

No. 19-5908

IN THE SUPREME COURT OF THE UNITED STATES

HOWARD LEON COMBS, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-5908

HOWARD LEON COMBS, 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

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 2a. Petitioner's sentence was imposed pursuant to the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), which applies if the defendant had "three previous convictions" for "violent felon[ies]" or "serious drug offense[s]" committed on different occasions. 18 U.S.C. 924(e)(1). Petitioner's prior convictions included convictions for delivery of methamphetamine, in violation of Tex. Health & Safety Code Ann.

§ 481.112 (West Supp. 1994); delivery of marijuana, in violation of Tex. Health & Safety Code Ann. § 481.113 (West Supp. 1994); and aggravated assault resulting in serious bodily injury, in violation of Tex. Penal Code Ann. § 22.02(a) (West 2005). Presentence Investigation Report ¶¶ 18, 46, 47, 53. Petitioner was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. Pet. App. 6a-7a. The court of appeals affirmed. Id. at 1a-4a.

Petitioner contends (Pet. 4-13) that his prior conviction for aggravated assault resulting in serious bodily injury under Tex. Penal Code Ann. § 22.02(a) does not qualify as a “violent felony” under the ACCA’s “elements clause.” Specifically, petitioner argues that Texas robbery can be committed with a mens rea of recklessness and 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). This Court has granted review in Walker v. United States, cert. granted, No. 19-373 (Nov. 15, 2019), to address that issue.

Petitioner alternatively contends (Pet. 13-16) that his prior convictions for delivery of methamphetamine under Tex. Health & Safety Code Ann. § 481.112 and delivery of marijuana under Tex. Health & Safety Code Ann. § 481.113 do not qualify as “serious drug offense[s]” under the ACCA, 18 U.S.C. 924(e)(2)(A)(ii). Specifically, petitioner argues that only state drug offenses that

categorically match the elements of a generic analogue satisfy Section 924(e)(2)(A)(ii), and that his Texas drug convictions do not match the generic analogue because the Texas drug statute defines the term "deliver" to include an "offer[] to sell," Tex. Health & Safety Code Ann. § 481.002(8) (West Supp. 1994), which petitioner asserts includes "possessing a drug with intent to offer it for sale," Pet. 13. This Court has granted review in Shular v. United States, 139 S. Ct. 2773 (2019) (No. 18-6662), to address whether a matching generic analogue is required.

Because this Court's decisions in Walker and Shular may affect the validity of petitioner's ACCA enhancement, the petition for a writ of certiorari should be held pending this Court's decisions in those cases, and then be disposed of as appropriate in light of those decisions.*

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

DECEMBER 2019

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