No. 20-7731

IN THE SUPREME COURT OF THE UNITED STATES

RODNEY BERNARD ALLEN, 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

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Petitioner contends (Pet. 6-9) that his prior conviction for robbery, in violation of Texas Penal Code Ann. § 29.02 (West 1974), does not qualify as a "violent felony" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), on the ground 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," 18 U.S.C. 924(e)(2)(B)(i). In Borden v. United States, 141 S. Ct. 1817 (2021), this Court determined that Tennessee reckless aggravated assault, in violation of Tenn. Code Ann. § 39-13-102(a)(2) (2003), lacks a mens rea element sufficient to satisfy

the ACCA's definition of a "violent felony." A remand in this case for further consideration in light of Borden is not warranted, however, because the resolution of the question presented in Borden does 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 collateral attack. See Pet. App. 1a-2a. The court's conclusion was based on the determination that, although petitioner's successive motion 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, petitioner had "failed to show that it was more likely than not that he was sentenced under the ACCA's residual clause." Pet. App. 1a; see id. at 1a-2a (citing United States v. Clay, 921 F.3d 550, 558-559 (5th Cir. 2019), cert. denied, 140 S. Ct. 866 (2020)). The court concluded that, because petitioner did not actually rely on the new, retroactive rule of constitutional law articulated in Johnson, his successive petition for collateral review failed to meet the requirements of 28 U.S.C. 2255. See Pet. App. 1a-2a; see also id. at 3a-4a (prior decision granting tentative authorization for a successive Section 2255 motion to allow petitioner an opportunity to demonstrate that his sentence was based on the residual clause).

This Court's statutory interpretation decision in Borden therefore has no bearing on the court of appeals' decision here.

Whether petitioner failed to show that his sentence was based on the now-invalid residual clause is a matter of "historical fact," as 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, it is unnecessary to provide the court of appeals an opportunity to reconsider its decision in light of Borden. And although petitioner also seeks (Pet. 10-17) review of the Fifth Circuit's application of the "gatekeeping" requirements for successive collateral attacks 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. 1a-2a.[1] The Court should follow the same course here.

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[1] See, e.g., Dennis v. United States, 141 S. Ct. 1694 (2021) (No. 20-6356); Alexander v. United States, 141 S. Ct. 1083 (2021) (No. 20-5537); Medina v. United States, 141 S. Ct. 1048 (2021) (No. 19-8838); Franklin v. United States, 141 S. Ct. 960 (2020) (No. 20-5030); McKenzie v. United States, 141 S. Ct. 954 (2020) (No. 19-8597); 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-

The petition for a writ of certiorari should be denied.[2]

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

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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).

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