did not actually rely on the "new, retroactive rule of constitutional law" articulated in Johnson, and that his successive petition for collateral review therefore failed to meet the requirements of 28 U.S.C. 2244 and 2255. Pet. App. 3a-5a (citation omitted).

This Court's resolution in Borden of whether the ACCA's elements clause includes state offenses with a mens rea of recklessness would not affect that determination. Whether petitioner failed to show that his sentence was based on the now-invalid residual clause 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. Petitioner also seeks (Pet. 20-30) review of the Fifth Circuit's application of the "gatekeeping" requirements for successive motions under Section 2255. This Court has recently and repeatedly denied review of similar issues in other cases, including Clay v. United States, 140 S. Ct. 866 (2020) (No. 19-6884), on which the court of appeals here relied. See Pet. App. 5a-6a.¹ The Court should follow the same course here.²

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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¹ See, e.g., Medina v. United States, No. 19-8838 (Jan. 11, 2021); McKenzie v. United States, No. 19-8597 (Dec. 14, 2020); Tinker v. United States, 140 S. Ct. 1137 (2020) (No. 19-6618); Anzures v. United States, 140 S. Ct. 1132 (2020) (No. 19-6037); Starks v. United States, 140 S. Ct. 898 (2020) (No. 19-5129); Wilson v. United States, 140 S. Ct. 817 (2020) (No. 18-9807); McCarthan v. United States, 140 S. Ct. 649 (2019) (No. 19-5391); Levert v. United States, 140 S. Ct. 383 (2019) (No. 18-1276); Morman v. United States, 140 S. Ct. 376 (2019) (No. 18-9277); Ziglar v. United States, 140 S. Ct. 375 (2019) (No. 18-9343); Zoch v. United States, 140 S. Ct. 147 (2019) (No. 18-8309); Walker v. United States, 139 S. Ct. 2715 (2019) (No. 18-8125); Ezell v. United States, 139 S. Ct. 1601 (2019) (No. 18-7426); Garcia v. United States, 139 S. Ct. 1547 (2019) (No. 18-7379); Harris v. United States, 139 S. Ct. 1446 (2019) (No. 18-6936); Wiese v. United States, 139 S. Ct. 1328 (2019) (No. 18-7252); Beeman v. United States, 139 S. Ct. 1168 (2019) (No. 18-6385); Jackson v. United States, 139 S. Ct. 1165 (2019) (No. 18-6096); Wyatt v. United States, 139 S. Ct. 795 (2019) (No. 18-6013); Curry v. United States, 139 S. Ct. 790 (2019) (No. 18-229); Washington v. United States, 139 S. Ct. 789 (2019) (No. 18-5594); Prutting v. United States, 139 S. Ct. 788 (2019) (No. 18-5398); Sanford v. United States, 139 S. Ct. 640 (2018) (No. 18-5876); Jordan v. United States, 139 S. Ct. 593 (2018) (No. 18-5692); George v. United States, 139 S. Ct. 592 (2018) (No. 18-5475); Sailor v. United States, 139 S. Ct. 414 (2018) (No. 18-5268); McGee v. United States, 139 S. Ct. 414 (2018) (No. 18-5263); Murphy v. United States, 139 S. Ct. 414 (2018) (No. 18-5230); Perez v. United States, 139 S. Ct. 323 (2018) (No. 18-5217); Safford v. United States, 139 S. Ct. 127 (2018) (No. 17-9170); Oxner v. United States, 139 S. Ct. 102 (2018) (No. 17-9014); Couchman v. United States, 139 S. Ct. 65 (2018) (No. 17-8480); King v. United States, 139 S. Ct. 60 (2018) (No. 17-8280); Casey v. United States, 138 S. Ct. 2678 (2018) (No. 17-1251); Westover v. United States, 138 S. Ct. 1698 (2018) (No. 17-7607); Snyder v. United States, 138 S. Ct. 1696 (2018) (No. 17-7157).

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