No. 21-5717

IN THE SUPREME COURT OF THE UNITED STATES

BRANDON DEMON BLACKMON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether aggravated assault with a deadly weapon in violation of Tex. Penal Code Ann. § 22.02(a)(2) (West 2003) qualifies as a "crime of violence" under Sentencing Guidelines §§ 2K2.1(a)(4)(A) and 4B1.2(a).

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (5th Cir.):

United States v. Blackmon, No. 20-10755 (Apr. 16, 2021)

United States District Court (N.D. Tex.):

United States v. Blackmon, No. 19-cr-258 (July 17, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not published in the Federal Reporter but is reprinted at 844 Fed. Appx. 729.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2021. The petition for a writ of certiorari was filed on September 13, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted on

two counts of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1. The district court sentenced petitioner to 46 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A4.

1. On February 3, 2019, Dallas police conducted a traffic stop on a stolen car in which petitioner was a passenger. Officers ordered the driver and petitioner to exit the vehicle. C.A. Record on Appeal (C.A. ROA) 238. After petitioner complied, the officers discovered a loaded pistol in his waistband. Ibid.

On September 14, 2019, a witness observed petitioner circle an ATM in a car and then heard loud banging noises when petitioner pulled alongside the ATM. C.A. ROA 238. The witness called the police, and when the responding officers attempted to stop petitioner's car, he accelerated in an attempt to escape. Ibid. After speeding through several streets, petitioner crashed his car into a pole and then fled on foot. Ibid. When the pursuing officers finally apprehended him, petitioner accosted them with a series of threatening and inflammatory remarks. Id. at 238-239. A search of petitioner's car revealed a loaded pistol on the driver's side floorboard. Id. at 239.

A federal grand jury in the Northern District of Texas returned an indictment charging petitioner with two counts of possessing a firearm as a felon, in violation of 18 U.S.C.

922(g)(1) and 924(a)(2). C.A. ROA 24-25. Petitioner pleaded guilty to both counts. Id. at 85-94.

2. The Probation Office's presentence report applied an enhanced base offense level under Sentencing Guidelines § 2K2.1(a)(4)(A), based on petitioner's prior conviction for aggravated assault with a deadly weapon in violation of Tex. Penal Code Ann. § 22.02(a)(2) (West 2003), which the report classified as a "crime of violence." C.A. ROA 240-241; see id. at 283-296 (documents from Texas case). Sentencing Guidelines § 4B1.2(a), incorporated by reference into Section 2K2.1, defines a "crime of violence" as a felony that matches one of several listed crimes, including "aggravated assault," or that "has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(a)(1)-(2); see id. § 2K2.1, Comment. (n.1). The presentence report explained that the qualifying conviction stemmed from an incident that occurred in December 2003, when petitioner exited a car and fired two shots at several people congregating outside a home. C.A. ROA 244-245. The Probation Office calculated an advisory Guidelines range of 46 to 57 months of imprisonment. Id. at 256.

At sentencing, petitioner argued that his prior conviction did not qualify as a crime of violence under the Guidelines, but acknowledged that circuit precedent foreclosed his position. C.A. ROA 141-142, 264-267; see, e.g., United States v. Guillen-Alvarez,

489 F.3d 197, 199-201 (5th Cir.) (holding that a conviction for Texas aggravated assault qualifies as the enumerated offense of "aggravated assault" under a separate Guidelines provision), cert. denied, 552 U.S. 967 (2007). The district court overruled petitioner's objection, C.A. ROA 142, and sentenced petitioner to 46 months of imprisonment, id. at 174, 181.

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. A1-A4. It agreed that Fifth Circuit precedent foreclosed petitioner's contention that his conviction for Texas aggravated assault was not a crime of violence under Section 4B1.2. Id. at A3 (citing Guillen-Alvarez, 489 F.3d at 200-201).

ARGUMENT

Petitioner renews (Pet. 5-10) his contention that his prior conviction for aggravated assault with a deadly weapon in violation of Tex. Penal Code Ann. § 22.02(a) (West 2003) does not qualify as a "crime of violence" under Sentencing Guidelines §§ 2K2.1(a)(4)(A) and 4B1.2(a). That contention raises a question of Guidelines interpretation that does not warrant this Court's review, and petitioner provides no sound basis for granting the petition for a writ of certiorari. This Court has recently and repeatedly denied review in other cases involving whether Texas aggravated assault and analogous state offenses qualify as crimes

of violence under the Guidelines.* It should follow the same course here.

1. The court below determined that a conviction under Tex. Penal Code Ann. § 22.02(a) (West 2003) qualifies as a conviction for the listed offense of "aggravated assault" and is therefore a crime of violence under the Guidelines. Sentencing Guidelines § 4B1.2(a)(2); see Pet. App. A3 (citing United States v. Guillen-Alvarez, 489 F.3d 197, 200-201 (5th Cir.), cert. denied, 552 U.S. 967 (2007)). Because petitioner's challenge to that determination raises an issue exclusive to the interpretation of the advisory Guidelines, it does not warrant further review.

Typically, this Court leaves issues of Guidelines application to the Sentencing Commission, which is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500

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* See, e.g., Gomez v. United States, 141 S. Ct. 2603 (2021) (No. 20-6407) (classification of Texas aggravated assault with a deadly weapon under Section 4B1.2(a)); Johnson v. United States, 141 S. Ct. 137 (2020) (No. 19-7382) (same); Robinson v. United States, 139 S. Ct. 638 (2018) (No. 17-9169) (same); Martinez-Cerda v. United States, 138 S. Ct. 1696 (2018) (No. 17-7173) (classification of Texas aggravated assault as a crime of violence under former Sentencing Guidelines § 2L1.2 (2015)); Saucedo-Rios v. United States, 138 S. Ct. 1694 (2018) (No. 17-6562) (same); Martinez-Rivera v. United States, 138 S. Ct. 1693 (2018) (No. 17-6338) (same); Saldierna-Rojas v. United States, 137 S. Ct. 2269 (2017) (No. 16-8536) (same for Georgia aggravated assault); Cervantes-Sandoval v. United States, 137 S. Ct. 2266 (2017) (No. 16-8192) (same); Hernandez-Cifuentes v. United States, 137 S. Ct. 2264 (2017) (No. 16-7689) (same).

U.S. 344, 348 (1991). Because the Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions interpreting the Guidelines. Ibid.; see United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."); Buford v. United States, 532 U.S. 59, 66 (2001) ("Insofar as greater uniformity is necessary, the Commission can provide it.").

Adherence to that longstanding practice is especially warranted here. The Commission has devoted considerable attention in recent years to the "statutory and guideline definitions relating to the nature of a defendant's prior conviction," including the Guidelines' definition of a "'crime of violence.'" 81 Fed. Reg. 37,241, 37,241 (June 9, 2016). In 2016, the Commission amended the definition of a "crime of violence" in Section 4B1.2(a), see Sentencing Guidelines App. C Supp., Amend. 798 (Aug. 1, 2016), and eliminated an analogous "crime of violence" provision in Section 2L1.2, see Sentencing Guidelines App. C Supp., Amend. 802 (Nov. 1, 2016).

The Commission also continues to study "the impact of such definitions on the relevant statutory and guideline provisions" and to work "to resolve conflicting interpretations of the

guidelines by the federal courts." 81 Fed. Reg. at 37,241; see 83 Fed. Reg. 30,477, 30,477-30,478 (June 28, 2018). The Commission's decision not to specifically define the term "aggravated assault" in its most recent amendment to Section 4B1.2(a) does not preclude the Commission from addressing that issue in the future. Cf. Longoria v. United States, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., respecting the denial of the petition for a writ of certiorari) (observing, with respect to another Guidelines dispute, that the "Commission should have the opportunity to address th[e] issue in the first instance, once it regains a quorum of voting members") (citing Braxton, 500 U.S. at 348); cf. also Guerrant v. United States, 142 S. Ct. 640, 641 (2022) (Sotomayor, J., respecting the denial of the petition for a writ of certiorari).

2. Petitioner provides no sound reason for this Court to review the Guidelines issue in this case. Petitioner suggests (Pet. 9) that other circuits apply a narrower interpretation of the Guidelines' reference to "aggravated assault," but the sole decision he cites is inapposite. See United States v. Gomez-Hernandez, 680 F.3d 1171, 1177 (9th Cir. 2012) (rejecting defendant's argument "that his conviction for attempted aggravated assault does not categorically qualify as a crime of violence because Arizona's aggravated assault statute criminalizes non-violent conduct"). To the extent that petitioner suggests that the Texas assault statute is overbroad because the first subsection

permits conviction based on a mens rea of recklessness, see Tex. Penal Code Ann. § 22.01(a)(1) (West 2003), that contention is likewise inapposite because petitioner was convicted under a subsection requiring a mens rea of intent or knowledge, Pet. 3, 7; see Tex. Penal Code Ann. § 22.01(a)(2) (West 2003); Landrian v. State, 268 S.W.3d 532, 540 (Tex. Crim. App. 2008) (Texas assault statute is divisible). And even if the mens rea argument were implicated here, it would not warrant this Court's intervention for the reasons explained (at 7-9) in the government's Brief in Opposition in Gomez, supra (No. 20-6407), a copy of which has been served on petitioner and is available on this Court's online docket.

Petitioner further suggests (Pet. 6-8) that this Court's recent decision in Borden v. United States, 141 S. Ct. 1817 (2021), casts doubt on the court of appeals' decision. That suggestion is misplaced. In Borden, the Court determined that a Tennessee aggravated assault offense with a mens rea of recklessness did not qualify as an offense involving the "use of physical force against the person of another" for purposes of the definition of "violent felony" in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i). See 141 S. Ct. at 1825. Petitioner invokes Borden to argue (Pet. 8) that his conviction for Texas aggravated assault does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another"

under Section 4B1.2(a)(1). But the court of appeals relied on circuit precedent interpreting the enumerated offense clause in Section 4B1.2(a)(2) -- not the elements clause in Section 4B1.2(a)(1) -- in classifying petitioner's offense as a crime of violence. Pet. App. A3; see Guillen-Alvarez, 489 F.3d at 199 n.2 ("Because we conclude that Alvarez's conviction qualifies as a conviction for the enumerated offense of 'aggravated assault,' we need not decide whether his offense has as an element the use, attempted use, or threatened use of physical force against the person of another."). The question of Borden's application to the Texas aggravated assault statute therefore is not presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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